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Remarks Delivered April 5, 2012, to Cutting Edge Topics in Domestic Violence Symposium

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*Katherine Dowling**

Good morning, everybody. I am Katherine Dowling and I am assistant United States attorney here in the Northern District.

I'm a little disappointed that we have so few men in the room, but thank you, and thank you [points out men], and thank you Professor Little. It's good to see some testosterone in the room because this is obviously an issue that affects all of us and not just women.

I am the United States Attorney's VAWA[1] representative, or point of contact. Basically, what [point of contact] means is that if you or anyone you know comes across a fact pattern that looks like it might fit something that is federal, hitting on federal tools of interstate commerce, or gun related, crossing state lines, whether it's the person or the gun, then perhaps it would be something that could be referred to our office. We are trying to increase our outreach. I'm a newer point of contact. The last point of contact is now a judge, and hopefully she will continue to be a point of contact as well. Our goal is to tap the local resources of the community to find the cases that fit the bill, and they tend to be very fact-intensive cases. There is a factual analysis that goes into whether the cases do fit the pattern. I really do encourage you, if you are out working in this field and you see these types of cases, that I am hopefully going to go through from a ten thousand foot view, that you will contact our office and refer these cases.

So, why the focus on domestic violence? About one-third of female murder victims are killed by intimate partners, and women are more often murdered by someone they know. In 2007, 64% of female homicide victims were killed by a family member or an intimate partner, and 24% of those were by a spouse or ex-spouse and 21% by a boyfriend or a

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1. Violence Against Women Act, 42 U.S.C. §§ 13925-14045d (2010).

girlfriend.[2] So, to put this in context, intimate homicides outnumbered gang-related homicides by 3 to 1. When you think about the context for that, it is a really high number. To highlight the importance of prosecuting firearm-related crimes with regard to domestic violence, about two-thirds of spouses and ex-spouses are killed by firearms, so that is why the gun-control crimes that the federal government is uniquely situated to utilize as a tool are extremely important, but it is becoming increasingly hard to prosecute these types of cases, and I will get into that a little bit.

In terms of jurisdiction, prior to the passage of VAWA, the federal government lacked jurisdiction in domestic violence crimes. Domestic violence crimes were state and local issues, if they were issues at all. For a long time period, domestic violence was considered a family matter, and there were not the types of laws and the types of resources to prosecute those crimes, go after the defendants, and help the victims.

Obviously, we have seen a lot of changes. In the presentation earlier, you see the growth in this area, and hopefully the continued growth in this area, because it is so important. But as we try to grow that area, it is good to look back and think how far we have come.

VAWA legislation allows the federal government to assist states in the fight against domestic violence at many levels, including national coordination and funding of programs. Since its enactment, there has been a tremendous increase in the coordination of the different law enforcement agencies. That is very important when you are trying to go after somebody who has violated a protective order in a different jurisdiction. You need to have that coordination because it allows collateral attack of those types of orders. You need to have that kind of national overview, to have databases you can tap in to, and you have to allow the coordination between not just law enforcement, but also shelters and medical professionals. It goes a long way toward helping the victims, and also toward prosecuting those who are guilty, and who, if not prosecuted, if not successful in the first turn, you see come back again, and that is, obviously, a bigger problem.

When a crime implicates interstate commerce, whether it is a gun or the person who is crossing the state lines, that is something that hopefully you are looking out for and will bring to our office if you see it. Typically, in the Northern District, we have not seen a lot of cases that fall within the VAWA rubric. It could be that these states and law enforcement locals are doing such a great job that they have not really needed us, or it could be that we are not doing enough outreach to educate the general public about the types of cases that we are looking at. We need to raise that awareness, and we ask that you please help us do that.

2. Shannan Catalano et al., *Female Victims of Violence*, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, Oct. 23, 2009, at 2 http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf.

I want to go through some of the statutes briefly. Some of the state statutes that fall under VAWA include interstate travel to commit a domestic violence offense, interstate stalking, cyber stalking, possession of a firearm or ammunition while subject to a protection order, and possession of a firearm or ammunition after conviction of a domestic violence misdemeanor. Again, the cases tend to be very fact specific.

I want to look at interstate travel to commit domestic violence, which is under 18 USC Section 2261(a)(1). It is a federal crime for a person to travel between states within federal lands, or to enter and leave Indian country, with the intent to kill, injure, harass, or intimidate that person's intimate partner or dating partner. When, in the course of or as a result of that travel, the defendant commits or attempts to commit a violent crime against the intimate partner or dating partner. You might ask what a dating partner is. That term refers to a person who has been in a social relationship of a romantic or intimate nature with the abuser. It is a very fact-specific test. It looks at the length of the relationship and the frequency of the interaction between the individuals. The important thing to remember with interstate travel to commit domestic violence is that the person must have had that intent at the time they crossed the state lines, and that can get tricky. That is where sometimes the holdup is in these cases, but it is something that we can prove. However, there is no need for the specific intent that creates a jurisdiction to match up with the actual crime of violence that occurs, which is another important distinction. Also, the victim must be the intended victim.

The flipside to interstate travel to commit domestic violence is under 18 UCS 2261(a)(2). It is a federal crime to cause an intimate partner or dating partner to cross state lines, or travel within federal lands, or to leave or enter Indian territory, by force, coercion, duress, or fraud, to attempt or commit a crime of violence. You have to prove that the interstate travel resulted from the force, coercion, duress, or fraud, and sometimes in these types of cases you see a situation where the husband comes and takes the child and the woman goes along with the husband because he has the child. The husbands in these cases will often say, "Well, she came." Well, she came because she was under duress, because you took her child. That is a common fact pattern that we see in these types of cases.

Interstate stalking cases, cyber stalking, we are seeing more and more. Interstate stalking falls under 18 USC 2261(A)(1). It is a federal crime to travel between states, within federal lands, or to leave or enter Indian country with the intent to kill, injure, harass, or intimidate another person, if in the course of, or as a result of such travel, the defendant places such person in reasonable fear of death or serious bodily injury, or causes substantial emotional distress to that person or a member of that person's immediate family. I know these are very detailed statutes, but, really, each one has a slight nuance or difference. With interstate stalking, we are not

just looking at the crime of violence, we are also looking at harassment and intimidation, that factors into what you can look to to the intent. With causing a substantial emotional distress, it does not just have to be the person; it can also be the person's family member. This often occurs when someone interferes or gets in the way, such as a parent of the intended victim. You can still prosecute when it is someone connected to the person's immediate family. Again, in this statute, the specific intent to violate a statute is required at the time of interstate travel, but the ultimate victim can be different from the intent victim, and it does not have to be a crime of violence; it can also be substantial emotional distress, so that opens it up a little bit for prosecution.

Cyber stalking, which falls under 18 USC 2261(a)(2), occurs when an instrumentality of interstate commerce is used—mail, internet, telephone—to do the stalking or to place the victim under surveillance. There have been many technological advances, and we are seeing this with increasing frequency.

The next area is interstate travel to violate an order of protection, and this falls under 18 USC 2262(a)(1). It is a federal crime to travel between states within federal land or to enter or leave Indian country, with the intent to violate the portion of a valid protection order that prohibits or provides protection against violence, threats, harassment against, communication with, or physical proximity. In this area of the law, we get into questions over the definition of what constitutes a protection order. The defendant must have intended to violate a protection order when he or she crossed over the state line. There is a lot of litigation looking at protection orders, and whether they are valid. This is where the national databases come into play to help tap into resources to find out more about the underlying protection orders, and avoid facing dismissal because you cannot prove that there was a valid protection order.

Some of the penalties in this area include, for the 2261, 2261(a), and 2262 offenses, about five years to life, but it is graded depending on the seriousness of the bodily injury. The 2006 amendment to VAWA allowed for, under 2261(b)(6), a defendant convicted of stalking, in violation of a temporary or permanent civil or criminal injunction, restraining order, no contact order, or other order, to be imprisoned for no less than one year. That helped to establish a floor in this area, so that we make sure that there are penalties for these crimes.

I want to turn now to some of the gun control act statutes that fall under the VAWA. I pointed out earlier that there have been some tricky litigative issues with regard to these cases that hopefully we can resolve shortly so we can have complete tools for prosecuting these cases. There are two statutes. The first is 18 USC Section 922(g)(8), which is possession of a firearm and/or ammunition while subject to a protection order. The second statute is Section 922(g)(9), which is possession of a firearm or

ammunition after conviction of a domestic violence misdemeanor. For Section 922(g)(8), it is a federal crime to possess a firearm and/or ammunition while subject to a valid, qualifying protection order, and law enforcement officers are not subject to this law. It is important to know because we do see fact patterns where a law enforcement officer is involved, and they are not subject to that because they carry a weapon for their job. This is not the case with 922(g)(9). A protection order, to qualify, has to meet three requirements, one of which is in the disjunctive, so the order has to be issued after a hearing in which the defendant had actual notice and an opportunity to participate. The defendant does not have to have actually gone to the hearing, but had to have notice or an opportunity to participate. Second, the order must have restrained the defendant from harassing, stalking, or threatening an intimate partner, or from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury. Third, the order had to include a finding that the defendant posed a credible threat to the physical safety of an intimate partner, or the order specifically prohibited the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury.

With regard to some of these requirements, for anyone who is working locally with the victims in this area, it is so important to make sure that that paperwork really reflects what is going [on]. It can create issues when you are in the Ninth Circuit and you do not have the right aspects in the underlying fact documents.

Another thing that is important at the local level is to make sure we cross our t's and dot our i's, so that the victims are not left without recourse.

I am going to turn to the possession of firearm after conviction of a domestic violence misdemeanor, and this statute does apply to law enforcement. It is a federal crime to possess a firearm and/or ammunition after conviction of a qualifying state misdemeanor crime of domestic violence. To be a qualifying misdemeanor crime of domestic violence, it has to be a misdemeanor under federal, or state, or tribal law, and an element of that law has to be the use or attempted use of force, or threatened use of a deadly weapon. This use of force element has caused a circuit split. To briefly touch on it, in the Ninth Circuit, the court has disallowed assault and battery statutes to qualify as misdemeanor crimes of domestic violence based on the finding that offense of physical contact of bodily injury do not necessarily include the use of physical force. This is causing some issues with prosecution in this area. Basically, it means you have to look at the statute that you are trying to utilize and work with the locals to insure that the underlying document reflects that the use of force is what occurred in the fact pattern, so that you will not be left without the underlying documents and can support your case.

My timing is running out here, but to quickly pass on the last aspects of 922(g)(9), you have to establish a relationship as well. The misdemeanor has to have been committed by a current or former spouse, parent or guardian, by current or former cohabitant as a spouse, parent or guardian, or by a parent with the victim of a child in common, or by a person "similarly situated" as a spouse, parent or guardian of the victim. We have Justice Ginsburg to thank in *United States v. Hayes* with the "similarly situated" definition because the defense need not have a domestic relationship as an element in order to qualify as a misdemeanor crime of domestic violence, and that's important.[3] It is going to be helpful in these cases.

Last, the defendant must have been convicted of the misdemeanor crime of domestic violence. This is another area where we open ourselves up to some weaknesses in litigation. The person has to have been represented by counsel, or has waived the right to counsel. If entitled to a jury, the person must have had a jury trial, or waived that right to a jury trial. If the conviction has been expunged, it does not help us; it does not qualify for it. So that is a little overview of some of the statutes. I wanted to give you a flavor for some of the statutes that can come to our office and some of the fact patterns that we would look for. We ask for your help, and hopefully if you see cases like this, or if you know people who work in this field, you will have them reach out to our office so we can prosecute these cases. Thank you very much.

3. United States v. Hayes, 555 U.S. 415 (2009).