

# **BEADLE COUNTY PROCEDURES AND POLICIES FOR PROSECUTION OF DOMESTIC VIOLENCE AND PROTECTION ORDER VIOLATIONS**

## **I. Policy statement.**

### **A. Overview.**

South Dakota prosecutors have made significant strides in the prosecution of domestic violence over the past two decades. Recognizing domestic abuse as serious criminal behavior, many prosecutors have taken on sharply increased caseloads and devoted substantial resources to address the complexities of this crime. State's Attorneys also have sought to be better informed about this complex issue by participating in continuing legal education sessions and multi-disciplinary training put on by the South Dakota Network Against Family Violence and Sexual Assault (SDNAFVSA). SDNAFVSA has also worked with the State in publishing a manual for domestic abuse and Sexual Assault in South Dakota. Despite these efforts, domestic abuse continues to be major problem warranting special attention. Two decades of experience in prosecuting these offenses and continued study into the dynamics of domestic violence have revealed the following facts that are essential to consider in order to effectively prosecute domestic violence cases, maximize community and victim safety, and minimize the negative effects of the criminal justice process on domestic violence victims:

\* Domestic violence rarely is an isolated incident of uncharacteristic behavior but, rather, is more often an act consistent with a pattern of violence and other abuse inflicted on a domestic partner by the abuser to exert power and control over the victim.

\* This pattern of abuse frequently involves a cycle of violence where episodes of abuse and violence against the victim are followed by periods of apology and promises of change by the perpetrator only to revert to further acts of violence.

\* This cycle of violence, coupled with economic, family and societal pressures and threats or promises by perpetrators, frequently causes victims of domestic abuse to seek dismissal of charges, change their account of what happened in the incident or otherwise not cooperate in the prosecution.

\* The most lethal period of risk for victims occurs around the end of a relationship or separation. Many domestic abuse homicides in South Dakota occur around the end or threatened end of a relationship.

\* Many domestic abuse homicides are preceded by threats of homicide or suicide by the perpetrator.

\* Parties to domestic abuse homicides often have had prior involvement with the criminal justice system regarding domestic abuse.

\* Firearms are used in the majority of domestic abuse homicides.

Prosecutors should be aware of these dynamics and react to the challenges they pose for prosecution of domestic abuse cases in a way that does not further victimize those who suffer domestic abuse, discourage victims from seeking help in the future or embolden those who choose to perpetrate abuse.

The continuing violence in homes across South Dakota is the impetus for these guidelines. If a prosecutor's intervention into domestic violence is to be effective, a consistent approach needs to be developed and followed. Such a consistent approach is the aim of these procedures and policies developed by the SDNAFVSA, South Dakota Attorney General's Office, in conjunction with the South Dakota State's Attorneys Association.

Variation in resources from county to county requires these guidelines to be flexible and invites individual state's attorneys to develop more particularized standards for their own jurisdictions. No matter the size of the county or the resources available, however, prosecutors should promote the ethic that domestic abuse is a crime and should help mobilize the resources of the community to reduce its incidence, protect victims and hold offenders accountable for their actions.

These standards for prosecuting domestic abuse cases should be read as consistent with the South Dakota Rules of Professional Conduct and the National District Attorneys Association Prosecutorial Standards. Ultimately all decisions as to charging and prosecuting any crime remain in the sound discretion of the state's attorney.

## **B. Goals in domestic abuse prosecutions.**

Prosecuting attorneys should focus on the following goals when prosecuting domestic abuse cases:

1. Recognize domestic violence as a serious, life-threatening crime.
2. Stop the violence.
3. Keep the victim, affected children, family members, and general public safe.
4. Hold the batterer accountable for violent conduct.
5. Provide resources and restitution for the victim.
6. Rehabilitate the batterer.
7. Deter the batterer and others from perpetrating acts of domestic violence.

## **II. Outreach.**

### **A. Leadership.**

Prosecuting attorneys should use their official position in the community to provide leadership in developing a community-wide response to domestic violence.

### **B. Community response.**

Prosecuting attorneys should actively foster and participate in multi-disciplinary efforts to maintain an effective and accountable justice system response to domestic violence and to encourage community-wide efforts to end the problem. A multi-disciplinary team should include the prosecutor, law enforcement, victim advocates, educators, probation officers, court personnel, DSS, and mental health professionals. A prosecutor should encourage these individuals to meet on regular bases. The prosecutor should take the lead in making the contacts and setting up a meeting of the above interested parties.

## **III. Education**

### **A. Continuing education of state's attorney staff on domestic abuse issues.**

As resources permit, prosecutors should avail themselves of opportunities for continuing education on domestic abuse issues including understanding the dynamics of domestic abuse and the seemingly paradoxical methods victims use to negotiate safety such as remaining in abusive relationships, or testifying on behalf of the defense.

### **B. Working with local law enforcement.**

1. Prosecutors should inform local law enforcement officers of prosecution policies and procedures. Prosecutors should update officers on applicable changes in the domestic abuse law. Prosecutors should also work with law enforcement to develop ways in which cases supported by probable cause can be prosecuted, whether or not the victim is available to testify.

2. Evidence gathering. Prosecutors should encourage local law enforcement to thoroughly investigate domestic abuse assaults, including the collection of evidence that would support a case even without the victim's testimony. Evidence useful to prosecutors may include, but is not limited to the following:

- \* photographs of the victim's injuries, including depictions of bruising at various stages following the assault to show evolution of the injuries;
- \* photographs of the crime scene;
- \* witness statements;
- \* 911 tapes;
- \* excited utterances;
- \* admissions by the defendant; and
- \* medical records and statements made for purposes of medical treatment.

3. Prosecutors should be aware of the admissibility limitations of out of court statements imposed by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct.1354, 158 L.Ed.2d 177 and *Davis v. Washington*, 541 U.S. 36; 126 S.Ct. 2266; 165 L.Ed.2d 224. Prosecutors should also be knowledgeable about developing case law in this area and assist law enforcement in investigative procedures to maximize the admissibility of such statements.

#### **IV. Communicating with victim.**

##### **A. Early contact.**

Prosecutors should attempt to have early contact with the victim. Such contact should emphasize the process and goals of intervention by the criminal justice system in domestic abuse cases and should include a victim counselor/advocate.

##### **B. Victim notification.**

Prosecutors should provide the victim written notice of the victim's rights and provide all the notices required by South Dakota Law, see SDCL 23A-28C and SDCL 25-10. Other offices in this State have developed handbooks with this information and a prosecutor's office can reach out to these offices for such information.

##### **C. Notification of case progress.**

Prosecutors should keep domestic abuse victims informed of the progress of the case. Whenever practical, prosecutors should attempt to notify victims before entering into a dispositional agreement with the defendant.

##### **D. Support services.**

Prosecutors should provide domestic abuse victims with information about available support services such as contact information or literature of the South Dakota Domestic Abuse Hotline, the nearest domestic abuse program, and the

Crime Victim Compensation Program. State's attorneys should assist domestic abuse victims in exercising their rights including the right to be present at all proceedings.

**E. Subpoenas, non-compliance and material witness warrants.**

Prosecutors should carefully consider the potential risks and advantages of issuing a subpoena to a domestic violence victim. Compelling testimony may cause increased danger to a victim. Conversely, placing responsibility on the prosecution for deciding if the victim will testify may remove pressure placed on the victim by the offender and others not to testify. Prosecutors should be sensitive to these concerns in evaluating whether to compel a victim's testimony through subpoena power, and should consider these along with the facts and circumstances known about the pending case in making this decision. Similarly, before seeking sanctions for non-compliance with a subpoena, prosecutors should consider whether such sanctions would further the goals of domestic abuse prosecution, should recognize that sanctions may result in victims choosing not to seek help from law enforcement in the future, and that use of such sanctions may be used by the perpetrator to exert power over the victim. The use of material witness warrants to compel testimony from domestic abuse victims is disfavored and is inappropriate if used to prevent the recantation of the victim's account of the abuse. Prosecutors should also be aware that the use of material witness warrants to compel testimony from an abuse victim can cause your jurisdiction to lose its ability to qualify for certain federal grant monies.

**F. Safety of the victim.**

Prosecutors should consider potential risks to victims' safety caused by communication with them and should consult with victims to develop contact methods that minimize these risks.

**V. Charging decisions.**

**A. Doing justice.** Prosecutors should consider all of the available evidence, the goals of prosecution set out herein, and the ethical rules and duties applicable to all criminal matters to do justice when making charging decisions regarding domestic abuse cases.

**B. Requirements of the Victim.** Prosecutors should not require victims to sign criminal complaints or require victims to attend the initial appearance or other pretrial hearings as a condition for proceeding with a prosecution.

**C. Considering victim's wishes.** Prosecutors should consider the victim's wishes as one of many factors in the decision whether to file or dismiss charges, but should not allow the victim's desires to be solely determinative of the case disposition.

**D. False report and perjury charges.** Prosecutors considering charges for false report to public safety entities or perjury against domestic abuse victims for recanting a report of abuse or testifying inconsistently with such report should carefully consider the dynamics of domestic abuse and victimization, the potential of witness tampering by defendants, the chilling effect on future reporting of abuse such charges may cause, and that such sanctions may provide the defendant with another method to exert control over the victim. Prosecutors should not bring false report charges against a domestic abuse victim for making a statement to peace officers that the prosecutor believes in good faith to have been truthful at the time it was made. Prosecutors should be diligent as to their ethical responsibility to disclose exculpatory evidence to defendants with regard to such recantations.

**E. Bail and conditions of release.** Prosecutors should carefully consider the potential danger posed to the victim and other persons; prior criminal record including nature of the offenses, prior compliance with terms of probation or parole and conditions of release; prior failures to appear at court proceedings; prior violations of no contact and/or protective orders; and other information relevant to the risk of flight with regard to a defendant and make recommendations to the Court on issues of bond and conditions of release that comport with these concerns.

## **VI. Case Management.**

### **A. Plea negotiations.**

1. Prosecutors should approach plea negotiations with the intent of serving the goals of prosecution.

2. Before making a plea agreement in a domestic abuse assault case, prosecutors should consider numerous factors, including but not limited to the following:

- \* The strength of the evidence;
- \* Seriousness of the offense, including such factors as: injuries inflicted, presence of children, harm and risk of harm to children both mental and physical, access to, and use or threatened use of weapons, threats of suicide and/or homicide by defendant;
- \* History of abuse to this and other victims including strangulation, threats of suicide and or homicide, and sexual assault within the intimate partner relationship;
- \* Defendant's prior criminal record including violations of no contact and protective orders and violations of prior sentencing provisions;
- \* General deterrence value;
- \* The value of sanctions available in domestic abuse assault convictions;

\* The potential for federal firearms law application to convictions.

## **B. Dismissals.**

1. Prosecutors should not dismiss domestic abuse charges solely because the victim refuses to cooperate. Prosecutors should evaluate the totality of the available evidence, including, but not limited to:

- \* photographs of injuries;
- \* 911 tapes and other non-testimonial hearsay;
- \* potential testimony of witnesses other than the victim;
- \* certain hearsay exceptions not dependant on proof of declarant's unavailability; and
- \* expert testimony

2. Prosecuting attorneys should use the utmost discretion before dismissing domestic abuse charges on the condition that the parties involved participate in diversion program including mediation or other nonjudicial procedures. It should be noted that a diversion program may put grant funding money at risk.

## **C. Assignment.**

To the extent possible, domestic abuse cases should be assigned to prosecutors with specific training and experience in this area.

## **D. Continuances.**

Prosecutors should vigorously resist continuances in domestic abuse trials unless necessary for the State's case.

## **E. Trials**

1. Trial Preparation. At a minimum trial preparation should include, talking to the victim and all witnesses and making sure that you as the prosecutor are familiar and knowledgeable about your entire case including all evidence you intent to present (pictures, 911 calls etc.).
2. Motions: Make sure to file all relevant pretrial motions, particularly 404(b) "other acts" motions.
3. Jury Selection. As with all juries, get to know their level of knowledge about domestic violence and their views towards it.
4. Evidence Admissibility. Prosecutors should be familiar with the admissibility issues with any of the evidence they are planning to present, for example, best evidence, authentication, hearsay, relevance and chain of custody issues.

5. Defenses. Know your defenses. The most common defense used in Domestic Violence case is Self-Defense. Often the Defendant will be blaming the victim, claiming the victim exaggerated the behavior and claiming that the victim was the aggressor.

## **VII. No-Contact Orders.**

### **A. Obtaining.**

Prosecutors should communicate expeditiously to the court any request or need for protective conditions of release. SDCL 25-10-23 requires issuance of a no-contact order upon granting of any type of bond, if the Court finds probable cause that a defendant has committed domestic abuse assault or violated a no-contact order and that the defendant poses a threat to the safety of the victim or member of the victim's family. Prosecutors should note that this statute says "shall" and not "may". The issuance of a no contact order as a condition of bond is not to be left to the discretion of the victim, and should remain in place until the case is resolved.

### **B. Lifting.**

When formulating a position on the victim's request to modify or lift a no-contact Order post conviction, a prosecutor should consider numerous factors, including but not limited to the following:

- \* risk of future violence (considering defendant's prior criminal record, substance abuse, history of violence, suicide or death threats, access to weapons).
- \* possibility that if contact is allowed defendant will intimidate or coerce victim.
- \* knowledge that the victim has been apprised of available services.
- \* probability that the victim's request to lift or modify the order is a product of coercion.

### **C. Enforcing no-contact orders.**

Violation of a no contact or other protection order by a defendant is an indication of increased threat of violence to a domestic abuse victim. When a no-contact order issued as part of a criminal case has been violated by the defendant, prosecuting attorneys should consider initiating criminal charges under SDCL 25-10-23 and consider stalking charges SDCL 22-19A-1. Prosecuting attorneys should also consider seeking to revoke or modify the conditions of release or pursue probation violation proceedings. When a protective order issued pursuant to a petition filed under SDCL 25-10-3 or a valid foreign protective order as

provided under SDCL 25-10-12.1 has been violated, prosecuting attorneys should file appropriate criminal charges under SDCL 25-10-13. Prosecuting attorneys should consider referral of no contact, pretrial release, and probation violations involving firearms to the United States Attorneys office for review of potential federal firearms charges.

## **VIII. Protection Orders.**

Prosecutors should vigorously enforce Protection Orders granted under SDCL 25-10-4 and Stalking Protection Orders granted under SDCL 22-19A-11. Prosecutors must realize that violations of Protection Orders and Stalking Orders by a defendant are an indication of increased threat of violence to the petitioner.

### **A. Obtaining.**

It is the responsibility of the petitioner to apply for a Protection or Stalking Order. Prosecutors should have trained staff and additional information available to inform a victim of how to apply for an order of protection. When granting a protection order, the Court should inquire of defendants on the record if they are in possession of firearms or ammunition and to identify the firearms possessed. If defendant is in possession of firearm the Court should require the defendant to surrender custody of such firearms and ammunition to the sheriff; the Court should order the defendant not to possess a firearm while the order is in effect; Prosecutors should make defendants aware that they are prohibited from possession of firearms and ammunition consistent with 18 U.S.C. 922 (g)(8)&(g)(9).

### **B. Enforcing Protection Order and Stalking Order Violations.**

When a protective order issued pursuant to a petition filed under SDCL 25-10-4, 22-19A-11 or a valid foreign protective order as recognized under SDCL 25-10-12.1 has been violated, prosecuting attorneys should file appropriate criminal charges under SDCL 25-10-13.

Prosecuting attorneys should consider referral of violations involving firearms to the United States Attorney's office for review of potential federal firearms charges.

### **C. Enforcing Foreign Orders of Protection.**

In 2003 SD adopted a law (SDCL 25-10-12.1) that requires enforce of protection orders from other jurisdictions in the same manner protection orders are enforced when issued within our own jurisdictions.

In doing so prosecutors should review SDCL 25-10-12.1-12.5 and SDCL 25-10-13:

In prosecuting these cases prosecutors should obtain information from the victim, local law enforcement and the issuing jurisdiction as well as information about all pending and past convictions.

Prosecutions for such violations shall be in accordance with laws of the State of South Dakota.

By enforcing these foreign protection orders the prosecutor works to ensure victim safety.

Some violations may qualify for federal prosecution, state prosecutors should develop a working relationship with the federal prosecutor to determine when such federal prosecution is warranted

In order to verify a foreign protection order when supplied a copy by the victim or law enforcement a prosecutor should check for the following: N I C E S T

N: Names of parties

I: Issued Date

C: Court Issued

E: Effective Date

S: Signed by Court

T: Terms of the order

If victim does not have a paper copy a prosecutor can do the following:

Check NCIC

Contact Issuing Court

Check for other law violations

A prosecutor must obtain a certified copy of the Protection Order in order to successfully prosecute the case.

## **XI. Final disposition.**

### **A. Victim recommendation.**

Prosecutors should encourage domestic abuse assault victims to complete a victim impact statement and give victims notice of a plea agreement and the right to make an impact statement to the sentencing court if they so desire.

### **B. Sentencing recommendations.**

When deciding what sentence to recommend, prosecutors should consider numerous factors including, but not limited to, the following:

- \* defendant's criminal record;
- \* whether defendant was previously on probation;
- \* history of violations of protective orders and conditions of release with this and other victims;
- \* history of violence with this and other victims;
- \* impact of the crime on the victim;
- \* seriousness of victim's injuries;
- \* use of, or threatened use of, and access to weapons;
- \* defendant's potential for rehabilitation;
- \* whether the offense involved drugs or alcohol;
- \* whether minors are present in the home;
- \* impact of the crime on children;
- \* general and specific deterrence value of the sentence

### **C. Sentencing.**

1. Prosecutors should request appropriate sentencing provisions, including screening and treatment for substance abuse, required batterer's education programming (NOT anger management), extending no-contact orders as appropriate including children as protected parties if necessary to assure their safety, and restitution.

2. In assault cases involving intimate partners as defined by SDCL 25-10-5.1, prosecutors should seek batterer's education programming. There is also a requirement of parenting if the batterer and victim share children, or if children were living in the home at the time of the assault SDCL 25-10.5.3.

3. Prosecutors should request the Court to inquire of defendants on the record if they are in possession of firearms or ammunition and to identify the firearms possessed. Prosecutors should ask for an order to surrender custody of such firearms and ammunition to the sheriff, and request the Court to advise defendants that they are prohibited from possession of firearms and ammunition consistent with 18 U.S.C. 922 (g)(8),(g)(9).

4. Prosecutors should promptly pursue sanctions where a defendant has violated the terms and conditions of his or her sentence including seeking contempt or probation violations, and referrals to the United States Attorneys office for violations involving firearms.

### **X. Monitoring and Evaluating**

Prosecuting attorneys should continually monitor their domestic abuse caseload and adjust their policies and procedures where the goals of prosecution are not being met.