

Some Issues to Consider When DV Survivors Are Charged with DV-Related Crimes

*King County Coalition Against Domestic Violence
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*The purpose of this document is to alert judges and attorneys that some defendants in domestic violence cases are also survivors of DV, and to outline key issues to consider in sentencing these defendants. A survivor of DV is a person who has been the victim of a pattern of **ongoing** violent and controlling behavior perpetrated by a current or former intimate partner or spouse. This behavior often includes physical and sexual violence, threats, abuse of children and family pets, control of finances and decision-making, isolation of the survivor from family and friends, constant criticism and degradation, etc. Some domestic violence survivors do use violence against their intimate partners, as discussed below.*

This document was prepared by an interdisciplinary workgroup of representatives from community and criminal justice-based agencies from Seattle and King County, Washington.

Recent research indicates that in many states around the US, an increasing number of women are being arrested for domestic violence-related crimes.¹ In King County, Washington, the number of domestic violence-related bookings for adult female inmates into the County's Department of Adult and Juvenile Detention increased 81% between 1990 and 2000 (from 588 to 1065)². The increase for male inmates was only 10% during this time (from 3374 to 3702). This is significant, because domestic violence prevalence studies indicate that the majority of domestic violence survivors are women. Anecdotal reports, and some initial studies indicate that many of the women arrested for domestic violence are domestic violence survivors. Gay and heterosexual men who are DV victims may also be misidentified as the primary aggressor.

There are survivors who are arrested because of false accusations by their batterers. However, some domestic violence survivors do use violence against their battering partners. Some use violence in self-defense, but are inappropriately arrested when the officer fails to recognize, acknowledge or document the context of self-defense. Other survivors initiate illegal acts of violence against their battering partners, but do not engage in a pattern of coercive control. In those cases, the interventions designed for batterers (including arrest, jail, treatment) are often not appropriate, and in fact can further endanger the survivor. There are many negative impacts of arrest and conviction that compromise the safety of survivors.

While domestic violence survivors who do commit DV-related crimes must experience some consequence from a criminal justice perspective, the traditional goals of sentencing such as providing punishment which is just, protecting the public, offering the offender an opportunity for rehabilitation, and reducing the risk of re-offense should be considered

¹ See *Understanding the Context of Dual Arrest With Directions for Future Research*, D. Hirschel and E. Buzawa, in **Violence Against Women**, Vol. 8, No. 12, December 2002

² Data on bookings was provided by staff of the King County Department of Adult and Juvenile Detention

in light of the unique circumstances of domestic violence survivors. Sentences should be carefully crafted so that the conditions do not compromise their safety.

Identifying DV Survivors Who Are DV Defendants

There is no simple formula for identifying a DV defendant who is also a survivor of DV. Ideally, the defense attorneys will screen for and identify survivors of DV, and can describe the individual's experience of victimization to the court when appropriate. In order to thoroughly screen for this issue, defense attorneys require additional time to interview their clients and investigate the cases.

Some indicators that further information may be needed about the history of violence between the parties, and the context in which the incident occurred include:

- the alleged victim has a history of arrests for DV-related crimes,
- the defendant is the protected party in a civil protection order,
- the parties are gay or lesbian,
- the defendant does not speak English or has limited knowledge of English, and no professional interpreter was used at the crime scene,
- the types of injuries sustained by the parties suggest the defendant may have been defending her- or himself.

Injuries are often found on the batterer from the survivor's attempt to defend herself, such as scratch marks and bite marks on the body, especially on the chest and face.³ Scratch marks to the face, hands and/or arms are common when survivors are defending themselves from attempted frontal manual strangulation. Bite marks on the chest are common when survivors are being straddled or held down. Bite marks on the arms are common when survivors are defending themselves from attempted strangulation by a "carotid restraint" or "chokehold".

Those who attempt to defend themselves often sustain injuries:

- on the back of the arms or palms (which may be used to block blows),
- the bottoms of the feet (which may be used to kick away the assailant)
- to the back, legs, buttocks or back of the head (from being curled in the fetal position).

It is important to note that many batterers describe themselves as the victims in their relationships, and go to great lengths to deny that they committed an act of violence. A study of 122 male batterers who used violence against their female partners found that batterers tend to describe their own use of violence by focusing on what the survivor did to "cause it." They minimize, shift blame, and deflect responsibility for the violence. By contrast, survivors of violence tend to blame themselves, minimize the extent of their injuries, or remain silent about the violence out of fear or shame⁴. Therefore, when the

³ *She hit me too: Identifying the Primary Aggressor: A Prosecutor's Perspective*: Gael B. Strack, San Diego Assistant City Attorney, gbs@sdcity.sannet.gov

⁴ *Violent Men and Violent Contexts*, in **Rethinking Violence Against Women**: R E Dobash and R P Dobash, Sage Publications, 1998

survivor is the defendant, she may not disclose her history of victimization unless she is specifically asked by someone who understands the issue.

Safety Considerations for Survivors Who Are Charged with DV-Related Crimes

One of the most significant impacts of arrest for the survivor is increased danger from the batterer. In those cases where the batterer has successfully set up his or her partner to be arrested, the batterer is able to give a clear message that the survivor will only be further punished if she calls 911 for help. Thirteen domestic violence survivors who had been arrested were interviewed for a paper by the King County Coalition Against Domestic Violence.⁵ All of them reported that they would never call 911 again if their partner or spouse were to assault them in the future.

When survivors use violence, their battering partners often respond by increasing their level of violence. Women interviewed for another study⁶ reported that their defensive use of violence resulted in “swift retaliation from their partners, and the escalation of the violence they were already experiencing.”

The arrest of domestic violence survivors often has a negative impact on the outcome of contested custody, and may also have a negative impact on the parties’ children. According to national research, many domestic violence survivors face potential loss of child custody when they leave their abusive partner.⁷ Batterers intentionally use child custody as a way to further abuse their partners. For batterers who want to remove custody of the children from their partners, having the survivor arrested can be an effective tactic.

Conviction for a domestic violence crime can bar access to critical resources and rights for survivors, including,

- employment opportunities in childcare, counseling, teaching, healthcare, law enforcement, and the practice of law,
- civil rights, including the right to vote, to serve on a jury, or to hold public office,
- access to public housing,
- access to educational resources,
- welfare benefits: a conviction can affect eligibility,
- residency in the US. Conviction for certain types of crimes can result in deportation.

Access to housing, education and employment are essential for survivors’ ability to maintain their safety and independence from an abusive partner, and to provide for their children.

⁵ *Victim-Defendants: An Emerging Issue in Responding to Domestic Violence in King County*, M. Crager, M. Cousin, and T. Hardy, 2003. Available at www.kccadv.org.

⁶ *Just Like Men? A Critical View of Violence by Women*, S. Dasgupta, in **Coordinating Community Responses to Domestic Violence, Lessons from Duluth and Beyond**, M. Shepard and E. Pence, Volume 12, Sage Publications, 1999

⁷ *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, P. Jaffe and R. Geffner, in **Children Exposed to Marital Violence**, American Psychological Association, 1998

Considerations in Bail-Setting

Domestic violence survivors who are defendants may face increased danger from the batterer upon release from jail. The batterer may have control of the defendant's money, credit cards, vehicle and temporary custody of the parties' children. It may be useful to include a referral to a community-based advocacy program upon release. It is also worth noting that many domestic violence survivors have no serious criminal history, do not present a danger to themselves or the community, and do not pose a risk of flight.

Considerations at Arraignment

The Court should be cautious about accepting a plea at arraignment from defendants who are not represented by counsel. This is particularly true if the Court learns that there are prior conflicting domestic violence orders in place involving the same parties. DV survivors often face pressure to take a plea, for several reasons. Some defense attorneys may not fully explore the defendant's legal options, and encourage their clients to plead. The survivor may believe that rapid resolution of the case is a helpful option, because batterers often increase their violence and threats when the survivor is a defendant in a criminal case. Many survivors can't come to court because of employment and childcare issues, or interference by the batterer. When a domestic violence survivor is pleading guilty at arraignment, she may have had limited opportunity to consult with defense.

Considerations in Issuing No Contact Orders

It is important to consider the potential negative impact of a criminal No Contact Order on a defendant who is also a survivor of domestic violence.

- If the defendant is a DV survivor and a parent, craft an order that protects the alleged victim if necessary, but does not prohibit contact with the children. Some batterers may intentionally try to set their partner up to be arrested when the survivor attempts to make arrangements to visit her/his children
- In DV cases where the defendant is a DV survivor, it is critical to check the order history of the parties, to determine whether there are any conflicting orders in place (per RCW 26.50.150⁸).

Recommendations for Sentencing Victim-Defendants

When there are indicators that the defendant might be a survivor of DV, it is useful to obtain additional information about the parties. The court should check the Judicial Information System to determine whether the alleged victim of this case is under jurisdiction in another court for a DV-related crime, before sentencing. In misdemeanor cases, the Court should order a Pre-Sentence investigation that asks specific questions about the defendant's history of abuse. The investigator should determine whether the defendant engaged in or has been the victim of an ongoing pattern of coercive and controlling behavior. Relevant information from collateral contacts,

⁸ RCW 26.50.150 Judicial Information System Database

including healthcare providers, advocacy and counseling programs, and other criminal and civil cases should be compiled.

For those defendants who are clearly survivors of ongoing domestic violence, the court may want to consider the following questions:

- What is an appropriate punishment for a defendant who has committed a crime but is the victim of ongoing violence by a battering partner who is the alleged “victim” in the case?
- If the defendant committed the crime in the context of ongoing violence and threats by the batterer, does she pose a threat to public safety?
- Is rehabilitation an appropriate sanction for a victim of ongoing violence by a battering partner?
- Does a defendant who is a domestic violence survivor pose a high risk for re-offending? If she committed the offense because she believed she was in danger, what resources would help to keep her safe?

The Court should consider whether there were mitigating circumstances as described under RCW 9.94A.535: *paragraph a*) to a significant degree, the victim was an initiator, aggressor or provoker of the incident, *paragraph c*) the defendant committed the crime under duress, coercion, threat or compulsion insufficient to constitute a complete defense, but which significantly affected his or her conduct, *paragraph h*) the defendant or the defendant’s children suffered an continuing pattern of physical or sexual abuse by the victim of the offense, and the offense is a response to that abuse.

We recommend that the court consider limiting the sentence to standard conditions imposed in non-DV offenses that will not compromise the survivor’s safety.

- Consider ordering minimal conditions, for example, No New Criminal Law Violations, and No Weapons only.
- Consider alternative sentences such as Community Service or Workcrew instead of DV Treatment or Counseling.

Problems with Current Sentencing Options for DV Survivors Convicted or Pleading Guilty to DV-Related crimes

Many judges order DV survivors who are defendants in DV-related crimes to one of three types of services: 1) DV Treatment, 2) Mental Health Evaluation and Treatment, 3) Victim Advocacy/ Support services. Each of the community-based services currently ordered by local courts can be problematic and in some cases dangerous for DV survivors.

Complete DV Treatment/Batterer Intervention: Those survivors who are required to attend a standard batterer intervention program must participate in treatment that is intended to stop a person from committing an ongoing pattern of abuse and to increase victim safety. Domestic violence survivors are not batterers, even when they have used violence proactively. The “Batterer” label that may be included in the court order is inaccurate, and stays in the survivor’s court file. It can be used by the batterer to humiliate her, to threaten her, to contribute to her loss of custody, and ultimately to deny her any legal protection from further abuse.

Participation in this type of program can further endanger a domestic violence survivor. For example, when programs notify the alleged victim (in the situation of a victim-defendant, the “victim” is the real batterer) of the survivor’s participation in treatment, he can learn where and when he can find her. Mandatory participation in batterer intervention for survivors can also provide opportunities for a batterer to sabotage the survivor’s compliance with the court order by interfering with her attendance, or reporting false allegations of new acts of violence.

For gay men and lesbian women who are victim-defendants, an order to complete a treatment program for heterosexual batterers is particularly problematic. Not only is the content inappropriate, but participation can be particularly detrimental because of by homophobia expressed by heterosexual group members.

Complete Mental Health Evaluation and Treatment: These orders are problematic in cases where the survivor has no related mental health issues, because they imply that the person’s status as a domestic violence survivor is in some way connected with a mental health problem. The rate of mental illness among domestic violence survivors is no higher than that of the general population, and mental illness on the part of the survivor is generally not the cause of the violence in general, or of the incident for which the survivor was arrested. Few mental health providers have specific training in assessing for domestic violence or in providing supportive advocacy services. Like the order to complete batterer treatment, the order to complete a mental health assessment can be used against the survivor in a number of ways, for example, it may contribute to her loss of child custody.

Receive Services at Victim Service Agency: It is contradictory for a domestic violence advocacy program to accept a mandate for a domestic violence survivor to participate in a support group or other services. Domestic violence advocacy programs are required by the Washington Administrative Code to “*focus on empowerment of the client through reinforcing the client’s autonomy and self-determination.*” Mandating participation in any program contradicts this requirement for reinforcement of autonomy and self-determination.

For agencies that serve domestic violence survivors, reporting to a court on an individual client’s participation conflicts with the confidentiality policies that are in place to protect all program participants and staff. However, if an agency does not report to the court, the survivor may be viewed as “out of compliance” and

required to serve jail time. This conflict can create a dilemma for agency staff who want to protect the confidentiality of all survivors who receive services, and at the same time want to support individual survivors who are court-mandated to services.

We recommend against imposing any of these conditions of sentences on domestic violence survivors. However, we recognize that judges have full discretion in sentencing and may continue to sentence defendants who are survivors to the services described above. Judges who continue to recommend these conditions should make every effort to reduce the potential harm to the defendant.

Considerations at Review Hearings

- When an issue arises necessitating a review hearing, make sure it is a full hearing in which both sides are represented. Consider having probation conduct a full inquiry into the history of the parties. A technical violation is not always a willful violation.
- For courts that schedule all DV-related reviews and probation violation hearings on one calendar, all cases of those defendants who are domestic violence survivors should be heard at the end of the calendar, after the other defendants have left the court room. As noted above, many batterers who are DV defendants claim to be the real victim of the case and might wish to discuss that with court if they heard others doing so.

Conclusion

Judges should be alert to the possibility that some DV defendants are domestic violence survivors. The potential risk to these defendants from their battering partners should be considered at every stage of the case. When the defendant is a DV survivor, we recommend that judges carefully weigh any mitigating circumstances, and impose sentences that do not impose undue hardships on survivors, or compromise their safety in any way.

Appendix

We recommend that the court consider limiting the sentence to standard conditions imposed in non-DV offenses that will not compromise the survivor's safety. However, we recognize that judges have full discretion in sentencing and may continue to sentence defendants who are survivors to the services described above.

If you order DV Treatment: Use language in the order that clarifies that the defendant is not a batterer, for example, "Complete counseling program for victim-defendants." If there is no such program available in your community, make sure that the domestic violence treatment program has a group for women only. For gay and lesbian defendants who are survivors of DV, include language in the order for counseling with a provider who specializes in working with gay and lesbian clients.

If you order mental health services: request that the probation counselor or other court staff contact a local DV advocacy program to get the names of mental health counselors who are knowledgeable about DV issues, and provide these to the defendant.

If you order services at a victim service agency: understand the confidentiality policies of this agency. Do not require detailed reporting on the content of the groups, or specifics about the defendant's participation.

Again, these services are not recommended for DV survivors who are defendants in DV-related crimes.