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Judge Christopher E. Acker
El Paso County Judicial Building
20 East Vermijo
Colorado Springs, Colorado 80903

John Newsome, District Attorney
Fourth Judicial District
105 East Vermijo
Colorado Springs, Colorado 80903

Sirs:

The Equal Justice Foundation very much appreciates the effort you are putting into the pilot program for processing convicted domestic violence offenders and the opportunities to view how this program is progressing on December 29, 2005, and January 6, 2005. I view your efforts as a very positive step forward with an extremely difficult problem and urge you to continue.

However, no pilot program can advance if feedback isn't provided by reviewers and I am taking this opportunity to provide you with my observations and suggestions. I am fully aware that I have had limited exposure to the program and that the current pilot project only deals with defendants who have accepted a plea bargain. But some features did stand out in what I have seen.

**Informed plea bargains**

It does not appear that the requirements of C.R.S. § 16-7-207(2)(d) *"That* [the defendant] *understands the possible penalty or penalties and the possible places of incarceration."* regarding plea bargains are adequately met in domestic violence (DV) cases.

In our experience defendants have not been informed about such critical issues to their future as inability to get a security clearance (and probable loss of current clearance), possible loss of professional licenses, loss of military retirement, inability to rent or lease, the negative impact of a conviction on child custody in a divorce, and etc.

My suggestion would be to work with the district attorney to draw up a handout, somewhat similar to the one now used by the probation department for offenders placed on supervised probation, that outlines in full the pains and penalties associated with a domestic violence conviction that could be given to defendants for review before they are asked to enter a plea.

In our experience most prosecutors and defense attorneys are themselves quite unaware of many of the penalties associated with a domestic violence conviction. It may well benefit both the district attorneys and defense counselors to have a more complete list for reference as well.

**Pre-sentence evaluations**

I find this idea quite appealing in principle. It certainly gives the court and the district attorney a much better idea of the background of the offender and what danger offenders may or may not present to society and their intimate partners before sentencing. Thus, I would strongly recommend this program be continued and refined.

However, there does not seem to be reasonable justification for denying defense counsel a chance to review the pre-sentencing evaluation of their client. During the review one defense attorney argued that he should be permitted to see his client's evaluation under Rule 16 in order to properly represent his client. The request was denied without stating the reasons on the record.

If the practice of pre-sentencing evaluation is to expand, and I think it should, then arrangements should be made for defense attorneys to be able to review the evaluation before sentencing. At present it appears the defendant can see only part of the evaluation. Such practices raise a number of unnecessary questions that would be easily answered by allowing defense attorneys to review their client's evaluations prior to sentencing.

It was my impression that pre-sentencing evaluations were still based too much on ideology and insufficiently on the available research. I have provided both John Newsome and Doug Miles a preprint of Dr. Don Dutton's latest paper *"Transforming a flawed policy: A call to revive psychology and science in domestic violence research and practice"* and would be happy to provide Judge Aker a copy on request.

The major problem with the pre-sentencing evaluation program, that I think is evident to all, is cost. Even with a sliding scale of between $200 and $400 the cost is, and will continue to be beyond many offenders. From what I've seen the only suggestion I have is to give the maximum sentence to those offenders who sought a lighter sentence by promising to complete the evaluation but didn't for whatever reason. A *"maximum sentence"* appears to be 24-months supervised probation, 52-weeks DV treatment program, continuation of the mandatory restraining order with no contact, no alcohol, and random UA. And I would point out when the plea bargain was accepted the estimated cost of the maximum sentence versus the cost of a minimum sentence attainable by a favorable pre-sentence evaluation. That would make the minimum $200 cost of completing the pre-sentencing evaluation quite attractive.

Perhaps something like that is already being done and simply needs reinforcement?

**36-week treatment program**

That brings up a major problem with the current sentencing. From data provided by DV treatment providers statewide it is apparent that only 60% of offenders who begin the 36-week program actually complete it. There are a variety of reasons for that but inability to pay is a major one. Further, we have no idea what percentage of offenders are sentenced to DV treatment but never even begin the program, but a reasonable estimate would be 10%. Thus, only approximately 50% of convicted DV offenders are completing the mandated 36-week treatment. Any program with only a 50% completion rate must be rated a failure, aside from any other merits, or lack thereof the program may have.

My suggestion here is to first try and find out what the overall completion rate is in El Paso County. Discussions with Misty Young indicate she is tracking completion rates for DV offenders with deferred sentences. I would assume probation has similar figures for those on supervised probation. With better data in hand it should be possible to determine what steps the court might take to ensure completion. Discussion with Lennis Campbell from the Probation Department revealed that there are contingency funds for indigent offenders but I don't think most offenders are aware of that. Further, one doesn't want to start a stampede on the probation department of people who have lost their jobs because of the DV conviction and now can't pay

for the treatment program. Another option might be to have these people petition the court for a determination that they are, or have become indigent. On the face of it that doesn't seem practical because they generally lack the necessary skills to file such a petition, are very afraid of the court in any case, and such petitions would add to the burden of the court system. However, probation might help these people file a standard petition for indigency (and might already be doing so). But some measures are necessary to raise the completion rate for the DV treatment program or it should be dropped as a failed experiment.

Putting people in jail because they don't complete the treatment program strikes me as an extreme last resort. Jail doesn't encourage good citizenship, rather the converse. And our new jail is already at capacity again.

**Punishing the innocent, freeing the guilty**

According to data provided by the state court administrator the 4th Judicial District has two to three times the number of domestic violence cases as comparable districts, e.g., 1st and 18th, in Colorado, and as predicted by national surveys such as the National Crime Victimization Survey (NCVS). Therefore, it is reasonable to assume that many of these local cases are in the legal system for specious reasons. From my observations it seems that all too often we convict the innocent, who take a plea bargain out of fear (this seems to be particularly true of female defendants), ignorance of the system and penalties, and lack of financial resources to make bail or hire a competent attorney (or all too often hire an incompetent attorney but that is a separate problem). Conversely, the true *"batterer"* is almost certainly familiar with the system and holds it in contempt. He, or she simply takes the plea bargain, walks out and away, and moves on to their next victim.

I think, insofar as possible, that needs to change.

The Domestic Violence Offender Management Board (DVOMB) has repeatedly stated that any DV charge that cannot be proven beyond a reasonable doubt before a jury should be dismissed. The court system, currently clogged with often trivial DV cases, would be much more effective if many of the minor cases of harassment and menacing, and even many assault charges, were quickly dismissed by the district attorney. One judicial district in Colorado is reportedly dismissing one-third of the DV cases prior to arraignment. Denver apparently has a pilot program where they are attempting to sort out such cases before arraignment. At present the practice of the prosecution is to attempt to bluff the defendant into a plea bargain. When the defendant doesn't bluff and insists on a jury trial, then the case is dragged on as long as possible. If the defendant has hired competent counsel typically the charges are dismissed the day before, or the morning of the trial. Even without an attorney the cases of most defendants who insist on a jury trial are dismissed. That procedure makes a mockery of justice and clogs the courts though it does enrich attorneys.

I think this is clearly an area where the 4th Judicial District could do better and I would estimate that at least one third of current DV cases in the 4th Judicial District should be dismissed before or at arraignment.

During the review on December 29, 2005, there was one clear example of a case that should have been dismissed rather than extorting a plea of guilty. One man of color, last name Babs(?), was clearly the victim in the incident, apparently with police photos to prove it. Yet he had been

arrested and pressured into a plea bargain apparently because he could not make bail. That is not justice!

**Prisoner treatment**

During the sentencing hearing on December 29, 2005, one man had entered a guilty plea after what can only be described as torture. According to his testimony when he was arrested he was wearing only shorts and a T-shirt, he was then confined in a cold waiting room overnight where he could not lay down. If standard practice was followed, he was also shackled the entire night and one or both of his hands were numb from improper placement of the handcuffs. Apparently he was not fed before the arraignment or at any time after his arrest.

From the defendant's description he was suffering from at least mild hypothermia and certainly sleep deprivation during his arraignment. I do not think it reasonable or just to pressure anyone into a plea bargain under such circumstances.

This man had also filed a motion to withdraw his guilty plea. After hearing his testimony about the arrest and detention the judge denied his motion and proceeded to sentence him for DV even though his partner was present and sat beside him in court, and spoke in his favor.

Given crowded jail conditions, unusual circumstances, and other uncontrollable factors it is likely that cases such as this man's will occur from time-to-time. Our police officers aren't perfect and our jails aren't 5-star hotels where one is guaranteed a restful nights sleep. But I think the interests of justice would be better served if, in such cases, judges would allow such defendants to withdraw their guilty pleas when such conditions are brought to the attention of the court.

The district attorney's office would improve its reputation by favoring such action in a limited numbers of cases.

**Mental problems and domestic violence**

Since we have reverted to the barbaric practice of treating mental disorders by throwing the sufferers in jail, the courts are faced daily with deranged individuals. In discussions with Sheriff Makeeta apparently if such poor souls are sent to the mental hospital in Pueblo all that is done is stabilize them on drugs and then ship them back to him in about a week.

I have no easy solutions or pat answers to these problems but note that in domestic violence cases one constantly sees:

- *Borderline personality disorder (BPD)* — About 2% of the general population suffer from this. 75% of diagnosed cases are women and it is commonly associated with violent behavior. Most experts say there is no reliable treatment for this condition although some drugs may help.
- *Bipolar disorder* — Readily treatable when diagnosed but many sufferers refuse or stop treatment. Behavior then becomes erratic and often violent.
- *Narcissistic disorder* — More common in men. Erin Pizzey rates this as the most dangerous disorder in intimate relationships.
- *Deliberate self injury* — About 1% of general population and 10% of adolescents deliberately injure themselves. Twice as many females as males do this and most have been sexually abused. Cutting is the most common manifestation but biting, hitting, burning, skin

picking, hair pulling, and other means of self injury, e.g., breaking bones, are often used. Blame is often placed on the male partner if police become involved.

- *Head injuries* — Ofttimes associated with erratic and sometimes dangerous or violent behavior.
- *Perimenopause (change of life)* — Females only. Typically encountered between age 35 and 50 and lasts for four to seven years. The average age when estrogen levels begin to drop is 43. Readily detected with follicle stimulation hormone (FSH) test. Perimenopause is very commonly associated with divorce, itching (often associated with scratch marks blamed on DV when police become involved), delusions, physical disorders (e.g., thyroid or glandular problems), and erratic violent behavior *("I'm out of estrogen and I've got a gun.").* About 10-15% of women undergo emotional or physical breakdowns during this period of their life. Extreme violence, which is rare, peaks around age 40 in a random sample and may drive partner to use of violence as well. Perimenopause is readily treatable with hormone replacement therapy (HRT) if the woman will accept treatment. These symptoms also result from a hysterectomy, or "*surgical menopause."*

Problems with personality disorders, e.g., bipolar and borderline, and head injuries were clearly in evidence in several cases before the court during the two-day review. The qualifications and credentials of evaluators for such cases are definitely in question. These are not cases that a run-of-the-mill DV treatment provider should be dealing with although they may well have the skills to recognize such conditions.

It seems obvious that 36 weeks of DV counseling is not going to be of much use with bipolar or BPD sufferers and better methods of handling such cases should be sought. As always, however, cost is a major factor and most of these individuals are too unstable to hold regular employment. If these individual's partners are trying to cope with the situation they are probably best able to do so even if some violence in the relationship must be tolerated. Unfortunately, all too often it is a male partner of a mentally-disturbed woman who is arrested, placed under a restraining order, and convicted of domestic violence. Perhaps if we could reduce that injustice it would greatly improve the situation for many of these sufferers.

I am at a loss, however, as to what procedures might work best for the prosecutor and court with these cases.

When middle-age (any woman 35 or older) individuals come before the prosecutor or the court it would be worthwhile to see if perimenopause (or a hysterectomy) is a contributing factor. If so, a recommendation for a medical examination and FSH test be made with results to be brought back to the court. The court might then mandate the woman follow her doctor's recommendations for HRT. That might solve a lot of these problems. If the male partner is charged perhaps the victim's advocate could arrange for the woman to have the medical exam and FSH test? Perimenopause is not her partner's fault although it is very convenient to blame the man.

Dealing with BPD, BP, deliberate self injury, perimenopause, or the panoply of other mental disorders does not constitute harassment, menacing, or even third-degree assault. While such cases are dumped on the legal system by default, because we have no better answers at present, does not mean we should simply continue the current practice. A pilot program is an ideal place to try other approaches for these difficult problem cases. I cannot say that my suggestions are

the best approach, or even practical within the constraints and strictures of the legal system, but some new ideas and approaches are needed.

**Sealing a convicted offender's record**

The offer by the prosecutor and the court to seal the offender's record if the terms and conditions of the sentence are met is a chimera. While the court may actually order the case to be *"sealed,"* in fact the record is rarely expunged from such databases as COcourts.com or the CBI database.

If an offender's records are to be *"sealed"* the individual will need to take a number of steps on their own to ensure their record is removed from at least the public databases. To help them do that the court should provide the following information at a minimum:

- A certified copy of the order sealing their record.
- Notice that their record may remain on public databases such as COcourts.com and information on how to contact the database administrators for those databases, e.g., Inside America through 2005, and Lexis Nexus for 2006 on for COcourts.com, and the CBI contact information, to request their records be removed.
- Information on how to check the public databases after requesting their records be removed, e.g., web site URL's, gun checks if applicable, etc.

Again, I don't know how much of this the court is already doing. But from discussions with men and women who have gone through the system they don't seem to know about these requirements.

Note that even after an individual makes the considerable effort to have their records removed from public databases that background checks by government officers for security clearances, military enlistment, police, passports and customs, or other government positions will almost certainly turn up their record.

Also it is my impression, and the experience of a number of individuals who have contacted the Equal Justice Foundation that completion of a deferred sentence does not restore one's gun rights. 18 USC § 922(g)(9) states a person *"who has been convicted in any court of a misdemeanor crime of domestic violence,"* can never again own, possess, carry, or be in the vicinity of a gun, ammunition, other weapons, or explosives and makes no exception for a deferred sentence that I'm aware of. As best I can determine this is a lifetime sentence, deferred judgement or not. If there are ways around this I would like to know them.

I also checked with two of the private investigators the Equal Justice Foundation works with who do background checks. They tell me that if an individual has a criminal conviction beyond a traffic ticket in a municipal court that they can almost certainly find it. The reason being is that once the court posts the record to a statewide database the information is sold and resold so that within a week an individual's criminal record is on public and private databases throughout the country, and often the world. In some large jurisdictions the courts themselves sell such data. Thus, it is impossible in practice to *"seal"* a criminal record so that it is not available to anyone with the resources to hire a private investigator or, today, do a web search.

My suggestion would be for the court to *"seal"* the court records if the terms and conditions of the sentence are met and inform the offender how to check the public databases and have their names removed if necessary. However, offenders should also be notified that the court has

no jurisdiction over federal and private databases that likely contain copies of their criminal records.

I hope this information and review is of some value to the court and the district attorney as they move forward with this valuable pilot program. If I, or members of the Equal Justice Foundation can be of further help please let me know.

Thank you for the opportunity to participate in this review.

Sincerely,

Charles E. Corry, Ph.D.
President

Fellow, Geological Society of America
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cc: Doug Miles