A background image of a statue of Lady Justice, the personification of the goddess of justice. She is depicted as a woman with a blindfold, holding a scale of justice in her left hand and a sword in her right hand. The statue is rendered in a dark, monochromatic style with a slight glow.

# Witness Intimidation Part II: Effective Use of Intimidation Evidence

AE



## **INNOVATIVE**

Sustaining effective practices and promoting systemic change

## **INFORMED**

Training, resources, and assistance supported by research and experience

## **PRACTICAL**

Customized strategies that are accessible, responsive, and easy to apply

# What We Do



## Resources

Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices



## Consultations

Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions



## Training Events

Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals



## Partnerships & Initiatives

Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training

# FOLLOW AEQUITAS @

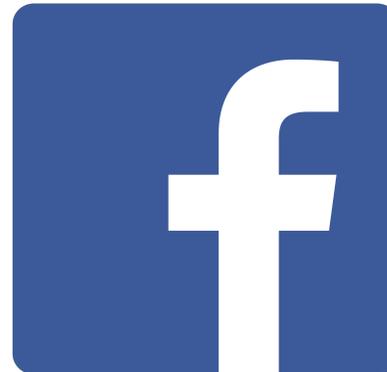
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# Support

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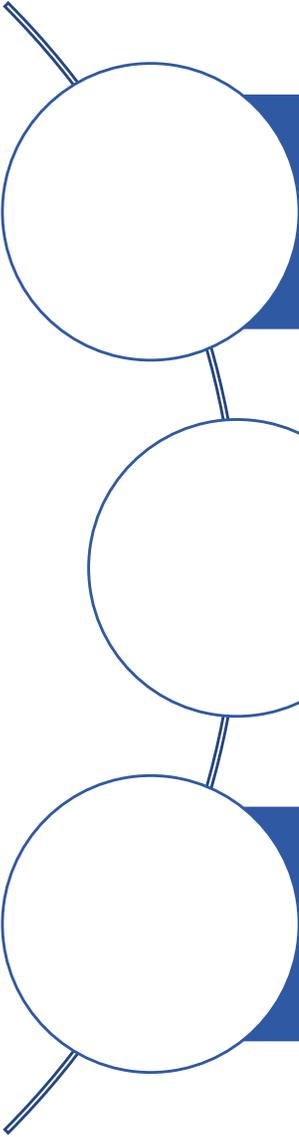
# Presenter: John Wilkinson



- AEquitas Attorney Advisor
- Former NDAA Program Manager
- Prior Assistant Commonwealth's Attorney in Fredericksburg, VA

# Objectives

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Educate judges and juries about the latest tactics defendants use to intimidate witnesses.

Protect witnesses throughout the course of a case including investigation, discovery, and trial.

File and argue compelling motions to admit the statements of witnesses unavailable for trial.

# What is witness intimidation?

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Anything done with the intention or purpose of preventing or altering a witness's testimony or report to law enforcement, or to retaliate against a witness for such testimony or report.

AEQUITAS FIELD GUIDE TO WITNESS INTIMIDATION (2018)

# Intimidation

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Who?

What?

When?

Where?

How?

Why?

Most explicit acts of intimidation take place **where police exert little control:** at the witness's home, school or work; or while the witness is running errands or socializing.

Nicholas Fyfe & Heather McKay, *Desperately Seeking Safety*, 40  
(4) BRITISH J. OF CRIMINOLOGY, 675-91 (2000)

But witnesses also report being intimidated at the crime scene, while at the police station making a statement and **while in the courthouse** waiting to testify. Some report being intimidated **while on the witness stand**

KELLY DEDEL, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, *WITNESS INTIMIDATION* (2006)

# The Most Dangerous Time

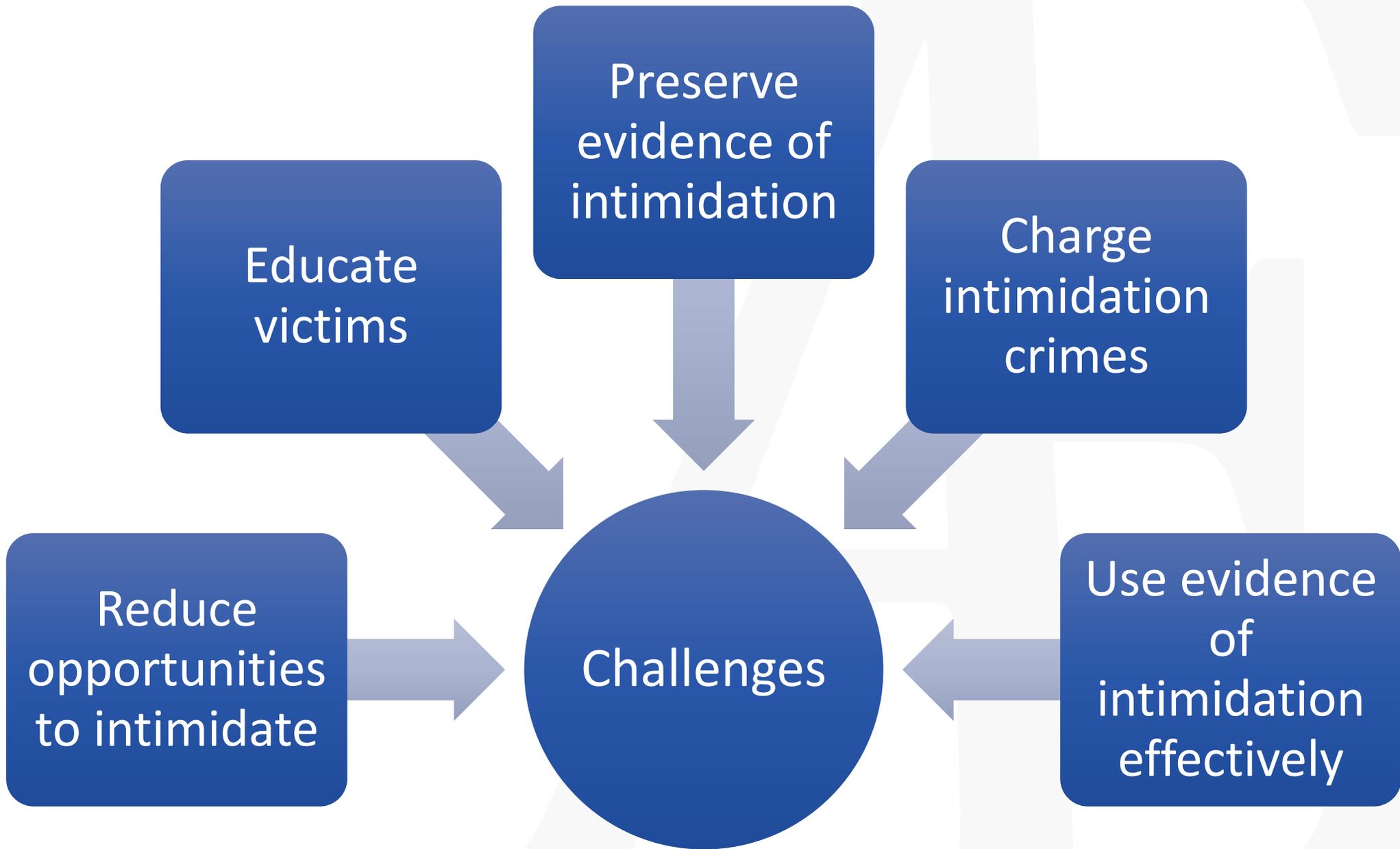
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- Most dangerous: between arrest and trial
- Second most dangerous: during the trial itself

KERRY HEALEY, NATIONAL INSTITUTE OF JUSTICE, *RESEARCH IN ACTION, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES*  
(Oct. 1995)

“Only unsuccessful intimidation ever came to the attention of police or prosecutors.”

KERRY HEALEY, NATIONAL INSTITUTE OF JUSTICE, *RESEARCH IN ACTION,*  
*VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS*  
*AND EMERGING RESPONSES 2* (Oct. 1995)



# Strategy

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Identify and Document Nontestimonial  
Statements

“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...”

U.S. CONST. amend. VI, Confrontation Clause

# WHAT IS “TESTIMONIAL”?

Generally more formal or made to law enforcement or their agents

Primary purpose is to report facts for later prosecution

# Testimonial Hearsay

Crawford, 541 U.S. 36

Admissible **ONLY** where:

- Declarant is available **for cross-examination** at trial, **OR**
- Prosecution shows that the declarant is **unavailable AND** defense had *prior opportunity to cross-examine*, **OR**
- **Forfeiture by Wrongdoing**

# WHAT IS “NON-TESTIMONIAL”?

Statements during ongoing emergency

- 911 calls
- To law enforcement to meet emergency

For purpose of medical treatment

Business records (not prepared for litigation purposes)

Casual remarks to others

# Non-testimonial Hearsay

Whorton v. Bockting, 549 U.S. 406 (2007)

- Sixth Amendment Confrontation Clause does not come into play
- Admissibility depends solely on jurisdiction's hearsay rules

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# To whom might the witness have spoken or confided?

Friends

Family

Employer / co-workers

Landlord

Neighbors

Professionals (medical or others)

# Federal Rule of Evidence

803(b)(4)

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## Statement Made for Medical Diagnosis or Treatment.

A statement that:

**(A)** is made for--and is reasonably pertinent to--

medical **diagnosis** or **treatment**; and

**(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

# Medical Treatment

State v Koederitz, 166 So. 3d 981, 986 (La. 2015)

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“These statements are non-hearsay as a matter of La.C.Cr.P. art. 803(4) and are therefore admissible as substantive evidence because they were made for purposes of diagnosis and treatment, essential components under current medical practice in cases of domestic violence, and not as part of a forensic examination intended for use at trial.”

# Medical Treatment

Webster v. State, 151 Md. App. 527, 545 (2003)

"We agree with the State and the trial court that a sexual assault victim's statement describing the assault may be admissible under Rule 5-803(b)(4), even though it was taken and given for dual medical and forensic purposes."

Officers, victim advocates, and prosecutors can ask:

**“Have you talked to anyone else about this incident, either before or after you spoke to the police?”**

***Document evidence of an ongoing emergency***

# Strategy: Charge intimidation crimes and join with principal charge

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Public Intimidation and  
Retaliation

Intimidating, impeding, or  
injuring witnesses

Suborning Perjury

Obstruction of Justice

# PROTECTION OF WITNESS Identity

La. Code Crim. Proc. Ann. art. 729.7A

Notwithstanding any other provision of law to the contrary, the district attorney or the defendant may delete or excise from any information required to be disclosed herein any information which identifies a witness if such party believes the witness's safety may be compromised by the disclosure.

# Redacted Discovery

State v. Le, 165 So.3d 242 (La.App. 4 Cir. 2015)

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- Ex parte hearing
- State must disclose reasons why information should be redacted
- Record of proceedings and unredacted documents kept under seal
- Reviewable by supervisory writ application to an appellate court



# Restricted Discovery

State v. Moody, 178 So. 3d 1031, 1046-47 (La. App. 2 Cir. 2015)

Defendant has failed to show any prejudice from the procedure employed. His counsel had access to all discovery materials and was allowed to show the materials to Defendant and to discuss them with Defendant in preparation for trial.

# Strategy

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Preserve Testimony with Opportunity for Cross-Examination

# Prior Opportunity for Cross

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- Prior trial testimony
- Preliminary hearing testimony, provided opportunity for cross is sufficient
- Deposition, under rules permitting
- Grand jury proceedings do NOT afford opportunity for cross

# Preliminary Hearing

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- Foster a “full and fair opportunity” for cross-examination
- Fight defense attempts to waive
- Pass discovery before hearing
- Allow short adjournments if necessary to allow defense reasonable opportunity to prepare
- Refrain from objections to extent possible

# Strategy

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## Forfeiture by Wrongdoing

# Concept

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- Defendant has the right to confront witnesses against him /her
- Right can be **forfeited** if the witness cannot be confronted due to the defendant's intentional **wrongdoing**

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# Forfeiture by Wrongdoing

Federal Rule of Evidence 804(b)(6)

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A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.



# Valuable Tool

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- Applies to any potential witness who is “unavailable”
- Opens the door to any hearsay
  - Testimonial
  - Nontestimonial

# Giles v. California

554 U.S. 353 (2008)

- Domestic violence related homicide: defendant shot ex-girlfriend
- Claimed self-defense
- 3 weeks prior → domestic violence callout
  - Victim crying
  - Made statements about being assaulted, strangled, threatened with knife
- Statements allowed under FBW based upon intentional act of killing
- Defendant convicted of 1st Degree Murder

# *Giles*

Cont'd

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Case remanded:

- Not enough evidence that victim was made unavailable due to intentional act of defendant
- Defendant had to have **specific intent** to make victim unavailable as a witness when committing the wrongdoing

# History of Relationship

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“Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be **highly relevant** to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.”

*Giles, 554 U.S. at 376*

# Unavailability

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- State must show efforts to produce witness were both reasonable and made in good faith

Barber v. Page, 390 U.S. 719 (1968)

- “The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.”

Ohio v. Roberts, 448 U.S. 56, 74 (1980)

# Unavailability

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**Is a witness who is present, testifies, and recants considered unavailable?**

# People v. Nelson

67 N.Y.S.3d 719 (N.Y. App. Div. 2017)

“Unavailability’ in this context is not limited to a witness's outright refusal to testify or physical absence from the proceedings; a witness is practically or effectively unavailable where the witness recants his or her initial statements or otherwise changes his or her version of the events as a result of misconduct on the part of the defendant.”

# People v. White

772 N.Y.S.2d 309 (1st Dept. 2004)

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To deem a testifying, but recanting witness 'available' for Confrontation Clause purposes, as defendant suggests, would provide witness tamperers with an incentive to induce witnesses to recant rather than to refrain from testifying at all.

# Strategy

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## Pretrial Motion Practice

# Admit Evidence; Protect the Record

- Motions to admit non-testimonial hearsay
- Motions to admit evidence under forfeiture by wrongdoing
- Litigate Forfeiture by Wrongdoing motions
  - “Forfeiture file” for any witnesses vulnerable to intimidation
  - Prior to trial; during trial when necessary

# Going Forward

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Recognize and address acts of intimidation

Support victims to enhance their ability to participate at trial

Document non-testimonial statements admissible under hearsay exception

Preserve testimony with opportunity for cross-examination

Litigate motion to admit evidence under forfeiture by wrongdoing

# John Wilkinson

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