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### **2010 SDTLA CALENDAR OF EVENTS**

August 19	Board meeting and Mock Trial 11am, USD Vermillion
September 29 September 30 – Oct 1	Board meeting, Location TBA, 4 pm MT Fall Seminar, Ramkota Inn, Rapid City
October TBA	USD 2L Mock Trial Competition, Vermillion
October TBA	Board Meeting with Chief Justice
November 18	Board Conference call, 4 pm CT
December 16	Board Conference call, 4 pm CT

# CRIMINAL DEFENSE CORNER: DEFENDING DOMESTIC VIOLENCE CASES

By John Murphy

In domestic violence ("DV") cases, clients face many hidden perils. The most serious consequence of a domestic violence crime may not be the fine or relatively short jail sentence typically imposed. Rather, it is the federally imposed lifetime ban on possessing a firearm that results from a domestic violence conviction.

You can protect your clients from these consequences. DV cases offer defense attorneys many opportunities. This article explores various opportunities that are often overlooked for getting DV cases dismissed.

I use the term "domestic violence" in this article. That term is interchangeable with "domestic abuse" for the purposes of this article. Most DV cases allege the crime of "simple assault – domestic violence." However, other DV charges exist, including "aggravated assault – domestic violence" and "disorderly conduct – domestic violence." The defenses outlined in this article apply to all DV cases.

## The Price of Inaction

If you dabble in criminal defense, you should vigorously attack the validity of every DV indictment or information presented to you. The consequences of inaction and ignorance are substantial. A DV conviction prevents your client from ever possessing a firearm again. 18 U.S.C. § 922(g)(9). This prohibition applies to all DV cases.

Uninformed defense attorneys and defendants often think they have been offered a good deal when a prosecutor agrees to reduce a simple assault domestic violence ("SADV") charge to a disorderly conduct domestic violence ("DCDV"). However, under federal law, the distinction between the offenses is irrelevant. Any person convicted of any domestic violence misdemeanor is prohibited from possessing firearms or ammunition again. 18 U.S.C. § 922(g). Because the distinction between the charges is inconsequential in regard to the firearm issue, defense attorneys should usually attempt to get the charges dismissed rather than to plead the case to a less serious DV charge.

## The Typical Scenario – Atypical Opportunities

In the typical case, your client is charged by complaint. The caption of the complaint alleges the crime of simple assault, with the words "domestic violence" inserted in parenthesis below the charge or offset by a colon. The body of the complaint, however, does not charge the crime of SADV. It sets forth the elements of simple assault and refers to SDCL 22-18-1, the statute defining simple assault.

Within a few days or weeks, that complaint goes before a magistrate or grand jury for a probable cause determination. At neither the preliminary hearing nor grand jury proceeding is either the judge or grand jury asked to make any specific probable cause finding as to whether "domestic violence" occurred. If probable cause

is found, an indictment or information is issued. Like the complaint, that indictment or information lists the crime charged as SADV. Once again, the body of the document only describes the crime of simple assault and only cites the simple assault statute.

## Grounds for Dismissal

There are three categories of grounds for dismissal of a DV case: statutory, constitutional, and constitutional challenges to the DV statutory scheme. These are discussed below.

### Statutory Grounds for Dismissal

#### • Failure to State or Charge an Offense

Most DV charging documents fail to state or charge an offense because (1) they charge crimes that do not exist under South Dakota law and (2) they fail to set forth the elements of the offense charged in the document. See SDCL 23A-8-2(5); SDCL 23A-8-3(3).

A charging document is defective if it fails to describe or set forth the elements of a public offense. *State v. Lodermeier*, 481 N.W.2d 614, 619 (S.D. 1992). Most DV charging documents fail to describe a public offense because there are no crimes of SADV or DCDV in the South Dakota Codified Laws. The legislature has never enacted or defined these alleged crimes. When a prosecutor charges the crime of SADV, that is a crime created by the prosecutor, not the legislature, and it is, therefore, no crime at all.

Similarly, charging documents must set forth all the elements of a public offense to be valid. *Lodermeier, supra*. Because there are no crimes of SADV or DCDV, there are no elements to describe. The State cannot attempt to cure the defect by citing to statute because there are no statutes defining the crimes of SADV or DCDV.

DV charging documents typically describe a public offense other than the one charged, usually simple assault or disorderly conduct. They set forth the elements of these offenses and cite to the corresponding statutes. But, that is not the crime charged in the document. Therefore, dismissal should be sought.

#### • Additional Statutory Grounds for Dismissal

SDCL 23A-8-2(3) permits dismissal of an indictment if it fails to conform substantially with Title 23A of the South Dakota Codified Laws. Most DV indictments fail to conform substantially with Title 23A.

SDCL 23A-6-4 provides that an indictment shall contain a reference to all statutes that a defendant is alleged to have violated. If the State is alleging the crime of SADV, then it should include the citations to all statutes that define this offense. In most cases, the only statute cited by the State is SDCL 22-81-1 which

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defines simple assault. If the State is only charging simple assault then, at minimum, all references to domestic violence are surplusage and should be stricken.

SDCL 23A-6-4 requires that the State set forth a definite statement of all facts constituting the elements of the offense. If the State is charging a DV offense, then it should be required to set forth the facts meeting the definition domestic violence. Most DV charging documents do nothing more than set forth the elements of simple assault or disorderly conduct. Therefore, the State has violated the statute by not setting forth the facts constituting the offense charged.

SDCL 23A-6-7(5) requires that the indictment be drafted with sufficient specificity such that a person of common understanding knows what is intended. Because not a single fact or statute related to domestic violence is charged in most DV indictments, no person of common understanding would know what conduct is described in the charging document. This attack on the charging document also raises substantial constitutional due process and notice concerns and should be grounds for dismissal of most DV indictments.

#### **Constitutional Grounds for Dismissal**

##### **• Violation of Right to Indictment by Grand Jury**

The most obvious constitutional challenge to a DV indictment is that it violates the defendant's right to indictment by grand jury. Both the state and federal constitutions guarantee defendants the right to indictment by grand jury. This includes the right to have a grand jury make a probable cause determination as to every element of the crime alleged. *United States v. Williams*, 429 F.3d 767, 775 (8th Cir. 2005). If each element is not alleged, the grand jury can not exercise its duty, and the resulting indictment is defective. *Id.* The fundamental nature of this error cannot be cured by amendment; dismissal is the remedy. *Id.*

In DV cases, grand jurors are presented with an indictment alleging SADV, but they are only asked to find probable cause for the elements of simple assault. Grand jurors are not presented with special verdict forms in which they assess whether probable cause exists to believe the crime involves domestic violence. Therefore, most DV indictments are returned by a grand jury that was not instructed on all the elements of the charged offense. Instead, the grand jury was instructed on the crime of simple assault, but returned an indictment for SADV. This prejudices defendants because SADV carries more significant consequences than simple assault.

##### **• Violation of the Right to Trial**

Another constitutional right implicated in DV cases is the defendant's right to trial and the right to the "beyond a reasonable doubt" burden of proof. In a series of

United States Supreme Court cases, culminating in *Apprendi v. New Jersey*, 530 U.S. 466, 494-95 (2000), the Court held that any fact (other than a prior conviction) that increases a defendant's possible punishment must be charged in the indictment and be found by the jury by evidence beyond a reasonable doubt.

Most courts agree that a conviction for SADV carries more serious punishments than a conviction for simple assault. This includes the loss of the right to bear arms under 18 U.S.C. § 922(g)(9), and the increased sentencing requirements imposed under state law, SDCL 25-10-5.1/5.3. Under the Court's reasoning in *Apprendi*, because the "domestic violence" allegation within the charging document increases the punishment, the DV allegation should be charged in the indictment, passed on by the grand jury, and found by evidence beyond a reasonable doubt by the jury before a conviction is allowed to stand.

The fact that the "domestic violence" issue is not presented to the jury is critical to this analysis. If a defendant goes to trial on an SADV charge and loses, he or she will forever stand convicted of a domestic violence offense even though the jury was never asked to consider whether the crime involved domestic violence. The jury's verdict found that simple assault occurred, but the defendant suffers the consequences of being convicted of SADV.

##### **• Additional Constitutional Grounds for Dismissal**

Other constitutional rights are implicated in DV prosecutions. First, all defendants have a Sixth Amendment right to be informed of the nature and cause of the accusation brought against them. This is the constitutional premise behind SDCL 23A-6-4 and 7. If a DV charging document fails to specify the facts and authority supporting the DV charge, the defendant's Sixth Amendment rights are violated.

Similarly, defendants have a Fifth Amendment right to a charging document of sufficient factual specificity to act as a bar to future prosecution. If an indictment charges SADV as a crime, but fails to set forth facts that establish the DV component, the defendant may be unable to plead double jeopardy at a later day or to prevent future prosecution for the same conduct.

#### **Constitutional Challenges to the Statutory Scheme**

I've litigated these issues over a dozen times. In every instance, the State's response has been based on SDCL 25-10-34. That response is inadequate and has been unsuccessful in preventing dismissal in most cases. Below is my analysis of the statute and an outline of grounds to challenge its constitutionality.

SDCL 25-10-34 provides:

The state's attorney of the county where a crime is believed to have been committed shall indicate on the summons, complaint, information, indictment,

arrest warrant, and judgment of conviction whether the charge involves domestic abuse.

- **The Statute Does Not Address the Challenges Listed Above**

The statute's mere existence does not address the constitutional challenges listed above. First, the fact that this statute allows an offense "involving" domestic violence to be labeled as such does address whether the indictment states a public offense or describes the elements thereof.

Second, the existence of SDCL 25-10-34 does not remedy the violation of a defendant's right to indictment by grand jury. Unless a grand jury is presented with a proper definition of domestic violence, and unless the grand jury is specifically asked to find probable cause as to that issue, an SADV indictment is invalid. The fact that the legislature enacted SDCL 25-10-34 does not abrogate the defendant's superceding constitutional right to indictment by grand jury.

Third, the existence of SDCL 25-10-34 does not remedy the violation of a defendant's right to trial if he or she is forced to stand trial for a crime that was not presented to the grand jury. And, it does not remedy the violation of a defendant's right to trial if the defendant faces increased penalties based on the "domestic violence" allegation if that allegation was not presented to and found by a unanimous jury by evidence beyond a reasonable doubt.

Fourth, SDCL 25-10-34 does not cure the Fifth and Sixth Amendment issues raised when an SADV indictment does not adequately define the crime in such a way as to inform the defendant as to the nature and cause of the accusation. As presently drafted, most SADV indictments provide the defendant with no information about the DV component other than merely stating in the caption that the case is a DV case. Similarly, the existence of SDCL 25-10-34 does not address the double jeopardy issues presented when an undefined charge is prosecuted.

Fifth, the existence of SDCL 25-10-34 does not address the numerous ways in which most SADV indictments and informations fail to meet basic statutory drafting requirements, such as those set forth in SDCL 23A-8-2(3), SDCL 23A-6-4, and SDCL 23A-6-7(5).

- **The Unconstitutionality of SDCL 25-10-34**

If the State relies on SDCL 25-10-34 to support the validity of the charging document, in addition to challenging the legitimacy of the charging document on the grounds set forth above, the statute should be challenged as unconstitutional. To understand the problems with the statute, re-read it and consider the breadth of power given to state prosecutors under the statute and how that power invades the province of the judiciary.

The statute gives prosecutors, who are members of the executive branch, the exclusive authority to label an indictment as one involving domestic abuse. However, the decision to issue an indictment is within the exclusive province of the grand jury. Grand juries are not institutions under the control of the executive branch. Grand juries are supervised by the judiciary. SDCL Ch. 23A-5. Under SDCL 25-10-34 this statute, the State is allowed to unilaterally "indicate" on an indictment that the charge involves domestic abuse without any input from the grand jury or supervision by the judiciary.

The statute also violates the separation of powers by giving state prosecutors the unfettered ability to alter a court's judgment of conviction. It is the court's role to issue judgments of conviction. Under the statute, a member of the executive branch can alter or modify a court's judgment of conviction based on the prosecutor's unilateral determination that the case involved domestic abuse. The court appears to have no role in this process, and the statute does not set up a process of review or appeal. This cannot be constitutionally sustainable.

The statute should also be challenged as being vague and over broad. It permits the State to label, unilaterally, all charging documents and judgments as cases and convictions "involving" "domestic abuse" without providing any definition or guidance as to what is meant by the terms. What does it mean to say that an assault "involved" domestic abuse? Imagine a case where a son and his friends assault his father. Can the friends be charged with SADV because the crime "involved" domestic abuse, or is that allegation only applicable to the son? The statute tells us nothing. Similarly, it does nothing to guide a prosecutor's determination as to what constitutes "domestic abuse." Most importantly, the statute permits prosecutors to modify a judgment of conviction substantively without any reference to the quantum of proof necessary before a modification is permitted. Apparently, if a prosecutor believes that domestic abuse was involved, that is enough for the modification to be made.

### **Conclusion**

The discussion above is just an outline of the opportunities presented when representing defendants charged with DV crimes. No doubt that other, more creative, challenges exist. This is an area ripe for creative and vigorous litigation. Because DV defendants face such dire consequences if convicted, the effort in litigating these matters is worth the effort.

**About the author:** John R. Murphy's practice is limited to criminal defense and quasi-criminal cases (habeas corpus actions, protection order defense, abuse and neglect cases) at the trial and appellate levels in both state and federal courts. His office is located in Rapid City. He can be contacted at [www.murphyllawoffice.org](http://www.murphyllawoffice.org) or [jmurphysd@hotmail.com](mailto:jmurphysd@hotmail.com).