

# The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association  
Volume 20, No. 1, Spring 2023



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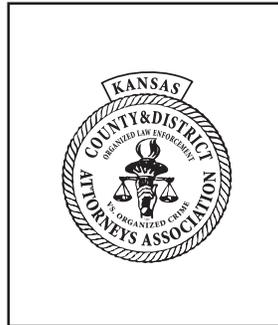


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**Our mission:**

The purpose of the KCDAA is to promote,  
improve and facilitate the administration  
of justice in the state of Kansas.

For questions or comments about  
this publication, please contact the editor:  
Mary Napier  
[mary@napiercommunications.com](mailto:mary@napiercommunications.com)  
(785) 783-5494

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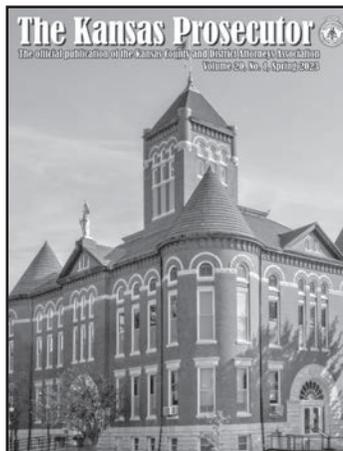
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## About the Cover

The Anderson County Courthouse, located at 4th and Oak Streets in Gamett, is the seat of government of Anderson County, Kansas. The courthouse was built from 1901 to 1902 by contractors Latimer & Benning at a cost of \$75,000. Architect George P. Washburn designed the courthouse in the Romanesque Revival style. The courthouse features a central bell tower and four corner towers with conical roofs. The building's entrances are topped by fan-shaped windows and surrounded by stone arches. The third-floor windows are also arched, and the stone arches are linked by a band of stone encircling the building. The courthouse was listed on the National Register of Historic Places in 1972.

Photo by John D. Morrison, Prairie  
Vistas Photography



## President's Column

By Chris McMullin, KCDA President  
Chief Deputy District Attorney, Johnson County

### KCDA 2023 Updates

When you (ahem) ascend to the presidency of KCDA, the professional staff ask you if you would like to set a theme for your term. When they asked me, it seemed relatively obvious: recruitment, retention, and training. In other words, the basics.

In her 2023 *State of the Judiciary* report, Kansas Supreme Court Chief Justice Marla Luckert noted that “rural Kansas collectively has only 25 percent of the attorneys needed to meet demand.” An accompanying chart graphically illustrated this issue, with some rural counties having no lawyers to serve their needs. Logically, this means we have a shortage of prosecutors. Anecdotally, our office has seen the number of applicants per opening plunge in recent years. Law school classes have been smaller of late. The Board has discussed a need to be more active in recruiting lawyers into the prosecution profession. I look forward to hearing their ideas and helping bring them to life.

KCDA recently hosted its first Trial Advocacy School, held at the campus of the Kansas Law Enforcement Training Center. This was a two-day event that featured lectures and workshops led

by several distinguished and experienced Kansas prosecutors. It was attended by prosecutors from jurisdictions throughout the State. I can tell you that, from a faculty perspective, this was a great event. I hope the feedback from the students confirms this. Hopefully, this is the first of many such events to come and will provide the type of training and inspiration for attendees to make prosecution a career. Read more and see photos on page 7.

Your KCDA Board is active at the Legislature. In addition to supporting our sponsored bills, we provide both proponent and opponent testimony regarding bills of interest that originate from other organizations. The Board has a weekly legislative zoom call during session, and many of our members have driven to Topeka on short notice to provide various committees with our perspective on proposed legislation.

I encourage anyone who has legislative or other concerns to reach out to any member of the Board of Directors. You can find contact information at [kcdaa.org/contact](http://kcdaa.org/contact). I am anticipating a busy year ahead, so stay tuned. 🗣️



*Will Hurst, ADA from the Johnson County District Attorney's Office stands with Senate Judiciary Chairperson Kellie Warren, R-Leawood. Hurst represented KCDA as he testified for SB 73, a bill adding domestic battery and violation of a protection order to the crimes that a person can have the intent to commit when committing burglary or aggravated burglary.*

# Kansas Prosecutors Foundation 2023 Scholarships

## Deadline to Apply is April 30, 2023

The KCDA Board of Directors established the Kansas Prosecutors Foundation to further the administration of justice in the best interests of the public. In 2013, the KPF gave out its first law school student scholarships to a law school student from each regent law school. We are currently accepting scholarship applications for 2023, so please help spread the word.

Recipients of KPF scholarships shall meet the following criteria:

- a Kansas resident;
- a 2L or 3L enrolled in a law school in Kansas;
- demonstrate a desire to become a prosecutor;
- exhibit previous or ongoing activities of public service;
- either be pursuing a career in prosecution or the administration of justice; and
- may not be a member within the first degree of relationship to either a member of the scholarship committee or the KPF board.



### Award Process

1. Scholarship application forms shall be reviewed and approved by the KPF Board of Trustees.
2. Scholarship application forms are due by April 30th of the year in which the scholarship is sought.
3. The review period of the submitted scholarship applications shall be between May 1st and May 15th.
4. The scholarship committee will review only fully completed scholarship applications which comply with the directions of the scholarship application form. Application packets which fail to conform to the scholarship application form requirements by the due date will be considered incomplete and not considered.
5. Final decision on scholarship recipients will take place during the KPF Board meeting each May unless otherwise authorized by the KPF Board.
6. All applicants will receive decision notification, in writing, within ten (10) business days of the KPF Board decision.
7. Scholarships shall be presented to selected recipients at the KCDA conference in June.
8. KPF scholarship will award at least two scholarships – one to a student of each regent law school (unless otherwise determined by the KPF Board). Each selected recipient will receive a minimum of \$1,500 via a check from the Kansas Prosecutor Foundation. The KPF Board of Directors may, at the discretion of the Board, increase the amount of the award for any recipient that have interned in a Kansas Prosecutor's Office, the Kansas Attorney General's Office, or the Kansas District United States Attorney's Office up to an additional \$500.

### How to Apply

**DOWNLOAD THE APPLICATION AT: [HTTPS://KCDAA.ORG/SCHOLARSHIPS](https://kcdaa.org/scholarships).**

Applications need to be submitted with all required materials (essay, proof of enrollment, biography and photo) by April 30th to: [kcdaa10@gmail.com](mailto:kcdaa10@gmail.com).

or mail to:

Kansas Prosecutors Foundation  
1200 SW 10th Ave.  
Topeka, KS 66604

If you have any questions, contact: [kcdaa10@gmail.com](mailto:kcdaa10@gmail.com). 



## Guest Article

By Kris W. Kobach, Kansas Attorney General

# My Focus as Kansas Attorney General

It is an incredible honor to serve as Kansas's 45<sup>th</sup> Attorney General. Our attorneys get to do work that isn't typically available in the private sector or even in most county prosecutor's offices. We thrive on complex litigation. Every case is meaningful, because we're protecting the life, liberty, and property of Kansas citizens.

One of my principal objectives as Kansas Attorney General is to ensure that all of our office's legal briefing and representation is of the highest order of excellence in the state. My team is accomplishing that, but we face significant challenges.

The greatest hurdle is a shortage of attorneys. Attracting and recruiting prosecutors is a challenge nationwide; and unfortunately, Kansas isn't immune to the growing crisis. I learned the true extent of the problem firsthand when I was inaugurated in January. When fully staffed, the Kansas Attorney General's Office employs 65 attorneys. We had only 42 attorneys in January, down 23 from full staffing levels. In other words, we had 35% fewer attorneys than we needed to fully and effectively perform our duties.

I want to make it clear that I am in no way blaming the previous administration or anyone else. States and counties across the country also share in this challenge. It's a systemic problem.

The chief cause is uncompetitive salary levels. Our office's salaries were below the salaries offered by neighboring states and well below salaries in private practice.

One of the ways the criminal division has coped with staffing shortages has been by limiting the scope of cases the criminal division will consider taking when responding to county requests. The division has limited its focus to only two crime categories: murders and off-the-grid child sex crimes. In the latter category, the criminal division had to decline to assist counties in 20 cases in the last six months. This forced

the county attorneys to take those cases themselves or hire expensive outside counsel.

Fortunately, with the help of the Kansas Legislature, we have begun to turn things around. We were able to substantially raise our salaries for existing attorneys and for new hires. In the last month, we have hired a substantial number of new attorneys. And we are not done yet. We will continue to hire attorneys at the higher salaries until we are fully staffed.

That's one of the reasons I'm penning this column to you. What else can we do to recruit and retain prosecutorial talent in our state and in our counties? If you have ideas, we want to hear them. I also want you to know that I am at your service. Our office wants to make your jobs easier when and however we can. I look forward to working with each of you. 🇺🇸

### *County Courthouse Portraits*



*Anderson County Courthouse*

### *John D Morrison*

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# 2023 Trial Advocacy School a Success

By Shannon Wilson, CLE Committee Chairperson

On March 9 and 10, the KCDAA in partnership with the Kansas Prosecutors Training & Assistance Institute hosted a basic Trial Advocacy School at the Kansas Law Enforcement Training Center.

Many of our members had the benefit of attending the basic trial advocacy courses offered by the National District Attorney's Association (NDAA) at the National Advocacy Center in South Carolina. These week-long courses provided valuable training for new prosecutors. Because that training is no longer available in that format, your CLE committee wanted to provide at least a portion of that experience at no cost to attendees.

We gathered seven prosecutors with more than 148 combined years of experience in prosecution and in excess of 820 jury trials between them. Over two days, we presented plenary sessions on a variety of topics including ethics, case analysis, openings, closings, direct examination, and cross examination. There were multiple small group sessions with exercises and demonstrations. Our goal was to give

attendees tangible tools and a framework to develop their trial skills.

As a member of the faculty, I can tell you we had a great time and were inspired by the talent we have coming up in our ranks.

The following people made the training possible:

- Chris McMullin, Current KCDAA President
- Marc Bennett, District Attorney Sedgwick County
- Kimberly Rodebaugh, Reno County DA's Office
- Will Hurst, Johnson County DA's Office
- Jennifer Tatum, Douglas County DA's Office
- Tom Weilert, Sedgwick County DA's Office (retired)
- National District Attorney's Association  
National Advocacy Center Faculty
- Melissa Munoz, Kearney and Associates
- KLETC 



# Member Highlight: KCDA Board Members

By Mary Napier, Editor, Kansas Prosecutor

When you join the KCDA Board of Directors as Director IV, you have many years of service ahead of you as you advance through the ranks and end as a past president. For this issue of the magazine, we want to highlight two prosecutors who are on different ends of that journey. Susan Richmeier, Finney County Attorney, joined the KCDA Board in January in the Director IV position. She is brand new to the board and hasn't served on committees yet, but she is looking forward

to getting more involved. Chris McMullin took over the KCDA president position in January. If you have been involved in KCDA for any length of time, you have probably served with Chris in some capacity as it seems he has done it all.

No matter where our KCDA Board members are on their journey, we thank them all for their service to the association and to the profession. Now, let's introduce you to Susan and Chris, so you can learn more about them.

## Susan Richmeier

Susan grew up all over the Midwest including: Indiana, Missouri, Texas, Oklahoma, Nebraska, back to Texas, and eventually landed in Kansas. She graduated high school in Garden City, then continued her schooling in the Midwest at Oklahoma State University for her B.S. in Elementary and Special Education and received her J.D. from the University of Oklahoma.

When she went to law school, she did not know she would someday be a prosecutor. She went to law school to advocate for persons with special needs. She said, "At the time, I had a desire to either represent school districts or help parents navigate and advocate for their special needs child through the process of delivering or obtaining needs appropriate services in keeping with the guidelines of IDEA and ADA."

Eventually Susan went back to school and got a master's in education administration from Fort Hays State. After 12 years in private practice and eight years in teaching special education, gifted and talented education, Susan decided to run for office to effect change.

She explained, "As a solo practitioner, defense attorneys were always complaining about various things we felt could be done better for not only our clients, but for the community. My parents instilled

in us a philosophy, 'Don't gripe about something if you aren't willing to change what you are griping about,' and 'If not you, then who?'. The timing was right since the sitting county attorney was retiring.

I ran for office to make changes, which would benefit my community and strengthen relationships with law enforcement, the local bar, and community leaders. In today's world, we must adjust and progress to meet society's ever-changing needs. The Finney County Attorney's office strives to do that."

Susan has now worked as the elected county attorney in Finney County for 10 years. She has handled JV, CINC, traffic and misdemeanor cases among others. She stated that due to her leadership role in the office, it is difficult to handle large cases from inception to completion, but she said, "I prefer to give the excellent trial prosecutors

in my office the accolades they deserve for the high success rate and convictions/sentencings achieved."

Susan is also proud of the progress her office has made with technology. With their cloud-based case management system, 100% of their cases are electronic since 2016, and starting with January 2021 cases, everything can be accessed remotely, including video and exhibits. Her office has worked in partnership with law enforcement, so they receive all data electronically from local agencies. The last



*Susan Richmeier, Finney County Attorney. Photo courtesy of Meza Photography.*

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step is to work with state agencies to achieve the same goal.

Membership in the KCDAAs was important to Susan as she joined right after being elected as a county attorney. Membership originally helped her with mentorship, guidance, and networking as a newly elected county attorney. She feels those are still important today, as they are invaluable tools to help with prosecutor issues like converting to a new case management software, budget development, and collaboration.

After 10 years as a member, Susan had a desire to serve on the KCDAAs Board of Directors to better understand how the organization works and to see southwest Kansas represented. She wanted to have a voice about the struggles in western Kansas and some of the obstacles they might not see in the eastern side of the state. Some of those obstacles are recruiting and retaining attorneys; implementing state law regarding programming for youth, mental health, and probationers; and having limited or non-existent resources.

As a board member, her goals include: getting involved in law schools to recruit young lawyers to the field of prosecution and fill the shortages; better communication and connectivity with OJA and the Odyssey System; continued work with legislators; and working on youth crime and improving child in need of care outcomes. Finding young prosecutors who are willing to relocate to rural areas and fill the shortage is her top priority as there are many rural counties with retirement age prosecutors who are the only attorney in their county with no one available to

fill their shoes.

Those goals may change over time, but Susan desires to serve in any capacity the board determines as she learns more about the organization. She encourages everyone to be a member of a professional association like the KCDAAs as they provide an avenue for professional development, policy implementation to effect change, and networking. Susan believes these are all invaluable tools to any professional.

When she isn't working, Susan is spending time with her family. She has three children, two daughters and a son. Laura is 26, recently married and gave birth to Susan's first grandchild (a girl) in February. Laura graduated from OSU with a BS in Health and Human Science and is working on her masters in marriage and family therapy, a field much needed in western Kansas. Lindsey is 23, also a graduate of OSU with a BS in Health and Human Science. She recently passed her private pilot exams and is applying to pilot training programs with the intent of becoming a commercial pilot. Her son, Reid, is a junior at K-State in Agricultural Economics. His current intention is to return to the family farm in SW Kansas.

Water and sunlight are a spiritual recharge for Susan, so she loves to travel anywhere with a lake or beach. Experiencing new foods and wine are also a passion for her, so she would love to travel to Sonoma and Napa one day. When she is at home, she enjoys reading, quilting, embroidery, and crafting along with college sports to cheer on her Cowboys and Sooners.

## Chris McMullin

Chris is also from the Midwest as he grew up in Iowa and Kansas. He graduated from the KU School of Journalism in 1998 and wants everyone to know Danny Manning walked the hill with his class. He also bleeds crimson and blue (ROCK CHALK).

During his journalism classes, one of his professors was a lawyer and his law war stories inspired Chris. He went on to attend the Shepard Broad Law Center Nova Southeastern University in

Davie, Fl. Chris mentioned that his law school had a clinic program that allowed you to work full-time as a prosecutor for credit. His trial advocacy professor was a huge influence on his decision to enter the criminal clinic as a prosecution intern. So, Chris started his prosecution career as an intern in the Broward County, Fl. State Attorney's Office working on a number of misdemeanor (mostly DUI) jury trials. He hasn't looked back since.

In November 1991, Chris and his wife moved back to Kansas, and he worked as an assistant district attorney (ADA) in Sedgwick County from 1991-2000. In 2000, they moved to Johnson County where Chris began working as an ADA. When Steve Howe was elected as Johnson County District Attorney in 2008, he asked Chris to be his Chief Deputy. He has been in that position since then.

As a career prosecutor for more than 31 years, you might say Chris has seen or tried it all. He said, “I have handled every type of case from dog bite to capital murder. The bulk of my career was spent handling sexually based crimes. I handled civil sexual predator cases for a number of years and tried several SVP jury trials. As Chief Deputy, I have had the opportunity to try major cases and supervise a number of attorneys and help run the office.”

He continued, “I have served as a special assistant attorney general, an ethics investigator for the Prosecutor Ethics Committee, a guest instructor at KLETC, a teacher at the JOCO Police Academy, a Board Member of Sunflower House Child Advocacy Center and chair of their multi-disciplinary committee; and had the opportunity to help with the design of our office space at the new courthouse and with the design of the new JOCO medical examiner facility. I am a member of the Johnson County officer involved critical incident team that responds to officer-involved shootings. I have also served on a number of task-based committees over the years.”

Chris has served in those capacities in addition to being a member of the KCDAAsince 1991 when he came to Kansas, presenting at numerous KCDAAs conferences, serving as a CLE committee member and chairman, serving on the *Kansas Prosecutor* editorial board, and being a board member before taking his role as KCDAAs president this year.

His focus for his time as president is similar to Susan. He feels recruitment and retention of prosecutors is high priority as the profession is close to crisis due to the lack of attorneys who choose

prosecution as a profession. His advice is to get involved in KCDAAs now! There are committees you can serve on who would love to have you. Or get involved in your local partner agencies, bar associations, and other law-based organizations.

Chris compares the various levels of prosecution experience in his office to the KCDAAs. He explains, “My office has over 40 lawyers. A young attorney

in our office can walk a few feet away and staff a case with a lawyer who has 20+ years of experience. The value of associations, like KCDAAs, is that every prosecutor in Kansas is one phone call away from staffing a case with an experienced lawyer. I value the friendships and associations I have made over the years. I have called and been called by numerous prosecutors throughout the state to discuss mundane and serious matters. It has helped me understand what a broad and diverse prosecution profession we have in Kansas.”

The opportunity for fellowship, training, and serving others through KCDAAs is important to Chris.

Even though he works in an office, Chris loves being outdoors. He likes to camp, fish, hike, snorkel, dive, swim, and garden. He is also a lifelong reader. Chris has been married to his wife, Verna, for 33 years and has two children. His daughter, Lanie, got married to her husband Sam in September 2022. His son, RC, is engaged to Chris’s “soon-to-be favorite daughter-in-law” Kelly. Chris said they are blessed that for at least the time being both of their kids live nearby, and they get to hang out with them regularly. He also loves that his kids are just as passionate about the KC Chiefs as he is. Chris is involved with his church as a choir member, lay minister, and serves on multiple committees.

Chris had some final thoughts. He commented, “I have been mentored and taught by so many talented women and men who I met through KCDAAs. I encourage you to get involved and meet some of the truly fearsome prosecutors we have who are keeping our State safe every day.” 🙏



*Chris McMullin, Deputy Chief District Attorney, Johnson County*

# KCDAA Milestones - News from Across the State

## Barton County

Assistant Barton County Attorney Rita Sunderland and her husband, Jason, welcomed their son, Luke Joe, into the world on Nov. 9, 2023. Luke was 5 lbs. and 5 oz., and was welcomed home by his older brother, Ty.

## Douglas County

The Douglas County District Attorney's Office recently welcomed three new prosecutors to its team.

Previously the elected county prosecutor for



*Adam Carey*

Morton County, Adam Carey accepted a position as a senior assistant district attorney for Douglas County. While serving as the Morton County prosecutor, a part-time position, Carey also served as the county counselor for Morton County and the city attorney for the City of Elkhart. Carey began his

criminal justice career as a deputy sheriff for the Morton County Sheriff's Office before earning his law degree from the Oklahoma City University School of Law. He went on to work at a private law firm and focused on criminal defense before serving as the county prosecutor.

Kylee Tokoi has joined the Douglas County District Attorney's Office to assist with Child in Need of Care (CINC) cases in addition to handling juvenile and truancy cases. A former legal intern with the CINC unit, Tokoi earned her law degree from Washburn University School of Law in May 2022. Prior to joining the DA's Office, Tokoi served as a law clerk with McCollum Crowley in Lakewood, Colo. She also served as an intern with the Disability Rights Center in Topeka and with Ward Potter, a family law firm based in Wichita.



*Kylee Tokoi*

Madeline Bjorklun, also a former intern with the Douglas County District Attorney's Office, is returning as an assistant district attorney to focus on domestic violence cases. A Washburn University School of Law graduate, Bjorklun previously

served as an assistant county attorney with the Miami County Attorney's Office where she handled criminal prosecutions and CINC cases. She also served as an assistant district attorney with the Shawnee County District Attorney's Office where she managed CINC cases.



*Madeline Bjorklun*

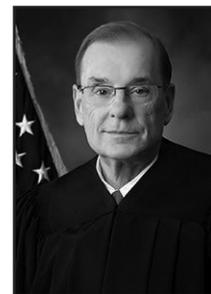
## Johnson County

Johnson County District Attorney Steve Howe was honored for his selfless service to child crime victims with the 2023 Lionheart Award from Sunflower House. This award is presented to someone who is a true champion of children, giving the gift of their time or resources with great courage and without reservation. Steve exemplifies these qualities in his role as the Johnson County District Attorney and serves as a member of the Board of Directors for Sunflower House.

Sunflower House is a Child Advocacy Center that provides child victims of sexual and physical abuse a safe and welcoming place to talk about what happened to them. The monies raised at the gala help Sunflower House continue to educate children and adults on how to recognize and respond to suspected child abuse, ensure parents and caregivers have the help and resources they need, and ultimately improve criminal justice case outcomes through their forensic work.

## Shawnee County

Dennis Jones is a fifth generation native of Southwest Kansas. Dennis served the citizens of Kearny County, Kansas for 30 years as county attorney, county counselor, and city attorney for Lakin and Deerfield. He moved to Topeka, Kan. in 2014. He has worked for the Shawnee County District Attorney's Office, the Kansas Insurance Department, and as a lobbyist for the Ad Astra Government Relations firm since moving to Topeka. Dennis now serves as a district court judge for the Third Judicial District Court in Shawnee County. 🇺🇸



*Dennis Jones*

# Kansas Prosecutors Visit Washington, D.C.

By Shannon Wilson, CLE Committee Chairperson

Prosecutors from Kansas were among prosecutors from around the nation who traveled to Washington, D.C. for NDAA's 2023 Prosecutor Advocacy Day. Day one, attendees were treated to presentations from influential members of Congress as well as key stakeholders in President Biden's administration. Following a full day of presentations, attendees were able to schedule appointments with their members of Congress and the appropriate staff.

NDAA's 2023 legislative priorities were supporting prosecutors, improving public safety,

victims' rights, and criminal justice reform.

Attendees from the KCDAA included:

- Marc Bennett, Sedgwick County District Attorney
- Steve Howe, Johnson County District Attorney
- Tabitha Owen, Smith County Attorney
- Brandon Jones, Franklin County Attorney
- Todd Thomson, Leavenworth County Attorney
- Suzanne Valdez, Douglas County District Attorney



# The New Self-Defense Rule in Felony Murder Cases

By Natalie Chalmers, Assistant Attorney General

In a recent trilogy of cases, the Kansas Supreme Court clarified Kansas's rule on when a defendant can get a self-defense instruction in a felony murder case. That rule is pretty simple: "Self-defense may never be used as a defense to the charge of felony murder." *State v. Milo*, 315 Kan. 434, 441, 510 P.3d 1 (2022). But, "self-defense may be asserted as a legal justification absolving the defendant of criminal liability for the underlying inherently dangerous felony." 315 Kan. at 442. While the rule is relatively simple, the path to get to the rule was far more complicated.

First, in *State v. Holley*, 313 Kan. 249, 485 P.3d 614 (2021), *reversed on rehearing*, 315 Kan. 512, 509 P.3d 542 (2022), the Kansas Supreme Court initially reversed a felony murder conviction because no self-defense instruction was given. The underlying felony in that case was aggravated robbery. The State's theory of the case was that D'Shaun Smith was killed after agreeing to meet Holley and sell him marijuana. At that meeting, Holley proceeded to use a gun to rob Smith before shooting and killing him. Holley, meanwhile, claimed that he shot Smith in self-defense after Smith tried to rob him with Smith's gun. And he claimed this occurred after he decided not to purchase any marijuana, but had offered to pay Smith to give him a ride.

Relying on *State v. Barlett*, 308 Kan. 78, 418 P.3d 1253 (2018), the Kansas Supreme Court found a self-defense instruction was warranted. In *Barlett*, the Kansas Supreme Court had overturned prior caselaw saying being charged with the commission of a forcible felony in a felony murder case prevents self-defense, and adopted a new rule: "a defendant may not assert self-defense if that defendant is already otherwise committing a forcible felony when he or she commits a separate act of violence." As applied to Holley's case, the Court found that a self-defense instruction was warranted because there was a factual dispute as to whether Holley was engaging in a forcible felony when Smith was shot. This dispute required a self-defense instruction.

After the court issued its opinion in *Holley*, the State filed a motion for rehearing, which was granted. Thus, the Kansas Supreme Court prepared itself to take another look at felony murder and its

interaction with self-defense.

At that same time, two other felony murder cases where the defendant claimed the right to a self-defense instruction were pending. In *State v. Milo*, 315 Kan. 434, 510 P.3d 1 (2022), the victim, Michael Hamilton, attacked Milo when Milo was in the process of selling Hamilton marijuana. During the melee, Milo shot and killed Hamilton.

In *State v. Keys*, 315 Kan. 690, 510 P.3d 706 (2022), Keys went to Cole Gilbert's apartment to buy marijuana. He intended to give it to others (a fact he testified to during his first trial that ended with a hung jury). Keys subsequently shot and killed Gilbert. The State's theory was that he did so while robbing Gilbert and during his plan to distribute marijuana. Keys claimed he fired the shot because he feared Gilbert's advances.

Both defendants argued they were entitled to self-defense instructions. Neither got them. While the cases were pending, the Kansas Supreme Court issued orders for the parties to address various self-defense and felony murder issues in light of *Holley*.

A number of supplemental briefs and arguments ensued. At first, the State conceded that the instructions may have been legally appropriate in light of *Barlett*, but argued that they were not factually appropriate when the defendant was in the process of committing a forcible felony. But, after additional questions by the Kansas Supreme Court, the State reversed course and argued they were not legally appropriate.

The Kansas Supreme Court then settled the issues in *Milo*. There, the court noted that *Barlett*, while correctly decided, had "led to an assumption that self-defense is available to a defendant charged with felony murder so long as the defendant can plausibly claim to have not been already engaged in a forcible felony when the separate act of violence (the killing) occurred." *State v. Milo*, 315 Kan. 434, 439, 510 P.3d 1 (2022). And then this led to vigorous argument over what constituted a forcible felony. 315 Kan. at 440. It also noted that its prior caselaw "failed to distinguish between self-defense as a legal justification absolving the defendant of criminal liability for felony murder itself versus self-defense as a legal justification absolving the defendant of

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criminal liability for the underlying inherently dangerous felony.” 315 Kan. at 441.

The court then joined the majority of jurisdictions and issued its new rule: “Self-defense may never be used as a defense to the charge of felony murder.” 315 Kan. at 441. The court explained that self-defense would only be available if it was a legal justification for the underlying felony. And, if it was, and the defendant successfully asserted self-defense, then “the felony-murder charge would necessarily fail as a matter of law given the State’s failure to prove one of the elements of felony murder—namely, the underlying felony.” 315 Kan. at 442.

The court then turned to how to determine whether self-defense was available. To answer that question, the court found the key question was “whether there is an element of force, inherently necessary to the commission of the underlying crime, which could be justified by the defense of oneself or another. Stated another way, some crimes contain an element—the use of force—which may be negated by a proper claim of self-defense.” 315 Kan. at 444. The court noted that criminal discharge of a firearm was an example of an underlying felony

that could be properly negated by a proper claim of self-defense. But it also observed that self-defense would be unavailable even in crimes that have an element of force if the defendant’s use of force was not legally justified. Examples of those crimes included aggravated robbery and aggravated assault. 315 Kan. at 444.

As applied to *Milo*, self-defense was not legally available because the distribution of marijuana does not require the use of force. 315 Kan. at 445. Meanwhile, in *Holley*, self-defense was not available for attempted aggravated robbery. 315 Kan. at 519-20. And, *Keys*, which involved both aggravated robbery and the distribution of marijuana, was likewise not entitled to a self-defense instruction. 315 Kan. at 715-16. All three felony murder convictions were affirmed.

In sum, self-defense is not a defense to felony murder. But it could be a defense to the underlying felony. If it is a successful defense to the underlying felony, then the felony murder conviction will fail. But, in many cases, self-defense will simply not be available because it is not an available defense to the underlying felony. 🗳️

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## The Pre-Mortem as a Strategy for Managing Trials

**By Kendall Kaut, Assistant Johnson County District Attorney**

While the 2006 Royals should likely never be written about again, manager Buddy Bell provided a quote that remains relevant for the pessimism of life’s toughest moments, “I never say it can’t get worse.”

As prosecutors prepare for big trials, one strategy to avoid the pitfall Bell identified is a concept called a premortem. In a 2007 article for “Harvard Business Review,” Gary Klein defined a premortem as, “The leader starts the exercise by informing everyone the project has failed spectacularly. Over the next few minutes those in the room independently write down every reason they can think of for the failure—especially the kinds of things they ordinarily wouldn’t mention as potential problems, for fear of being impolitic.”

For a trial premortem, increasing the number of people thinking about a problem offers more chances at solutions. If someone is preparing for a murder trial, it might mean asking a trial assistant or another prosecutor in the office to think of reasons they believe the trial could result in a not guilty verdict. Then the group engaged in a premortem could make a list of all the reasons they could see the trial spiraling and identify the planned response to those events.

While the prosecutor handling the case might have identified all the best ways they believe the case can be attacked by the defense, new voices can think of additional reasons the case could turn. Maybe the video that felt so overwhelming isn’t so persuasive. Maybe the weaknesses of a detective’s

testimony could prove catastrophic to the case, but your friendship with the detective makes objectively evaluating his or her testimony difficult. In long trials, something is almost assuredly going to go wrong. Having new people identify new concerns helps.

That line of thinking with a premortem is an expansion of the 9/11 Commission's phrase, "Failure of the Imagination." Following September 11, Congress set up a group to investigate how America's intelligence apparatus failed to predict and stop the attacks. The 9/11 Commission identified four areas that stuck out and one was the failure to imagine the possibility of a small number of Al Qaeda hijackers pulling off such an attack. The commission noted, "Imagination is not usually associated with bureaucracies."

While we may bristle at the idea prosecutors are part of a bureaucracy, we run the same tunnel vision risk problems that befell the nation's bureaucratic intelligence structure before 9/11. We have routine tasks that dominate the day. Most cases end in pleas. Too often we get into cycles where we risk going through the motions. Eventually experience can become as much of a curse as a gift, as one can think, "I've done this plenty of times. I know what I need to worry about."

As America's intelligence cadre learned, experience is not sufficient to prevent problems when not properly applied. The premortem gives everyone a chance to think about unusual scenarios. Maybe the defense will be different than expected. In a recent case, I focused too narrowly on what I thought the best defense would be and had to scramble to react to a new defense. I ended up crafting my opening too narrowly, and when the defense came up and offered a new theory of

innocence, my opening became largely irrelevant. If I'd spent more time thinking through every defense—instead of narrowing in on how to beat what I thought was the best defense—I'd have been better able to pivot regardless of the defense offered.

Premortems are not guarantees of success. Robert Draper wrote what may be the definitive account of America's foray into Iraq in his recent book, "To Start a War." In that book, Draper views the decision to invade Iraq as "Imagination run amok." He recounts how America viewed the slightest innocuous incident as definitive proof Saddam Hussein had an active Weapon of Mass Destruction (WMD) program and the desire and capability to use those weapons against the United States. Under Draper's framework, America overlearned the lesson of 9/11 and started imaging scenarios too far-fetched to happen and ended up in a conflict—that in a postmortem—it would have never entered.

Trial premortems require balancing "failure of the imagination" with "imagination run amok." Life provides plenty of ways to leave us anxious about everything that could happen. Somewhere along the line, some defenses are so ridiculous or improbable that they warrant little attention. Other times, the best planning can still leave us surprised. Nobody can plan for everything.

Despite the limitations of a premortem, they've proven highly successful in the business world. Klein's study cited another study that found a premortem could correctly identify future outcomes 30% better than just participating in an event. For a profession that makes thousands of decisions to increase the odds of success by a slight degree, Klein's odds certainly warrant consideration of performing a premortem. 🐾

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# Charging Ahead: Prosecuting Human Trafficking Cases Without Victim Cooperation

By: Alicen Rodolph, Project Attorney, Human Trafficking Institute, Fairfax (VA) and Tyler Dunman, Special Counsel to the Director of Public Prosecutions in Uganda, Human Trafficking Institute, Fairfax (VA)

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This article provides brief, practical guidance and resources to practitioners prosecuting human trafficking cases. More specifically, this article examines issues contributing to the non-cooperation of victims and protections employable to encourage victim participation. Using the victim-centered and prosecution-led approaches, this article then provides pre-trial and trial strategies for proceeding without victim and survivor cooperation.

## Introduction

The testimony of a human trafficking victim can be powerful evidence against a trafficker. There are, however, numerous reasons why victims often hesitate to participate in the case against their trafficker. When even best practices for victim protection are insufficient to overcome a victim's fear, trauma, or other factors that may deter their cooperation, prosecutors must learn how to successfully prosecute the case without this key evidence and assistance.

## Why Some Victims are Unwilling or Unable to Testify or Cooperate<sup>1</sup>

“[The offender] was basically pimping her out

but she was completely uncooperative and she had all sorts of issues and didn't want to come to court and when she took the stand at the testimony, it was just awful. She was clearly trying to protect him . . .”<sup>2</sup>

Successful human trafficking prosecutions usually rely heavily on victim testimony and cooperation.<sup>3</sup> Notably, however, these cases present unique circumstances with victim cooperation, which necessitates more attention from prosecutors for the welfare and needs of victims.<sup>4</sup> Unique issues and factors that influence and prevent victims from testifying or cooperating include victims' fear of retaliation by the traffickers, wariness of possible implications of complicity in the traffickers' crimes,

## Footnotes

1. See Heather J. Clawson, Nicole Dutch & Megan Cummings, Caliber/ICF Int'l, Law Enforcement Response to Human Trafficking and the Implications for Victims: Current Practices and Lessons Learned 37–38, 55 (2006), <https://www.ojp.gov/pdffiles1/nij/grants/216547.pdf> [hereinafter Clawson et al., Prosecuting Human Trafficking Cases]; Heather J. Clawson et al., ICF Int'l, Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices v-vii (2008), <https://www.ojp.gov/pdffiles1/nij/grants/223972.pdf> [hereinafter Clawson et al., Promising Prac.]; Amy Farrell et al., Urb. Inst., Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases 64 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238795.pdf>; Nat'l Dist. Att'ys Ass'n, Women Prosecutors Section, National Human Trafficking Prosecution Best Practices Guide 26–27 (2020), <https://ndaa.org/wp-content/uploads/Human-Trafficking-White-Paper-Jan-2020.pdf>; Kevin Bales & Steven Lize, Trafficking in Persons in the United States: Final Report 4–6, 15, 51–53, 84, 93, 96 (NCJ No. 211980, 2005), <https://www.ojp.gov/pdffiles1/nij/grants/211980.pdf> [<https://perma.cc/LY24-6WTD>]; Michael Bradley, *Human Trafficking: Why Do So Many Victims Refuse Help?*, BBC News (Oct. 17, 2013), <https://www.bbc.com/news/uk-england-24548143>; Sarah Warpinski, Know Your Victim: A Key to Prosecuting Human Trafficking Offenses 4–7 (unpublished manuscript) (2013), <https://www.law.msu.edu/king/2012-2013/Warpinski.pdf>; see also *E4J University Module Series: Trafficking in Persons & Smuggling of Migrants, Module 9: Criminal Justice Responses to Trafficking in Persons*, U.N. Off. Drugs & Crime (2019) [hereinafter UNODC, *E4J Module 9*], <https://www.unodc.org/e4j/en/tip-and-som/module-9/key-issues/challenges-to-an-effective-criminal-justice-response.html>.
2. Farrell et al., *supra* note 1, at 178.
3. Clawson et al., Promising Prac., *supra* note 1, at v-vii.
4. Clawson et al., Promising Prac., *supra* note 1, at vi; see also Warpinski, *supra* note 1, at 7–8, 10–30.

inability or unwillingness to identify themselves as victims, and lack of trust in authorities.<sup>5</sup> Additionally, many victims do not understand their rights, fear deportation, or lack knowledge and understanding regarding law enforcement's role in the process.<sup>6</sup> It is imperative for law enforcement and prosecutors to recognize and understand the issues and challenges that can impede victim testimony and cooperation.<sup>7</sup> It is equally important to recognize that a victim-centered approach sometimes means making the tough decision to proceed without victim testimony or cooperation because that is what is best for the victim and achieving justice in the case.

## Pre-Trial Strategies for Encouraging Victim Participation<sup>8</sup>

### **A. Employ Interagency Collaboration**

Effective collaboration and relationship-building is integral to the success of prosecuting human trafficking cases. Federal prosecutors surveyed

stated that successful cases generally depend on testimony of victims, properly trained investigators, multi-agency collaboration, and trusting relationships with victims.<sup>9</sup> Additionally, evidence demonstrates a higher likelihood of identification, prosecution, and services provided to victims where agencies participate in task forces.<sup>10</sup> Prosecutors should therefore collaborate with victims, law enforcement, and other service providers; focus on investigations and evidence gathering; and use available pre-trial protections to facilitate victim cooperation and successful prosecutions.

Collaboration with other law enforcement agencies and other community service providers produces better outcomes.<sup>11</sup> Consequently, lack of coordination and collaboration between agencies may diminish victim's confidence in the system and their willingness to participate in the prosecution process.<sup>12</sup> All too often, however, prosecutors and investigators are not trained specifically on dealing

5. Bradley, *supra* note 1.

6. Amy Farrell et al., Inst. on Race & Just., Understanding and Improving Law Enforcement Responses to Human Trafficking 84 (2008), <https://www.ojp.gov/pdffiles1/nij/grants/222752.pdf>.

7. Farrell et al., *supra* note 6, at 84.

8. See Annette Brunovskis, Balancing Protection and Prosecution in Anti-Trafficking Policies: A Comparative Analysis of Reflection Periods and Related Temporary Residence Permits for Victims of Trafficking in the Nordic Countries, Belgium and Italy, Nordic Council of Ministers 65–68 (2013), <http://norden.diva-portal.org/smash/get/diva2:701729/FULLTEXT01.pdf>; Clawson et al., Promising Prac., *supra* note 1, at 8–10; Franklin Cruz & Teresa M. Garvey, *Æquitas*, Improving Witness Safety and Preventing Witness Intimidation in the Justice System: Benchmarks for Progress 14–22 (2016), <https://aequitasresource.org/wp-content/uploads/2018/09/Benchmarks-for-Progress.pdf>; Teresa M. Garvey, *Æquitas*, Witness Intimidation: Meeting the Challenge 31–42, 49–60 (2013), <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>; Keisha Livermore et al., Int'l Org. for Migration, Investigating Human Trafficking Cases Using a Victim-Centered Approach 37–67 (2018), [https://publications.iom.int/system/files/pdf/investigating\\_human\\_trafficking.pdf](https://publications.iom.int/system/files/pdf/investigating_human_trafficking.pdf); John Wilkinson, Franklin Cruz, Holly Fuhrman & Spurgeon Kennedy, *Æquitas & Just. Mgmt. Inst.*, Combatting Witness Intimidation 21 (2019), <https://aequitasresource.org/wp-content/uploads/2019/09/CWI-Final-Report-9.26.19.pdf>; Amy Farrell, Colleen Owens & Jack McDevitt, *New*

*Laws But Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases*, 61 Crime, L. & Soc. Change 139 (2013); Anne T. Gallagher & Nicole Karlebach, Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice (unpublished manuscript) (2011), [https://www.ohchr.org/Documents/Issues/Trafficking/Geneva2011BP\\_GallagherAndKarlebach.pdf](https://www.ohchr.org/Documents/Issues/Trafficking/Geneva2011BP_GallagherAndKarlebach.pdf); Joseph M. Scaramucci, *Notes from the Field: Reducing the Need for Victim Testimony in Human Trafficking Cases*, Nat'l Inst. of Just. (June 25, 2020), <https://nij.ojp.gov/topics/articles/reducing-need-victim-testimony-human-trafficking-cases#citation--0>; Warpinski, *supra* note 1, at 23–36. See generally *Æquitas*, Annotated Bibliography Witness Intimidation 14, 16–18 (2013) [hereinafter *Æquitas*, Annotated Bibliography], <https://aequitasresource.org/wp-content/uploads/2018/09/Annotated-Bibliography-of-Witness-Intimidation-Resources.pdf>; U.N. Off. Drugs & Crime, Toolkit to Combat Trafficking in Persons 173–243, 253–56, 289–97 (2008) [hereinafter UNODC, Toolkit], [https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375\\_Ebook\[1\].pdf](https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook[1].pdf); *Anti-Human Trafficking Manual for Criminal Justice Practitioners*, U.N. Off. Drugs & Crime (2009), <https://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>; UNODC, *E4J Module 9*, *supra* note 1.

9. Clawson et al., Promising Prac., *supra* note 1, at vi.

10. Farrell et al., *supra* note 6, at 10.

11. Farrell et al., *supra* note 2, at 64.

12. Wilkinson et al., *supra* note 8, at 6.

with the unique issues and challenges presented in human trafficking cases. This lack of training leads to continuing difficulties with victim and witness cooperation and creates additional obstacles to successful prosecution.

## **B. Implement a Victim-Centered Approach**

Focused on a victim-centered response,<sup>13</sup> the federal government funded numerous multi-agency task forces designed to help local law enforcement agencies partner with victim's services agencies and United States Attorney's Offices.<sup>14</sup> Top federal law enforcement officials say that local law enforcement agencies are likely best positioned for identifying human trafficking in their community.<sup>15</sup> Therefore, in human trafficking cases, the federal government has focused on establishing and utilizing task forces, comprised of law enforcement, service providers, and community agencies.<sup>16</sup>

### **1. Be a Proactive Practitioner**

Prosecutors should be proactive and take the lead in investigating and coordinating necessary support in human trafficking cases. While some state prosecutors are adequately prepared to handle human trafficking cases presented to them, many states, smaller cities, and rural areas lack access to task forces, training, and resources. Consequently, many state prosecutors are forced to wait for local police to bring cases to them.<sup>17</sup> Additionally, police investigators and prosecutors are not usually most suited for these highly sensitive interactions with victims, as they often lack the necessary training and time to establish rapport and trust with the victims.<sup>18</sup>

Consequently, once cases are initiated, victims should be immediately referred to victim-witness coordinators or non-governmental organizations that can help advocate and assist the victim in finding appropriate resources.

Human trafficking cases are unique and require an approach that is distinct from other types of criminal cases. Nonetheless, the lack of resources or limited ability to collaborate with law enforcement on human trafficking investigations should not hinder prosecutors from pursuing human trafficking cases.<sup>19</sup> Prosecutors should be proactive in their interactions with law enforcement investigators and work to implement prosecution-led or -guided investigations in human trafficking cases.<sup>20</sup> They should help organize trainings, identify human trafficking cases, and coordinate with appropriate agencies for investigating cases and assisting victims. Finally, prosecutors should also seek to leverage other laws and resources at their disposal and hone other effective skills and tactics in pursuit of successful prosecution of human trafficking cases.

### **2. Use Protective Orders**

Pre-trial protective orders should be used to help protect victim's privacy and safety. Rule 16 of the Federal Rules of Criminal Procedure provides courts broad authority to order protections during the discovery phase. Under this rule, courts have the authority to permit or deny pre-trial protections and relief.<sup>21</sup> Prosecutors may request protections such as victim name redaction, restricting the defendant's access to certain documents and pictures, and in camera review of evidence, among others. To

13. Off. for Victims of Crime Training & Tech. Assistance Ctr., *Victim-Centered Approach*, in Human Trafficking Task Force e-Guide, OVCTAC.gov (n.d.) [hereinafter OCVTAC E-Guide], <https://www.ovctac.gov/taskforce-guide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> (defining the victim-center approach as “the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner”).

14. Farrell et al., *supra* note 6, at 8–10.

15. Farrell et al., *supra* note 6, at 26.

16. Farrell et al., *supra* note 6, at 84, 233–46. For more information on the victim-centered approach or starting a task force, see OCVTAC E-Guide, *supra* note 13.

17. Farrell et al., *supra* note 8, at 155.

18. Warpinski, *supra* note 1, at 35.

19. Farrell et al., *supra* note 8, at 155.

20. Lindsey Roberson & Alyssa Currier, Best Practices for Prosecution-Led Trafficking in Persons Investigations in Uganda, Hum. Trafficking Inst. 3–6, 11–21 (2020), <https://www.traffickinginstitute.org/wp-content/uploads/2020/06/HTI-Best-Practices-Manual-WEB-High-Res-1.pdf>.

21. Fed. R. Crim. P. 16(d)(1) (“The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party’s statement under seal.”).

support successful prosecution of human trafficking cases, prosecutors should seek these and other necessary pre-trial precautions to reassure victims of their privacy and safety, and to help encourage victim cooperation and testimony.

### **Pre-Trial Strategies for Moving Forward with Limited or No Victim Participation<sup>22</sup>**

When proceeding through the pre-trial stage with limited or no victim participation, practitioners should look to other resources and forms of evidence to aid the veracity of their case. This requires shifting the focus from relying mainly on the victim's testimony to exploring other avenues and strengthening other evidentiary sources.

#### **A. Reduce Reliance on Victim Testimony and Focus on Enhancing Other Evidence**

For understandable reasons, human trafficking prosecutions are highly reliant on victim testimony for successful prosecution. However, investigators and prosecutors should seek to reduce this reliance whenever possible by deploying similar investigative tactics used in other types of cases. Domestic violence and murder cases are often prosecuted without the victim's testimony or cooperation, and it is reasonable to work toward similar goals in human trafficking cases when feasible.<sup>23</sup>

Yet, unlike murder and domestic violence cases, human trafficking cases are unique because they often lack physical evidence. The lack of physical evidence in human trafficking cases

necessitates specialized training for investigators and prosecutors. Those handling human trafficking cases should have thorough knowledge of the particular and unique elements of human trafficking laws and comprehensively understand how to prove these elements.<sup>24</sup> Law enforcement should expand the scope of available evidence in the case through evidence gathering techniques that are not solely focused on the victim's testimony. Prosecutors should look to sources outside of victim testimony, such as victim cell phone contents, hotel receipts, and surveillance recordings to augment investigations.<sup>25</sup> Specifically, evidence related to components such as advertising, renting of real estate, transportation methods and documents, communication methods, and financial transactions should be sought after and gathered.<sup>26</sup>

#### **B. Consider Other Charging Options Based on Available Evidence**

After assessing what evidence is available, consideration should be given to what, if any, other charges may be proven with the evidence obtained.<sup>27</sup> While it is often best practices to charge traffickers under anti-trafficking laws, in certain situations, it might be better strategy to file charges in addition to or beyond the anti-trafficking statutes to ensure successful prosecution. Consequently, in trafficking cases, investigators and prosecutors must be knowledgeable in all relevant or applicable laws and have the capacity to think more broadly or creatively.

22. See Farrell et al., *supra* note 1, at 132–42; Garvey, *supra* note 8, at 20–24, 32–42, 53–60; Keisha Livermore et al., *supra* note 8, at 68–70 (2018); Wilkinson et al. *supra* note 8, at 21; Bales & Lize, *supra* note 1, at 90–92, 94–107; Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 Mod. L. Rev. 834, 840–42 (2002); Farrell et al., *supra* note 8, at 161–65; Kristin Grossman, *What Will it Take? Examining the Use of Preliminary Hearing Testimony Where Victims are Unavailable Due to Mental Illness Stemming from Domestic Violence and Sexual Assault*, 39 N. Ill. U.L. Rev. 140, 150–56 (2018); Bobby Naudé, *The Uncooperative Victim and the Admissibility of Evidence: Some Pointers from the USA*, 39 Comp. & Int'l L.J. S. Afr. 450, 454–59 (2006); Scaramucci, *supra* note 8; Rachel Louise Snyder, *We Prosecute Murder Without the Victim's Help. Why Not*

*Domestic Violence?*, N.Y. Times (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html>; UNODC, Toolkit, *supra* note 8, at 176–99, 206–16; UNODC, *E4J Module 9*, *supra* note 1.

23. Snyder, *supra* note 22.

24. Livermore et al., *supra* note 22, at 62.

25. Farrell et al., *supra* note 1, at 223.

26. Livermore et al., *supra* note 22, at 63.

27. Nat'l Dist. Att'ys Ass'n, *supra* note 1, at 41. For a broader discussion of evidentiary issues in human trafficking cases, see U.N. Off. Drugs & Crime, *Evidential Issues in Trafficking in Persons Cases* (2017), [https://www.unodc.org/documents/human-trafficking/2017/Case\\_Digest\\_Evidential\\_Issues\\_in\\_Trafficking.pdf](https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf).

## How to Proceed with the Trial Stage if the Victim Remains Uncooperative or Absent<sup>28</sup>

Even with the above practices, some victims remain unwilling or unable to testify. When this occurs, prosecutors should examine whether strategies developed in other contexts, such as domestic violence, assault, sexual assault, and child abuse cases are appropriate. The following Section presents strategies for proceeding without victim cooperation and testimony at trial.

### **A. Use Protections for Victims Who are Compelled to Testify**

Sometimes reluctant or fearful victims are compelled to testify against their trafficker in court, which may cause more trepidation. The best practice is to avoid compelling victims to testify, and victim-centered prosecutions should place concern for the victim as the ultimate guide for how to proceed at trial. In employing victim-centered practices, practitioners ought to recognize the victim's apprehension and the possibility of re-traumatization that often occurs when victims are compelled to testify. This possibility for greater harm should trigger efforts on alternative avenues for proceeding without a victim's testimony.

In rare situations however, such as when the victim is the sole witness or the sole source of

evidence, it may be necessary to legally compel a victim to testify. After carefully assessing and confirming the necessity of this testimony, practitioners should request other protections to help alleviate victims' fears (in addition to those available under Federal Rule of Criminal Procedure 16, previously mentioned) such as in camera proceedings, closed courtrooms, and closed-circuit or video testimony.<sup>29</sup> These provisions are most often used in cases with child victims, or victims who may be adults at trial but were underage during the crime.<sup>30</sup> However, courts may permit wider use of these protections in human trafficking cases, especially if prosecutors sufficiently establish the victim's need for these provisions.<sup>31</sup>

### **B. Educate the Court and Jury by Introducing Expert Witness Testimony**

When trafficking victims are unwilling or unable to testify at trial, prosecutors should present expert witness testimony to inform and educate the court and jury on the psychology of why victims might be unwilling to cooperate and testify.<sup>32</sup> Prosecutors should find an expert to communicate the effects of coercion and abuse, specifically in trafficking cases, and how that contributes to the victim's fear and behaviors.<sup>33</sup> The expert should be someone who

28. See Farrell et al., *supra* note 1, at 162; Garvey, *supra* note 8, at 37; Nat'l Dist. Att'ys Ass'n, *supra* note 1, at 39–45; UNODC, Toolkit, *supra* note 8, at 233–42; Bales & Lize, *supra* note 1, at 108–11; Ellison, *supra* note 22, at 842–48; Farrell et al., *supra* note 8, at 161–65; Teresa Garvey, *Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing*, 17 Strategies (Æquitas, Washington, DC), Dec. 2018, at 4–9, <https://aequitasresource.org/wp-content/uploads/2018/12/Legal-Jiu-Jitsu-for-Prosecutors-in-IPV-Cases-Forfeiture-by-Wrongdoing-2.pdf>; Warpinski, *supra* note 1, at 30–36; Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up*, 7 Strategies (Æquitas, Washington, DC), Nov. 2012, at 1, [https://aequitasresource.org/wp-content/uploads/2018/09/S\\_Issue\\_7\\_No\\_Victim-Dont\\_Give\\_Up.pdf](https://aequitasresource.org/wp-content/uploads/2018/09/S_Issue_7_No_Victim-Dont_Give_Up.pdf); Grossman, *supra* note 22, at 157–66; Snyder, *supra* note 22. See generally Æquitas, Annotated Bibliography, *supra* note 8, at 16–17; Æquitas, *Forfeiture by Wrongdoing*, The Prosecutors' Resource 3–7 (2012) [hereinafter Æquitas, *Forfeiture by Wrongdoing*], [https://aequitasresource.org/wp-content/uploads/2018/09/The\\_Prosecutors\\_Resource\\_Forfeiture\\_by\\_Wrongdoing.pdf](https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf).

29. See Child Victims' and Child Witnesses Rights Act, Pub.

L. 101-647, title II, §225(a), 104 Stat. 4798 (1990) (codified as amended at 18 U.S.C. § 3509); see also Thomson Reuters Found. & Rights4Girls, *Survivor Protection: Reducing the Risk of Trauma to Child Sex Trafficking Victims 17–27* (2018) [hereinafter *Survivor Protection*], <https://rights4girls.org/wp/wp-content/uploads/r4g/2018/01/Survivor-Protection.pdf> (discussing CCTV, videotaped depositions, and videotaped testimony, along with other alternatives to direct testimony).

30. *Survivor Protection*, *supra* note 29, at 17–27.

31. *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (applying the *Craig* analysis and determining that the trial court's decision to limit the pro se defendant's ability to personally cross-examine the victim-witnesses did not violate his constitutional rights, finding the government's interest "sufficiently important to outweigh" the defendant's rights).

32. Long & Garvey, *supra* note 28, at 5–6.

33. Long & Garvey, *supra* note 28, at 5–6; see also Æquitas, *Just. Mgmt. Inst. & Urb. Inst., 1 Model Response to Sexual Violence for Prosecutors 71* (2017) [hereinafter *RSVP Model*], <https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf>.

can effectively explain that public and individual perceptions of how a victim *should* respond to abuse and trauma often conflict with a victim’s actual response.<sup>34</sup> Experts may also testify generally about other issues in trafficking cases including, but not limited to, that victims may: (1) not see themselves as victims; (2) have relied on the trafficker for food, housing, and other basic needs; (3) have been threatened or had their family threatened; or (4) think they are “in love” with their trafficker.<sup>35</sup>

### **C. Use Hearsay Exceptions to Admit Evidence instead of Victim Testimony**

Prosecutors should examine whether the use of a hearsay exception is an appropriate method for introducing evidence where live victim testimony is unavailable. Such exceptions include use of a victim’s prior statements (including spontaneous utterances and state of mind statements), forfeiture by wrongdoing, or introducing the prior bad acts of the defendant.<sup>36</sup> The admissibility of statements offered under these exceptions have often been unfairly questioned or incorrectly thought of as an inadequate replacement for victim testimony at trial.

When a victim is unavailable to testify at trial because of the defendant’s actions, prosecutors may be able to use the forfeiture by wrongdoing exception.<sup>37</sup> This exception allows the admission of a victim’s out-of-court statements if they are unavailable during trial due to the defendant’s actions.<sup>38</sup> Wrongdoing, as classified under this exception, may involve direct or explicit intimidation, such as aggressive behavior, threats, and assault.<sup>39</sup> And, “declarations of love, or promises to marry or to change, when they are intended as inducements for the victim not to testify” may also

be included.<sup>40</sup> The inclusion of these promises or inducements is significant because they are common methods of coercion in human trafficking cases.<sup>41</sup> This exception is especially important in human trafficking cases where the trafficker’s intimidation is similar to the dynamics of domestic violence cases, as traffickers often threaten retaliation against the victim or their family and “victims may be too fearful to testify or may go into hiding to escape, not trusting in the ability of law-enforcement to protect them.”<sup>42</sup>

Of interest to practitioners prosecuting human trafficking cases is the emerging theory of “Forfeiture by Exploitation.”<sup>43</sup> Under this theory, scholars argue for the expansion of forfeiture by wrongdoing “to include ‘forfeiture by exploitation,’ or the admission of testimonial hearsay when a ‘defendant exploited a child’s vulnerabilities such that he could reasonably anticipate that the child would be unavailable to testify.’”<sup>44</sup> Arguably, the baseline assumptions and arguments would not apply only to trafficking cases involving children, but also should be inclusive of all trafficking cases where exploitation is found. Thus, practitioners should follow the development of this theory, and perhaps work to incorporate all trafficking victims under its umbrella.

### **Conclusion**

Victim and witness cooperation and testimony provide arguably the most powerful evidence in human trafficking cases. Yet, for a multitude of reasons, victims often hesitate to provide testimony or cooperate with investigations. Accordingly, it is important for prosecutors and investigators to understand and adapt to the unique complexities

34. RSVP Model, *supra* note 33, at 74; *see generally* Eric Werner, *Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutors*, 25 Lewis & Clark L. Rev. 573 (2021).

35. RSVP Model, *supra* note 33, at 71–75.

36. Ellison, *supra* note 22, at 846–48.

37. Survivor Protection, *supra* note 29, at 17–20; Naudé, *supra* note 22, at 459–66.

38. *Æquitas*, Forfeiture by Wrongdoing, *supra* note 28, at 1–8.

39. *Æquitas*, Forfeiture by Wrongdoing, *supra* note 28, at 1–8.

40. *Æquitas*, Forfeiture by Wrongdoing, *supra* note 28, at 1.

41. Kyleigh Feehs & Alyssa Currier, Hum. Trafficking Inst., 2019 Federal Human Trafficking Report 26–27 (2020), [https://www.traffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report\\_Low-Res.pdf](https://www.traffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report_Low-Res.pdf).

42. Feehs & Alyssa Currier, *supra* note 41, at 1–2.

43. Survivor Protection, *supra* note 29, at 21.

44. Survivor Protection, *supra* note 29, at 21.

presented in human trafficking cases. To this end, strategies that practitioners have developed in other contexts—such as domestic violence, assault, sexual assault, and child abuse cases—may be helpful. Moreover, investigators and prosecutors should focus on interagency collaboration, using protective measures, and employing appropriate evidence rules. If these measures are broadly adopted and incorporated, practitioners are likely to see improved victim cooperation and increased success in human trafficking prosecutions. 📌

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### About the Authors

**Alicen Rodolph** is a Project Attorney for the Human Trafficking Institute. Rodolph assists in the development and publication of the *Federal Human Trafficking Report* by collecting and analyzing data and identifying current trends in human trafficking cases. She served as a 2020–2021 Douglass Fellow at the Human Trafficking Institute, where she contributed to research and scholarship, including the 2020 *Federal Human Trafficking Report*, and co-hosted and produced the *Trafficking Matters* podcast. Rodolph earned her J.D. from William & Mary Law School in 2021 and her undergraduate from Southern New Hampshire University. **Tyler Dunman** is Special Counsel to the Director of Public Prosecutions in Uganda for the Human Trafficking Institute. In his position, Dunman assists Ugandan law enforcement and prosecutors in conducting trafficking in persons and child exploitation investigations and prosecutions. Prior to his current position, Dunman was state prosecutor in Texas. Dunman received his undergraduate degree from Texas A&M University and law degree from South Texas College of Law in Houston, Texas. Dunman also received a Master of Science in Criminal Justice Leadership & Management from Sam Houston State University, where he also serves as an Adjunct Lecturer.



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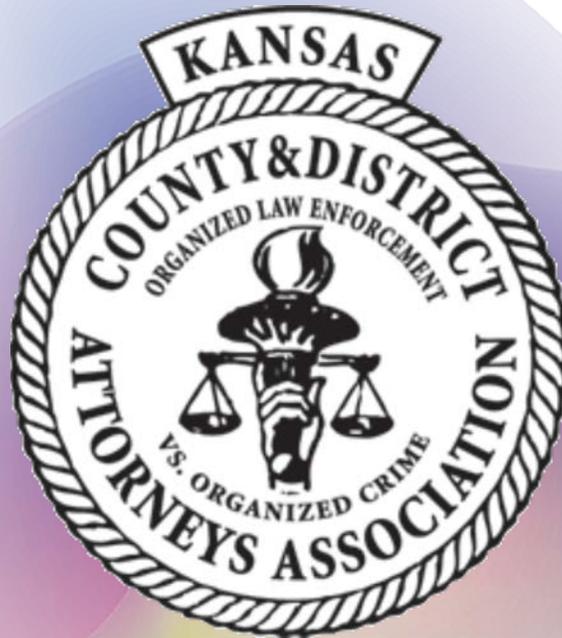


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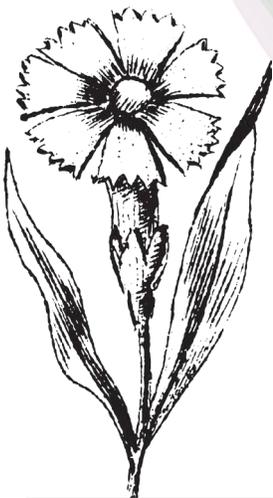


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