THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

A closer look at strangulation cases

The prosecution might have more evidence than you realize, even if the victim is uncooperative or there aren't any visible injuries. Here is advice on how to look for this evidence, present it to the jury, and seek justice for domestic violence victims.

By Kelsey McKay
Assistant District Attorney in Travis County

Many years ago I prosecuted an aggravated assault case where Tony Brewer strangled, hit, and threatened his girlfriend (I'll call her Samantha) with a knife. Samantha recalled that the defendant came home, took the battery out of her phone, strangled her off and on for 15 minutes, releasing his grip only when it appeared she was about to pass out, and then re-engaging once she regained clear consciousness. She recalled feeling dizzy and having to use the restroom immediately after her release.

Too scared to report the incident after the defendant threatened to kill her if she reached out to the police, Samantha stayed at a friend's house that night and returned home the next day. After Brewer attempted to assault her yet again, she escaped and called 911 from a store down the road.

During the trial, Brewer made threats against most of the people in the courtroom, including the prosecutors, and he acted violently in the holding cell just outside the courtroom. Samantha remained relatively cooperative during the prosecution of the case, and we knew we had to send Tony Brewer to prison for a long time.

Because this incident took place before the statute that made strangulation a felony, we indicted it as an aggravated assault. To prove a felony, we needed to show that the defendant had either used or exhibited a deadly weapon (his hands and/or a knife). Absent the deadly weapon element, this case would be a misdemeanor. We had an added incentive to convict him of a felony, as he was habitual and another felony conviction would send him to the penitentiary for a minimum of 25 years. With our only physical evidence and visible injury corroborating a misdemeanor, we looked for ways to strengthen our deadly weapon allegations. The knife had never been collected, so we did what we could to have Samantha identify something that well represented the weapon. When it came to the strangulation, we knew we needed something to connect the dots for the jury. I had been to a domestic violence conference and heard speakers discuss using a strangulation expert in this type of setting. In trial, we called a deputy medical examiner from our county to help explain strangulation to the jury—specifically, how symptoms Samantha had experienced were consistent with a person who was strangled.

The jury deliberated for just under five hours, and I became con-

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The Giving Tree is growing

At the 2013 Annual we announced a partnership between TDCAF and The Giving Tree Network. Simply put, if you begin your online shopping through **www.ShopTDCAA.com**, the Foundation will receive the online referral sales commission of 2–8 percent, which usually goes unpaid. Even with small purchases, the numbers add up. It is a way that you can support your professional association with the click of your mouse.

By Rob Kepple
TDCAA Executive Director in Austin

Thanks to **Sarah Wolf**, our TDCAA Communications Director and resident Creative Crafts Consultant, who developed and executed the plan to give all those attending the Key Personnel and Victim Assistance Coordinator Seminar a gift bag filled with wonderful things purchased through **www.ShopTDCAA.com**. What a great way to introduce y'all to the network! And it gives us a great response when you ask, "What can I do to help the Foundation?" Our answer: "Just go online and buy yourself something nice!"

Thanks to Bert Graham

I just wanted to take a moment to thank the 2013 President of the Foundation Board of Trustees, **Bert Graham**. Bert is a former Harris County First Assistant District Attorney and currently serves that office in an "of counsel" role (his full-time job today is remodeling the family ranch house in La Grange). Bert has been an engine of productivity this year and has kept the Foundation and our profession close to his heart. We aren't letting his energy and enthusiasm get away from us any time soon, that's for sure.

Honoring the Founding Fellows of the Texas Prosecutors Society

In conjunction with the Elected Prosecutor Conference, the Foundation sponsored a reception to honor those who have joined the Texas Prosecutors Society in 2013. It is a distinguished group, and they are listed in the box at right.

We are honored that this class of inductees completes the Founding Fellows of the Prosecutors Society. The society will grow by leaps and bounds in the future, but the first 106—representative of the 106 years that prosecutors organized as an association before the Foundation was created—will stand apart as the bedrock of something very special. What is even more significant is that the society in 2013 has made another generous contribution to the TDCAF endowment. It is in its infancy yet, but we are proud of those who have the foresight to plan for the future of this noble profession we hold so dear. ❇

2013 inductees to the Texas Prosecutors Society

Johnnie Actkinson
Mike Anderson
Dustin H. Boyd
Don Davis
Dan Dent
James Eidson
Anton E. Hackebeil
Charles Kimbrough
Kenda Culpepper
Brett Ligon
Andy McMullin
Karen Morris
Sherri Wallace Patton
Ross Rommel, Jr.
B.J. Shepherd
Steve Smith
John Terrell
Bill Torrey
David Williams

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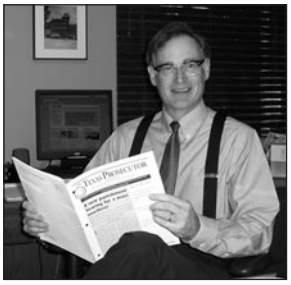
Rules for mandatory *Brady* training

As I reported in the September–October edition of *The Texas Prosecutor* journal, all attorneys prosecuting criminal cases of Class B misdemeanors or above will need one hour of mandatory training relating to the duty to disclose exculpatory and mitigating evidence (HB 1847, §41.111 of the Texas Government Code). The Court of Criminal Appeals has been charged with promulgating the rules for such training, and TDCAA has been tasked with developing and producing it. That is something we are happy to do, by the way, because we have been training on the duty to disclose under *Brady* and the relevant ethical rules for many years now. As well as producing the training, TDCAA will be the repository of the records of compliance.



By Rob Kepple
TDCAA Executive Director in Austin

The court has promulgated the rules as required, and combined with the statute, here is how it will work:

- Everyone who prosecutes a criminal case other than a Class C misdemeanor must receive one hour of training in the duty to disclose exculpatory and mitigating evidence. This includes any special prosecutor or attorney *pro tem* who is appointed on even a single case, so be sure that if your office uses a special prosecutor, that person has the required training. Note that prosecutors who exclusively practice civil law are exempt from the training requirement.
- All prosecutors handling criminal cases who were employed as of December 31, 2013, have one year (until December 31, 2014) to receive the training.
- All attorneys prosecuting criminal cases employed on or after January 1, 2014, have 180 days to complete the training.
- Once an attorney has completed the initial mandatory training, the attorney must take an additional course within four calendar years of that training and every four years thereafter.

TDCAA will keep records relating to the training and will provide the court with an annual report of attorneys completing the course by January 31 of the following year. We were happy to volunteer for that job because it gives us a chance to keep y'all notified when it is time to take the refresher course.

You will have plenty of opportunities to get the required training from TDCAA in the upcoming year. First, we just ran a pilot of the training in conjunction with the Elected Prosecutor Course in December, so our first graduates are good to go for four more years. You can expect to receive this mandatory training at most TDCAA conferences this year, at a series of summer regional conferences, and even by webinar. And of course we will offer the training at our two Prosecutor Trial Skills Courses in January and July, so all new prosecutors will be able to get the needed training within 180 days of taking a job at a prosecutor's office.

I want to thank **Chip Wilkinson** of the Tarrant County Criminal District Attorney's Office for quickly developing training that meets the requirement of the statute. As you may know, Chip literally wrote the book on *Brady* for prosecutors (a book we sent for free to prosecutors' offices in 2009), and his presentation and materials are substantive. You will see other speakers doing the training for TDCAA throughout the year, but it is good to have our "resident expert" on the team.

If you have any questions, suggestions or concerns, please just give me a call or send me an email at Robert.Kepple@tdcaa.com.

Elected Prosecutor Conference and leadership

In December the elected prosecutors of Texas gathered in San Antonio. We had a record crowd of more than 170 prosecutors who took time out to compare notes, share ideas, and seek solutions to problems in their communities. Texas is unusual, as we now have 336 elected prosecutors. In this last year we had 78 new elected prosecutors take office, which tops the total number of elected prosecutors in most states (for instance, California has 58 elected district attorneys). With this many elected leaders in prosecution spread across the state, it is imperative that we gather and discuss the condition of the profession on a regular basis.

Of course the new discovery law had folks preoccupied, but the other issue that took center stage was leadership. As you recall from our continued discussions centered on the 2012 TDCAA report, "Setting the Record Straight on Prosecutorial

Misconduct," effective leadership is a key ingredient to doing justice in the courthouse. And we aren't talking about leadership only for larger offices with lots of staff, because even the county or district attorney with little or no staff must demonstrate leadership in criminal justice issues in their communities. The sheriff, county judge, and police chief don't work for you, but in the end an elected prosecutor must be able to lead the criminal justice community.

Although TDCAA has provided single-shot sessions on leadership in the past, the 2012 report called for our profession to develop a complete training curriculum on leadership that is developed solely for Texas prosecutors and the unique and disparate challenges they face. That training began in December at the Elected Prosecutor Conference and was based on a survey that elected prosecutors answered concerning their views, issues, and needs when it came to leadership and leadership training. It was led by **Jo Ann Linzer**, the chair of the TDCAA Training Committee and an ADA from Montgomery County; **Jack Choate**, TDCAA Training Director; and **Michelle Mikesell**, the management pro from a management group named Insperity. It was a good first step toward developing a leadership curriculum tailored to prosecutor offices that is valuable to small and large offices alike and can be appropriated into your own workplace. We learned a lot from the participation of the electeds, so keep an eye out as this project develops into a sustained training program for your office.

"Courtroom Playbook"

Recently a prosecutor sent me a copy of the "Courtroom Playbook." Some of you may have already come across someone armed with this document. It is 11 pages of, well, ways to make the judge mad. We have all heard of the Republic of Texas folks and others who claim that the laws and judiciary of Texas have no jurisdiction over them. This appears to be a version of that group's handbook.

It contains a bunch of scripted answers to courtroom questions designed to frustrate the proceedings. You should suspect someone is running a play from this booklet if the defendant, without benefit of counsel, says any of the following things (apparently in response to the prompt, which is in bold):

When is your birthday? "Your Honor, I can't possibly tell you because I was too young to remember, and if I told you what my parents tell me, that would be here-say [sic], and therefore not admissible in court."

Taking the defendant's chair: "Can I take the chair with my unleinable [sic] rights in full effect?"

Do you understand the charges against you? "No, I do not comprehend"; "I can't enter a plea until I get some questions answered"; or "Your Honor, a criminal action requires an injured party and a claim. Who is making the claim?"

If the judge says the State is the injured party: "Your Honor, I make a motion that this case be dismissed. We are in the wrong court. The State cannot be both the prosecution and the plaintiff. This case needs to be transferred to federal court or be dismissed."

My guess is that last little "A-ha! I got you judge!" comment is more likely to get the defendant transferred to jail for contempt of court than the case transferred to federal court.

Crime and punishment in Norway

You might recall that about this time last year TDCAA hosted a delegation of attorneys from the Japanese Bar Association. Their motive for the journey was to get a clearer picture of the Texas death penalty scheme, with an eye to find ways to reduce the use to the death penalty in Japan. (Japan's death penalty laws are not too awfully different from those of Texas, and they had had way too many death penalty verdicts that year—three as I recall.)

This fall we had a visit from some folks across the other pond—Norway to be exact. The purpose was similar: to gain insights into the Texas criminal justice system and the death penalty in particular.

The meeting was instructive for us in Texas. After all, we are getting pretty used to complaints by European countries about our criminal justice system and the death penalty in particular. It was interesting to get an insight into their view of crime and punishment. For instance, Norway, which is not too much bigger than Harris County, had a grand total of 34 murders in 2008. Its crime rate seems to be going up, but it is safe to say that until the mass murder of children by Anders Behring Breivik at a summer camp in 2011, the nation has not had to deal with an armed gunman with

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evil intent or the aftermath of that crime within the criminal justice context. Heck, their cops don't carry guns or seem to have a need to. It is reported that their new maximum security prison cell looks a lot like a college dorm room, complete with a mini-fridge, sunny private suite, flat-screen TV, private bath, and privileges at the tanning beds, recording studio, and rock-climbing wall. When someone commits a crime, the first instinct is to do some societal soul-searching for what they did wrong to cause this to happen. And so far for their culture, that all seems to have worked just fine.

So high crime rates can be very confusing for a small, homogeneous, and relatively affluent country. We can appreciate why it would be hard for Norwegians to view the death penalty as a reasoned moral response to crime. After all, they never had the crime rates of large metropolitan areas in the 1980s where it seemed that every weekend saw a couple innocent store clerks killed in robberies. They have never had a Texas magazine put the picture of a serial murderer on the front cover with the caption "Monster."

I will say this: After sharing the Texas experience with crime, they did appreciate why Texans are a little disturbed that the summer camp gunman will be in one of those "maximum security" facilities for 21 years. I am not sure our guests were entirely comfortable with the brevity of that sentence either, as they were quick to note that the courts can keep him longer at the end of his term by extending it in five-year increments. I don't think our Norwegian friends will be looking to Texas for any criminal justice advice in the near future, but maybe they have a little better appreciation for our state.

Congratulations to Life Member Craig Hill

The entire TDCAA Board of Directors was thrilled in December to award **Craig Hill**, a former Nueces County District Attorney's Investigator, with lifetime membership in TDCAA. This is indeed a rare honor; the list of life members is very short. But Craig, a regular dues-paying member of the association since 1977, has been a true leader of the Investigator Section of TDCAA. He is one of the folks who helped galvanize the investigators in prosecutor's offices into a cohesive group of professionals dedicated to serving the people of Texas. His loyalty to his office and his fellow investigators is remarkable. I want to thank the entire Investigator Board, led by **Dale Williford**, for forwarding this nomination.

Welcome to some new prosecutors

Since the last edition of *The Texas Prosecutor* went to print, we have had some changes in prosecutor leadership. I'd like to welcome **Omar Collin**, County Attorney in Kingsville; **Ben Smith**, District Attorney in Snyder; **Courtney Tracey**, Criminal District Attorney in Newton; and **Thomas Duckworth**, County Attorney *pro tem* in Kermit. Glad to have y'all in the profession!

And farewell to one of our finest

Tom Maness, the Criminal District Attorney in Beaumont, retired on December 31st after a distinguished career in criminal justice. Tom had been in the business for 42 years: seven as an assistant prosecutor, eight as a county court-at-law judge, and 27 as the criminal district attorney. Tom is one of many folks who went into prosecution with the intention of learning to try a case so he could go into private practice, only to look back 42 years later at a distinguished career serving the public and fighting for justice. Tom has been a great leader of both our association and our profession. Thanks for your service, Tom—you will be missed.

Your new research attorney

Next time you call TDCAA for some legal help, you will probably be talking with our new research attorney, **Jon English**, pictured below. Jon is a recent graduate of St. Mary's University School of Law. We'd like to think he got his taste for criminal law during his tenure as the Chief of Staff for **Representative Debbie Riddle** over four legislative sessions. During that time Jon's boss passed numerous criminal justice bills, including "Jessica's Law," which created the continuous sexual abuse and super-aggravated sexual assault statutes. So next time you call the TDCAA research attorney and ask, "What the H-E– double–L was the Legislature thinking when they wrote *that* statute?!" Jon might actually know


Jon English

*Recent gifts to the Foundation**

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* denotes gifts received between October 2 and December 10, 2013

Photos from our Key Personnel & Victim Assistance Coordinator Seminar

2014 Victim Services Board

2014 Key Personnel Board

Photos from our Elected Prosecutor Conference

Award winners at the KP & VAC Seminar

TOP PHOTO: Tree Chamberlain (at left in photo), formerly of the Hunt County Attorney's Office (now retired), was honored with the Oscar Sherrell Award at November's seminar. She is pictured with Amenda Arnold (at right), also of the Hunt County Attorney's Office.

BOTTOM PHOTO: Jill McAfee (at left in photo), victim assistance coordinator for the Bell County District Attorney's Office, received the Suzanne McDaniel Award. She is pictured with Cyndi Jahn (at right), outgoing Victim Services Board chair and victim assistance coordinator at the Bexar County Criminal District Attorney's Office.

Congratulations to both women!

Success stories in border prosecution

I am honored to serve as President of the Texas District and County Attorneys Association for 2014. This organization is a credit to its members and is unmatched in meeting the professional needs of Texas prosecutors and their staffs.

By Rene Peña
District Attorney in Atascosa, Frio, Karnes, La Salle, and Wilson Counties

At the forefront of issues faced by Texans is border security and safety. The challenge for Texas prosecutors and law enforcement is how to deal with the evolution of organized criminal activity, namely, the transnational threats that result. Texas shares 1,254 miles of border with the Republic of Mexico. In 2011, Texas dominated all border states with the number of U.S.-Mexico border crossings. Out of the 27 vehicular points of entry into Texas from Mexico, the Port of Laredo was ranked first in the number of crossings, according to the Office of the Governor.

Additionally, Texas' population continues to grow rapidly. At the last census, the population stood at 25 million. Texas' gross domestic product (GDP) exceeded $1 trillion in the last decade. Over the last few years, the impact of the Eagle Ford Shale oil and gas play has been significant to border communities and metro areas. It is estimated that in 2011, Eagle Ford revenue was in excess of $25 billion.

As a result, there has been an increase in organized criminal activity in rural areas, specifically in crimes that can be categorized as white collar in nature, such as money laundering. Today's climate is ripe for the creation of illegitimate "shell" companies and corporations and the cloning of legitimate business vehicles including first responder and law enforcement vehicles. This is in addition to the use of seemingly legitimate business and recreational travel between Texas and the Republic of Mexico, a model much-used by criminal enterprises.

Border and rural counties have all experienced expansion in other areas of criminal activity beyond money laundering and drug trafficking, such as kidnapping, extortion, murder for hire, home invasions, aggravated robbery, human and sex trafficking, and weapons trafficking.

The criminal enterprise model is prefaced on control of trafficking and smuggling routes between Texas and Mexico. The primary motivation is profit. This control is not achieved without these criminal enterprises receiving assistance from prison and street gangs in Texas. The relationship between the gangs and the criminal enterprises is facilitated by cultural and familial ties to Mexico, which bonds these two groups beyond the normal profit-based loyalty. The evolution that has taken place between the cartels and street gangs is, no doubt, a security issue. Should gangs continue to take hold of communities one by one, the result will be an extension of the transnational criminal enterprise into Texas and the United States.

The use of criminal aliens has facilitated the evolution of the criminal enterprise. (This is not to say that all aliens, legally or illegally here, are criminal actors or that they are primarily from Mexico.) As of 2012, there are in excess of 140,000 criminal aliens that have been arrested in Texas. The crimes include but are not limited to murder, sexual assault, robbery, human trafficking, sex trafficking, and drug offenses. The criminal alien who is legally within the U.S. who is part of the criminal enterprise uses his dual residence as a means to further money laundering, for example.

To highlight the profiting one need only take into account that according to the Texas Safety Threat Overview of 2013, Operation Border Star drug seizures from April 2006 through December 2012 totaled $7,677,441,458. That's more than $7.6 trillion (with a T).

Gang sophistication is systematic in terms of structure, communication, and operations. Gangs' objective is to conduct their business and illegal activities without attracting law enforcement attention, and their goal is to avoid detection by utilizing technology and counter-measures against law enforcement. Even so, according to the National Gang Assessment, a majority of the crimes committed in 2011 were gang-related.

Consequently, the emergence of gang activity in rural communities is of great concern. The lack of law enforcement resources in combatting these gangs in the areas of training,

equipment, technology, and personnel is a significant disadvantage.

A response

The Legislature and Governor Perry recognized the security concerns to our state. Hence, in 2009 the Border Prosecution Unit (BPU) was created. BPU consists of 48 counties along the Texas-Mexico border and includes 17 prosecution offices from El Paso to Brownsville united under a cooperative working agreement.

In each prosecution office, state funding provides an assistant district attorney who handles the specialized caseload of border crimes. Border crimes are defined as any crime that undermines public safety or security because of proximity to the border, such as, without being limited to, crimes involving:

- drugs/trafficking
- human trafficking or other exploitation
- financial crimes and money laundering
- criminal enterprise
- kidnapping
- extortion
- murder
- Mexican nationals or undocumented aliens
- transnational elements
- public corruption

BPU has formed a strategic partnership with the Texas Department of Public Safety. The model promotes an efficient collaboration with DPS and federal and local partners. The emphasis is detecting the local threats to a particular region, county, or community and engaging the appropriate resources to dismantle and disrupt the criminal enterprise.

Success stories

BPU has many success stories since its creation. In Laredo, over several years, federal law enforcement had been conducting a major investigation regarding Mexican Mafia members dealing large quantities of drugs. A Laredo DPS-CID agent uncovered a major target that the federal agents were unaware of. This brought BPU and DPS into coordination with the now-extended investigation. As a result of this collaboration with the Webb County (and Region 2) BPU counsel, the U.S. Attorney's Office, DPS, and federal agencies, 34 members of the Mexican Mafia were indicted. This investigation remains ongoing, with nationwide focus.

In my own 81st Judicial District, methamphetamine sales and use was epidemic in Wilson County. For years, certain individuals were highly suspected by local law enforcement as being major distributors of methamphetamine in the area; however, local law enforcement lacked the resources both in manpower and equipment to put a significant dent in their illegal activities. Two agents from DPS-CID decided these suspects were viable targets and dedicated months of work to dismantling the major suppliers of methamphetamine in Wilson County. By working closely with the District Attorney's Office, the U.S. Attorney's Office, Homeland Security, local law enforcement, and the SAPD-HIDTA group, DPS-CID executed multiple search warrants on the same morning, and three people were arrested at the respective scenes, including the two targets of the investigation. Methamphetamine arrests substantially decreased after the arrests, and word on the street was that users were leaving town because of the scarcity of local product.

The 38th Judicial District (Medina, Real, and Uvalde Counties) has also had several great successes. There, DPS-CID agents, working closely with the DA's office, seized over $500,000 from a woman who admitted the money was from drug-trafficking profits and was being transported from Dallas back to Eagle Pass. The BPU Unit also convicted a former Uvalde County jailer for possession of a controlled substance, along with his passenger, when they were stopped by the Uvalde Police Department and attempted to discard the drugs from the vehicle. The defendant was sentenced to six years in prison.

Earlier this year, the same BPU Unit worked with DPS in a seizure of over $500,000 when a vehicle with two women and several children was stopped for a traffic violation. The seizure led to the indictment of one of them, a resident of Eagle Pass, after she admitted to a DPS-CID agent that the money was payment for the sale of narcotics.

The 38th Judicial District BPU Unit has also conducted two fugitive and gang member round-ups over the past couple of years. The first operation in Uvalde County netted 22 arrests and 34 closed cases against gang members. The second round-up, also in Uvalde County, resulted in the arrest of six state felony offenders and five federal probation warrants. The Medina County round-up resulted in 15 arrests of

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gang members from the Mexican Mafia, Tango Orejons, and Latin Kings.

In Laredo, a DPS-CID agent became involved with a major, multi-year investigation of drug trafficking by La Familia Michoacan, which extended into Los Angeles, Seattle, Arizona, and Minnesota. The investigation resulted in 21 federal and one state indictment of La Familia members. All but three pled guilty. BPU efforts included coordination with law enforcement and the U.S. Attorney, as well as development of confidential informants.

Conclusion

Those who are involved in criminal enterprise are limited only by their imaginations. They have the will, the power, almost unlimited resources, and the violent tendencies to bring about any effect that they wish. They adhere to no law and to no sense of humanity or decency. This is what the men and women in law enforcement face each and every day. We must bring them to justice and do so with limited resources.

By creating new models and adapting to the local threat through cooperation, collaboration, and communication among prosecutors, local law enforcement, federal partners and the Texas Department of Public Safety, we can have a greater effect on dismantling these organizations. In essence, we must mount both a strong offensive and defensive effort in the pursuit of justice. ❇

Wehrenberg v. State: Resetting a bad search with the independent source doctrine

As a prosecutor, I generally love it when a police officer calls me about a search issue because it usually gives me an opportunity to validate the officer's foresight and understanding of the law before the search occurs. Unfortunately, there are a few occasions where an officer calls in the midst of an investigation like Goose from *Top Gun* asking me to do some of that "prosecutor @&#%" to save a search that started off on the wrong foot.

By David C. Newell
Assistant District Attorney in Harris County

Well, the Court of Criminal Appeals has recently decided a case that does provide some help to those well-intentioned officers who might have stumbled upon evidence improperly. By recognizing the "independent source" doctrine as an exception to the State exclusionary rule in *Wehrenberg v. State*, the Court of Criminal Appeals has provided a rationale for the admission of evidence that has been properly seized after an initially illegal search. Thus, a police officer may be able to hit the reset button on a search that starts off improperly by ensuring that any subsequent search and seizure conducted independently of the original search.

Fixin' to commit a crime

A police anti-narcotics unit had been conducting surveillance of Michael Wehrenberg for almost a month when officers received a call from a confidential informant advising them that the folks in the house were "fixin' to" cook meth that night.[1] Several hours later, at 12:30 in the morning, the officers entered the residence without a search warrant and without consent to prevent the evidence from being destroyed. They removed several subjects, including Wehrenberg, placed them in the front yard, handcuffed them, and performed a protective sweep of the premises. No one had been cooking meth so the officers went back outside.

Police subsequently prepared a search warrant that a magistrate signed about an hour and a half after the residence was secured. The search warrant affidavit relied only on information provided by the confidential informant and made no mention of the officers' warrantless entry into the residence. The affidavit stated that the informant had personally observed the suspected parties in possession of certain chemicals with intent to manufacture a controlled

substance. According to the informant, the subjects were planning to use the "shake and bake" method of manufacturing methamphetamine, which is often utilized to prevent detection of the meth-making process. Police officers conducted a search pursuant to the warrant and discovered methamphetamine and the tools for making methamphetamine.

At the hearing on the motion to suppress, the lead investigator noted that the "shake and bake" method of cooking meth was volatile and hazardous, so he felt the need to remove the subjects from the home to avoid a possible fire. He also said that he left to get the warrant signed immediately after the initial detention. The trial judge suppressed any evidence from the initial entry and detention. However, he did not suppress any evidence obtained pursuant to the search warrant because the search warrant did not allude to or mention the previous entry or detention. Thus, the evidence seized pursuant to the search warrant—methamphetamine and the tools for its manufacture—was untainted by the previous entry and detention.

On appeal, the State argued that the case fell squarely within the parameters of the "independent source" doctrine because all the information contained in the search warrant was derived from facts that were made known to the officers by the confidential informant before the warrantless entry into the residence. But the court of appeals rejected this argument. First, it observed that the Court of Criminal Appeals had twice declined to recognize the "inevitable discovery" doctrine as an exception to the Texas exclusionary rule (in *State v. Daugherty* and *Garcia v. State*). Because the court of appeals felt inevitable discovery and independent source were two sides of the same coin, it declined to recognize either. The court of appeals also declined to recognize "independent source" because the Court of Criminal Appeals had left the issue open, hinting only in dicta that the doctrine might be applicable.[2]

Independent source vs. inevitable discovery

The Court of Criminal Appeals reversed, holding that the "independent source" doctrine provides for the admissibility of untainted evidence under the Texas statutory exclusionary rule.[3] Writing for an ostensibly eight-judge majority, Judge Alcala explained that the United States Supreme Court first recognized the independent source doctrine in 1920 when it held that facts do not become "sacred and inaccessible" simply because they are first discovered unlawfully.[4] According to Judge Alcala, the U.S. Supreme Court has long held that evidence is not to be excluded when the connection between the illegal police conduct and the discovery and seizure of evidence is so attenuated as to dissipate the taint. The central question in determining whether challenged evidence is admissible under the independent source doctrine is whether the evidence at issue was obtained by independent, legal means.

Judge Alcala then went on to detail the two Supreme Court cases that laid out the doctrine. In *Segura v. United States*, for example, police responded to a tip regarding drug trafficking and entered an apartment without a warrant or consent.[5] However, the United States Supreme Court upheld the subsequent seizure of the evidence because it had occurred a day later pursuant to a valid search warrant based solely upon information known to the officers prior to the initial illegal entry. Similarly, in *Murray v. United States*, the United States Supreme Court broadened the holding in *Segura* to not only cover evidence observed for the first time during an independent lawful search (the case in *Segura*), but also evidence that had been observed in plain view during the initial *unlawful* search.[6]

But Judge Alcala made clear that *Murray* authorized only a subsequent seizure of evidence that police had improperly observed in plain view where the search pursuant to a warrant was in fact a genuinely independent source of the information and tangible evidence at issue. So while the officers would not be able to enter illegally and seize items in plain view, they could subsequently seize that evidence pursuant to a warrant so long as the warrant was based upon information known to officers before the initial, illegal entry and not upon any observations pursuant to an illegal entry.

Of course, the Texas exclusionary rule in Art. 38.23 is different from the court-made rule in the federal system. But the Court of Criminal Appeals noted that the rule implicates only evidence that was "obtained" in violation of the law. There must be some causal connec-

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tion between the illegal conduct and the acquisition of the evidence.[7] And if the taint from any illegality has dissipated by the time the evidence is acquired, Art. 38.23 is not implicated. The Court of Criminal Appeals had already held that this "attenuation" doctrine was not really an impermissible non-statutory exception to Art. 38.23; it was a method of determining whether evidence was actually "obtained" in violation of the law. When the causal relationship between the illegality and the acquisition of evidence is attenuated, exclusion is not required because the ordinary meaning of "obtained" does not extend to such a remote or attenuated causal relationship. And so, if it is true that evidence is not obtained when the causal relationship is too attenuated, then it is also true that evidence is lawfully obtained if there is no causal relationship between the prior illegality and the later lawful discovery of evidence through the independent source doctrine.

However, this is different from the "inevitable discovery" doctrine, which presupposes that the evidence was actually obtained in violation of the law. Judge Alcala noted that initially a plurality of the court observed that "inevitable discovery" was a species of harmless error where a constitutional violation is determined to be inconsequential when the outcome of a police investigation was probably unaffected by the violation.[8] Later, a majority of the court adopted this reasoning in *State v. Daugherty* to hold that there is no "inevitable discovery" doctrine in Texas. And there still isn't. But according to the court, these two doctrines are not the same, and the unavailability of the inevitable discovery doctrine does not require a holding that the independent source doctrine is foreclosed by the Texas exclusionary rule. Simply put, "inevitable discovery" applies to unlawful seizures, while "independent source" necessarily applies to otherwise lawful seizures.

Judge Price wrote a concurring opinion to not only endorse the majority opinion but also to expand on the court's rationale. According to Judge Price, the terminology of "inevitable discovery" and "independent source" causes confusion because at bottom, "independent source" is about attenuation of the taint. Applying *State v. Mazuca*, Judge Price noted that the intervening circumstance of a valid warrant, coupled with the relative lack of purposefulness and flagrancy of the police misconduct, would break the causal connection between the primary illegality and the seizure of the contraband.

Judge Meyer's minority report

Judge Meyers dissented to lament the recognition of the independent source doctrine and to criticize the use of a warrant based upon the prediction of future crimes. According to Judge Meyers, probable cause for a search warrant cannot be based upon anticipation of a prospective crime. The informant in this case would have to have provided credible information that Wehrenberg possessed methamphetamine or materials to manufacture the drug.[9] The fact that he did not suggested to Judge Meyers that police had relied upon their observations during the initial illegal entry to secure the warrant rather than on the confidential informant's information.

Of course, Judge Meyers may have been needlessly philosophical with this point. Regardless of whether the information describes a future or a past crime, the evaluation of the warrant would be the same. As the court has repeatedly said, probable cause to support the issuance of a search warrant exists where the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued.[10] The warrant is read in a common-sense and realistic manner, and reasonable inferences may be drawn from the facts and circumstances contained in the four corners of the affidavit. Indeed, the probable-cause determination in *Illinois v. Gates* included predictions of future criminal activity.[11] Seems likely that a magistrate could review an affidavit regarding a future meth cook[12] and determine if that information gave rise to the reasonable inference that the contraband or evidence would be on the premises. That said, a significant body of law on precognition has yet to be developed.

Conclusion

It is always the better practice to err on the side of getting a search warrant, but this case is a useful tool for those circumstances when law enforcement misjudges a situation and enters a residence in mistaken reliance upon an exception to the warrant requirement that later turns

out to be inapplicable. And while it is nice to have such a clear-cut case that finally recognizes the independent source doctrine, note that a strong majority of the court refused to budge on the inapplicability of the inevitable discovery doctrine. The court continues to hold that this exception to the federal exclusionary rule is incompatible with the Texas exclusionary rule. Still, this opinion provides nice validation for all those times prosecutors have told officers to stop what they are doing and get a warrant. So if police can secure a search warrant based solely on the evidence at their disposal prior to any illegality, there still may be a chance to hit the reset button through the independent source doctrine. ❇

Endnotes

1 No, Jeff Foxworthy was not the confidential informant.

2 See *State v. Powell*, 306 S.W.3d 761, 769 (Tex. Crim. App. 2010)(noting possible applicability of the independent source doctrine).

3 *Wehrenberg v. State*, Nos. PD-1702-12, PD-1703-12, slip op. at 9 (Tex. Crim. App. Dec. 11, 2013).

4 *Id.* citing *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392 (1920).

5 *Segura v. United States*, 468 U.S. 796 (1984).

6 *Murray v. United States*, 487 U.S. 533, 537 (1988).

7 *State v. Daugherty*, 931 S.W.2d 268 (Tex. Crim. App. 1996).

8 See *Garcia v. State*, 829 S.W.2d 796 (Tex. Crim. App. 1992).

9 Or to put it in Foxworthy terms, he'd have to say they used-ta-could have made meth rather than they were fixin'-to do so.

10 See e.g. *Davis v. State*, 202 S.W.3d 149 (Tex. Crim. App. 2006)(setting out the law regarding review of a search warrant).

11 *Illinois v. Gates*, 103 S.Ct. 2317 (1983).

12 After watching *Breaking Bad*, I'm totally down with the lingo.

Care for the victims of DWI

By W. Clay Abbott
TDCAA DWI
Resource Prosecutor
in Austin

In this job one eventually tires of sending search warrants, discussing *Missouri v. McNeely*, and explaining drug levels in blood samples—but occasionally I am forcefully reminded of how deeply these things matter. I had one of those moments when I read the article, "Chilli's story will warm your heart" by Allenna Bangs, an ACDA in Tarrant County, in the September-October issue of this journal. If you have not read it, you should pause now and check it out in that edition or online at www.tdcaa.com.

That story helped even me remember why we do what we do. The most innocent and random victims we serve are so often found in impaired-driving cases. What came to me reading that story is how much good came from the simple device of the Victim Impact Statement (VIS). The case was pled out to the satisfaction of all parties; it was not resolved by strenuous courtroom presentation. But thanks to one brave little girl and a prosecutor's office that heard her, her story was so much more than the resolution of a criminal case.

Prosecutors are often accused of ignoring the Victim Impact Statement, but I am not sure this is a fair accusation. Many victims understandably don't want to re-live the traumatic events of the crime and do not (will not) engage in what can only be an incredibly difficult endeavor for them. But as Chilli's case shows, sharing a VIS can be healing, informative, empowering, and educational, sometimes for the whole community. Prosecutors should do everything in their power to make sure victims know how to fill out Victim Impact Statements and make the process as simple as possible.

The 83rd Legislature, responding in part to criticism of prosecutors underutilizing this important process, passed SB 1192 and SB 213, amending Article 56.03 of the Code of Criminal Procedure, which governs Victim Impact Statements. The first act made some clean-up corrections and clarified that there is no official form required of victims to avail themselves of this process. A new model form is now available on the TDCJ website, but the clear goal of the law's change was to inform prosecutors that they should use what they get and not adhere to legal formality. (If you need a perfect example of how powerful these statements are regardless of their format, go back to the original article and re-read Chilli's heart-wrenching, hand-written letter she titled, "From one of your victom [sic]." Really, who cares what form her VIS was on?)

The second act requires the court to determine whether the prosecutor received a VIS before sentencing. It also took out the middleman and requires the prosecutor, not the court, to send a copy of the VIS to probation in probation cases. When I was out doing Legislative Updates last summer, I heard from many of you how these changes added effort to our already-full plates. But how wrong would it be if anyone connected with deciding the defendant's sentence did not have access to that VIS?

Not every VIS will be as touching and true as Chilli's short note. So what? What matters is that all victims deserve to be heard, if even for a moment. Every crime victim has the right to be considered by prosecutors, judges, parole boards, probation officers, and even by the defendants who victimized them in the first place. To actively or passively silence that voice is unjust, and our duty is always and only to see that justice is done. Sometimes we may not agree with the message, but again, so what? We stand for the truth, whatever it may be, and we should never flinch from it.

I won't spend time here going line by line through Article 56.03 and the process of the Victim Impact Statement. But if you are unfamiliar with it, I promise it is only a five-minute read, and you cannot see that justice is done without understanding it. Set this article down and go take a look at that part of the Code of Criminal Procedure.

I have two other victims' issues that continue to come up on a regular basis that I want to mention.

First, victims of simple DWI—those suffering "only" property damage or bodily injury—often fall through the gaps of an overtaxed and chaotic misdemeanor docket. The biggest issue is that they are often not named in the information because

their property damage or injury does not enhance the offense or constitute an element of the offense, making them easy for prosecutors to miss. While property damage will not qualify someone as a crime victim under Chapter 56 of the Code of Criminal Procedure, those who suffer bodily injury are. Yet both are frequently overlooked in a misdemeanor case. We often wrongfully believe that insurance covers all of their expenses and needs, but that is not necessarily true. Plus, insurance can't possibly cover the shaken peace and dignity (recognize that phrase?) of someone who comes bumper to bumper with an impaired driver. And although property-damage survivors are not victims by law, they can be a valuable tool in the prosecution and disposition of a case, as they were on the scene with the defendant.

Prosecutors and their staff must be diligent to identify these oft-overlooked victims and be willing to give them a voice. While it is clearly true we may not be able to get them everything they want or even deserve, what we must provide is the opportunity to be heard. Police reports and our office policies and procedures (both official and unofficial) must be studied carefully to avoid inadvertent injustice. Like burglary victims, these DWI survivors often have damages that are non-economic. The randomness and violence of impaired driving crashes often affects more than our bodies and automobiles.

The second issue is that some crashes have a whole bunch of victims. This is not unique to impaired driving cases, but it is an all-too-frequent event. Special care must be taken to include all of those harmed and all of the family members of those killed or seriously injured. While the statutes are helpful in sorting out who has statutory and constitutional rights, it remains axiomatic that prosecutors represent the people—all of the people. We sometimes fail here. When we do, it is unjust.

I have two suggestions. First, hold a meeting with everyone whom you can contact and certainly everyone who has contacted you—they should all be invited, and conduct the meeting at a point in the process where you can actually answer most of their questions. Let everyone hear you at once; sometimes prosecutors are unfairly criticized for saying things over the gossip party line. And remember that with many victims, there are many points of view. But having a chance to hear what the prosecutor has to say and to be seen and be heard helps people process their grief and emotional trauma. Trust is shattered in these most random of crimes, and by giving them a voice, the justice system helps to rebuild it. Again, we serve the truth, and what we do is transparent. Be careful not to violate privacy laws or due process, but be as open as you ethically can. The more they know and understand the process, the more apt they are to be on-board with your difficult decisions when there are evidentiary issues. Not everyone will be happy with you, but if that were your goal in life, you have already made a tragic career miscalculation.

At that meeting, create an e-mail list, and from then on out, send all basic communications to the people on that list. With modern technology, this is actually a time-saver. And nothing says "I care" like an e-mail from the local prosecutor's office. (I know that prosecutors care, but sometimes we need to show it.)

So many of us, day in and day out, prosecute DWI cases, and most never get an award or even a thank-you letter. But we know that because we do a hard job well, unknown members of our community will make it home one night safe and sound. That is why we do what we do. And on behalf of those folks who will never be the victim of an impaired driving crash, thank you. ❇

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A closer look at strangulation cases (cont'd)

cerned that my idea to call a "strangulation expert" wasn't enough to overcome the lack of visible injury that they may expect from a 15-minute-long strangulation. Luckily, the jury returned a guilty verdict on both counts, and the judge sentenced Brewer to 35 years in the penitentiary.

Having never called a strangulation expert before, I was eager to hear jurors' feedback, and I was surprised to find out that they had reached a guilty verdict on his hands as a deadly weapon within a few minutes. (It was the knife that held their deliberations up.) They also shared with me that had the expert not testified, they wouldn't have so quickly recognized his hands as a deadly weapon. With this feedback, I was encouraged that we could be successful in prosecuting a strangulation case without visible injury.

I've learned in the years since how to try cases that involve strangulation. They are tough cases, and I'm hoping this article will offer guidance on where to start.

Now a felony

In 2009, §22.01 of the Penal Code was modified to recognize family violence by strangulation or suffocation as a third-degree felony. In cases where a defendant has a prior family violence conviction, the offense is enhanced to a second-degree felony. Under the new law, the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood by applying pressure to the throat or neck (strangulation) or by blocking the nose or mouth (suffocation).[1]

This change in the law gives prosecutors a powerful new tool against abusers who strangle their victims. In the past, law enforcement often treated strangulation like a slap in the face, where only redness was present. With this change, law enforcement can now treat strangulation more in line with its serious nature. While the law was warranted, it has left most prosecutors with the difficulty of figuring out how to prove a felony-level assault beyond a reasonable doubt, without much evidence.

My background

I've been a prosecutor in Travis County for close to a decade and have been involved with family violence cases for much of this time. In late 2010, our office received a grant for a prosecutorial position dedicated to strangulation. I was assigned to this position, which allows me to give trainings in our community as well as prosecute cases and work with law enforcement. In a given year, I will typically be involved in over 400 felony strangulation cases. I am also responsible for staffing strangulation cases for law enforcement as well as reviewing files and presenting them to the grand jury.

Since 2011, I have reviewed more than 1,000 strangulation cases in Travis County and tried a variety of them (from misdemeanor assault to sexual assault and capital murder) to juries. I have spoken to dozens of victims, and three things have been constant—and a fourth often makes prosecution difficult or impossible. One, when asked what she thought was going to happen during the strangulation, the victim almost always responds, "I thought I was going to die." Two, the majority of the cases have no visible injury, or if officers documented anything, it was "slight redness" to a victim's neck not visible in a photograph. Three, offense reports often provide very little evidence or follow-up investigation of strangulation beyond the victim reporting to the officer, "I couldn't breathe." And fourth, the victim who was in such fear the night of the offense has often shifted into a much different witness by the time the case gets to the courtroom.

These observations reveal that prosecutors are handling cases involving a very serious crime with almost no evidence—or, at least, what *seems* like no evidence. As this article shows (I hope!), we in Travis County have had success with certain methods to strengthen our investigation and prosecution of strangulation cases, and here we share them with others to make these cases easier to present to a jury.

The danger of strangulation

I find people are often surprised by the statistic that 10 percent of violent deaths in the United States are attributable to strangulation, and in the majority of these cases victims were women.[2] Non-fatal strangula-

tion is an important risk factor for homicide in a domestic violence relationship. Victims of non-fatal strangulation are 700 percent more likely to become a victim of domestic homicide.[3] In Louisville, a study showed that in 2009, strangulation was the cause of death in three out of four intimate partner homicides. An abuser's willingness to strangle his partner correlates to other dangers as well. In a study of 133 homicides secondary to asphyxia in the Bexar County Medical Examiner's Office from 1985–1998, sexual assault was the motive in 66 percent of female victims of ligature strangulation and in 52 percent of those due to manual strangulation.[4] Although anecdotal, research looking at defendants who shoot law enforcement officers showed that one-third have also strangled an intimate partner. These kinds of statistics are unfortunately not all that shocking to the domestic violence community, which for years has used a history of strangulation as a predictor of lethality.

And although the (very welcome) change in the law has allowed us to charge the crime as a felony in a more consistent way, it did not give us guidance on how to prove the crime. The challenge has been how to successfully prosecute and proportionately punish such a dangerous crime with little to no obvious evidence and an oftentimes uncooperative or recanting victim.

In my experience, success in prosecuting strangulation has been three-fold. First, prosecutors must understand injuries and develop non-traditional evidence to show the jury. Second, we must train officers to gather that evidence at the scene—before a victim becomes uncooperative. Finally, we must call an expert to the stand to explain strangulation and interpret this non-traditional evidence for a jury.

Step 1: Understanding injuries

The biggest challenge in a strangulation case is often the lack of obvious injury and thus evidence. For years, the majority of my offense reports read simply, "The victim stated she could not breathe," with a short description of the defendant placing his hand or arm around the victim's neck. In some cases officers noted the victim had redness on her neck, which was usually photographed in a dark room or with the shadow of her chin covering her neck, making it difficult to show to a jury.

This observation is consistent across jurisdictions. In San Diego, California, a study of 300 cases revealed that most cases lacked physical evidence of strangulation and only 15 percent included a photograph of sufficient quality to be used in court as physical evidence of strangulation.[5] In half the cases, there was no visible injury and in another 35 percent, the injury was not sufficient to photograph. The lack of physical evidence caused both law enforcement and prosecutors to treat strangulation cases as minor incidents, like a slap to the face where only redness might appear. Relying on external visible injury as a gauge for how serious we should treat an assault is misguided. Even in fatal strangulation cases, there is often no evident external injury.[6] Unlike many other crimes where the aggravating factor is usually corroborated with physical evidence, we can't always *see* strangulation. There are no pictures of a bloody stab wound to show the jury or a gun to display during closing arguments. Strangulation is not so straightforward. In seeking a reduction or a dismissal, a defense attorney relies on this challenge and depends on a prosecutor's or the jury's lack of understanding about the crime.

Visible evidence

Some of the best evidence of strangulation comes in the form of post-mortem examinations (autopsies) where the tissues of the neck and the brain can be evaluated. Obviously in a non-fatal case we do not have the ability to gather such evidence to present to the jury. Instead we often depend on a superficial evaluation of the victim's skin that is done shortly after the strangulation. Though the majority of cases will not have any external visible injuries, it is important that a trained professional perform a thorough exam because many of these injuries can be small and easily overlooked.

For instance, a half-moon-shaped abrasion may exist on the back of the victim's neck, hidden under her hair if her hair is long. Though the mark may only be a few centimeters in size, it could corroborate a victim's account that the defendant's hands wrapped around her neck and could indicate the point where the defendant's finger dug into her skin. Vertical fingernail marks or scratches on the victim are more often associated with self-inflicted defensive wounds than a result of the defendant's hands

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around the victim's neck, but again, the existence of such marks can still corroborate the strangulation and aid a prosecutor in describing to the jury how brutal the attack was. Such markings may be present on the victim's neck or chest as she fought to pull a defendant's hands or fingers or a ligature from her neck. They may also appear on the defendant's face, chest, or arm as she claws at him out of panic.

Likewise, I often notice bite marks to the defendant. The victim may not even remember doing so, but victims often bite their assailants in an attempt to get them to release their grip. I find that if I have a good account of how he strangled her and I understand the positions of the defendant and the victim, the bite mark is usually consistent with how her head would contact his body. A bite mark can be on a defendant's forearm or bicep, usually when the strangulation is committed with an arm or his hands, and I've seen bites to the defendant's upper chest and shoulder, most often when the defendant is strangling her from behind with his arm. It is important to have a good description of how the strangulation played out so that the jury can see and understand why that bite mark is consistent with the victim's account. Rather than considering these injuries on the defendant as a weakness to the State's case, consider arguing to the jury the fear and panic the victim felt during the assault that made her react in such a primal way.

Bumps or injuries to the head are often overlooked because officers may not see them under a victim's hair, and victims may not know they exist. Head injuries happen when a suspect bangs the victim against the floor or a wall during strangulation. They can also corroborate a loss of consciousness if they occurred as a result of the victim falling to the ground. Other unexplained injuries, such as a twisted ankle, might also help to prove that she lost consciousness.

Other visible injuries to look for are swelling of the neck (edema), lips, or tongue. Again, such injuries may not photograph well, so it is important that they are well-described and documented by law enforcement or medical personnel. Bruising, usually caused from the pressure of the defendant's fingers or from a ligature, is sometimes present. The thumb generates more pressure than the other fingers, so singular thumb impression bruises are found more often than contusions showing a whole-hand grasp.[7] Often bruising does not develop immediately and is an important reason for follow-up pictures to be taken. At the scene, these injuries will be documented as redness to the neck.

Petechiae, which is the rupturing of capillaries (small blood vessels near the surface of the skin) is present in a very few cases. When petechiae is lacking, defense attorneys seem to want to hang their hat on its absence as evidence that no strangulation occurred. Petechiae occurs in moments where the jugular vein (which is closest to the surface of our skin and is thus obstructed with less pressure) is blocked and prevented from sending blood down to the heart but the carotid artery (which is deeper than the jugular vein and sends blood to the head) is open. This blockage of blood causes the capillaries to burst. This is significant because for petechiae to occur, some pressure was placed on a certain part of the victim's neck that occluded the jugular vein. In other words, petechiae is caused when only the most superficial part of the anatomy is blocked. This is not to say that the presence of petechiae isn't important—it certainly helps to prove strangulation in that it is evidence of impeding the blood flow of the jugular vein—but it can also support the argument that a struggle took place or that the suspect released and/or varied the pressure he used during the assault. At the same time, the absence of petechiae shouldn't be a concern for a prosecutor. Even in cases where petechiae might be present, it is easily missed as it sometimes presents itself as a single pin-point dot on the earlobe, in the eye, on the eyelid, or behind the ear. Like many other visible injuries consistent with strangulation, it is such a small injury that it is often overlooked and can be easily covered by freckles, dark skin, make-up, or lighting.

Tiffani Dusang, a forensic nurse examiner in Houston who has testified as a strangulation expert, explains that in her experience, strangulation is missed and misunderstood. It is missed because if we do not ask if the defendant strangled her, the victim most likely will not offer that information. This is primarily because strangulation is often part of a broader violent event such as domestic violence and sexual assault. The victims, who themselves do not understand the potential lethal outcomes of strangulation,

will not mention that strangulation occurred and even downplay serious symptoms such as difficulty breathing. This should be expected as the victims are focused on the here and now, such as the sexual assault, where their abuser is, or what is causing them the most pain at that moment.

Though it may sound strange, on more than one occasion I have heard a victim minimize and downplay strangulation and even refer to it as not being abuse, or that the abuser told her he wasn't abusing her because he was not hitting her. That attitude, combined with the likelihood that there are no serious markings as a result of a strangulation assault, all contribute to the victim minimizing the severity of a strangulation.

Non-visible evidence

Because so many of the visible injuries in a non-fatal strangulation case can be missed or misinterpreted, I have found that documenting other signs and symptoms is key to a successful prosecution, and to document them, we must be familiar with them. While this list is not exhaustive, these are some of the more common observations of what victims experience during and after strangulation.

Ask the victim about her breathing and if it was affected or if it changed both during and after the strangulation. For instance, did she experience rapid, shallow, or painful breathing? How would she describe how her breathing felt during and after the strangulation?

Other sensations can corroborate that her blood flow or airflow was impeded, so it is important to ask whether she experienced any other feelings during or after the strangulation: dizziness, nausea, headaches, or feeling disoriented or faint. Because some victims might experience symptoms during the actual strangulation and others once it is over, we need to ask about those time periods separately.

Did she have any physical response to the strangulation, such as coughing, urination, defecation, vomiting, or dry-heaving? I find that it is particularly important to not just ask about urination, but also to inquire about the urge to urinate or the loss of bladder control during, soon after, or in the days and weeks that followed the strangulation. I met with a victim a few months ago in preparation for trial. In this particular case officers had documented almost no signs of strangulation—not because they didn't exist, but because the officers didn't know what questions to ask. During my conversation with the victim, I asked about urination. She paused and told me that over the last several months, she had urinated on herself repeatedly. She told me she thought she had a urinary tract infection or a sexually transmitted disease and had even been tested for both at the doctor. She had no idea, nor did the doctor know to ask, that this was a result of the strangulation. The same victim remembered being nauseated for days after the strangulation but at the time assumed it was because of some medication she had taken. However, when I asked about it, she admitted that she had taken the same medication for 10 years and it had never before made her nauseated. Similarly, I met with another victim who, in response to my asking about nausea or vomiting, told me that she remembered being nauseated after the incident. She was able to recollect that feeling because she remembered being annoyed about it, thinking that the defendant must have gotten her pregnant. Never did it occur to her that it could be a result of the strangulation.

When we ask whether she blacked out or loss consciousness, a victim will often respond that she doesn't know or that she doesn't think so. In strangulation cases, experts have told me that if she isn't sure whether she blacked out, she probably did. I find that when the answer is anything other than a confident, "No, I did not lose consciousness," it is worth exploring. For instance, in follow-up interviews, law enforcement can ask her about any unexplained injuries (perhaps to the head, which would explain if she fell as a result of losing consciousness) or about any periods of time that she has forgotten.

Just as compelling are changes in the victim's voice or ability to swallow. Victims will sometimes report that it is painful or difficult to speak and may display a raspy or hoarse voice. A victim may be unable to speak or have to whisper as a result of the strangulation. She may experience neck tenderness or pain or it may be difficult to turn her head in the hours or days following the assault. Victims describe their throats as feeling scratchy and swollen and will often say that it felt like they had a sore throat. Sometimes they describe that it was painful to swallow or that it hurt to eat or drink. These symptoms are significant as they corroborate a

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strangulation that was so deep that it affected the victim's trachea (windpipe). To give you an idea of how deep the strangulation went, it takes only 4.4 pounds per square inch (psi) of pressure to occlude (block) the jugular vein and 11 psi to occlude the carotid artery. Compression of the trachea requires 33 pounds of pressure.[8] Therefore, any sign or symptom that relates to the airway supports the argument that the amount of pressure was even more significant and acts as corroborating evidence.

Additionally, I like to ask victims open-ended questions that they can answer in their own words. Doing so builds credibility, provides unique descriptions that are hard to make up, and allows a jury to better visualize the experience. I ask three main questions, and following those are some examples of answers that I've heard:

- "Did you experience any change or loss of hearing during or after the strangulation or suffocation?" (Often the victim couldn't hear anything or will describe her hearing as "muffled," "ringing," "gurgling," or "it went silent.")
- "Did you experience any change or loss of vision during or after the strangulation or suffocation?" (Frequent responses are that "it went black or white," that she "saw stars," her vision got blurry, "the room closed in," or she experienced "tunneling" of her vision.)
- "How did your body or head feel during and after the strangulation or suffocation?" (Common phenomena include feeling "no strength"; "like a noodle"; wooziness; limpness; throbbing; "wavy"; "like my eyes were popping out"; that "my head felt big and red"; a tingling sensation in lips, arms, and legs; and that "my head felt hot."

Finally, I find that answers to the following questions provide both insight and inherent credibility to the case:

- What did the suspect say during the strangulation?
- Describe the suspect's demeanor during the strangulation.
- Describe how the suspect's face looked during the strangulation.
- What made the suspect stop?
- What did you think was going to happen during the strangulation?

Answers to these questions are usually incorporated into my closing argument and provide an element of credibility to the severity of the assault and how the victim felt that night. Later, when she recants or claims that he was just restraining her or he claims self-defense, answers to these questions support our argument that what she said the night of the offense, when she was scared enough to call the police, is a more accurate account of the truth.

Ideally, law enforcement would have asked these questions and the victim's answers are included in the offense report upon prosecutors' receipt of the case. However, this is rarely the case, especially in a community without strangulation-specific training for patrol officers.

Almost two years ago, I tried Vondrick Ware for strangulation. After reading the offense report, I had no evidence of strangulation other than the victim telling law enforcement that Ware put his hands around her neck and she couldn't breathe. Officers observed no visible injury to corroborate the strangulation and spent about 15 minutes at the scene. The detective did little to no follow-up on the case, and I did not call them to testify to the jury. Throughout the years, the defendant had been arrested on many family violence charges in numerous states against a variety of victims. In each case charges had been dismissed at the victim's request or because she was uncooperative. Luckily, by the time the case went to trial, our victim, Sandra Smith (a pseudonym), was cooperative and it was finally time for Ware to face justice.

During trial preparation, Sandra and I talked about the assault and specifically about signs and symptoms she recalled experiencing during and after the strangulation. By the time we ended our conversation, she had described two other strangulation incidents in the two weeks preceding our charged offense. After discussing all three incidents, she was able to describe at least 20 signs and symptoms consistent with strangulation and that corroborated the assault (i.e., she couldn't swallow, her vision went blurry, she felt weak, sound was muffled, she felt woozy, etc.). None of this evidence had been detailed in the offense report, as the victim had not been asked.

I quickly re-indicted the case, adding a second count of continuous family violence alleging the other three assaults (two strangulations and one misdemeanor assault) she had described to me during our conversation. (It is often a good strategy, when appropriate, to include a second count to a strangulation indictment that alleges continuous family violence because it allows the jury to gain some context into an otherwise very limited, complex dating or family relationship full of dynamics and

influences reaching beyond just one alleged incident.) In this case, although she had never reported additional incidents and they took place out of county, she had taken pictures on her phone and still had text messages he had sent her between the assaults (in many of which he apologized and acknowledged his behavior and included promises never to hurt her again). In this case, we called a local paramedic (whom we had trained on strangulation) to testify as a strangulation expert. The jury convicted Vondrick Ware, and he was sentenced to 6½ years in the penitentiary.

Step 2: Training officers to gather evidence

Under the statute, there must be a family, household, or dating relationship between the victim and defendant to charge third-degree strangulation. The assault typically occurs in the privacy of a home where there is no third-party witness. Often it also occurs within the context of a domestic violence relationship, carrying along with it all the complicated dynamics of power, control, fear, and recantation. Because of this complexity, it is vital that responding officers are trained to ask the right questions regarding the signs and symptoms of strangulation and documenting any physical evidence at the scene.

In some cases, the victim is cooperative and we can follow-up with questions. However, prosecutors aren't always that lucky, and it is paramount that visible injury, signs and symptoms of non-visible injuries, and details about the strangulation are investigated at the scene when law enforcement is initially called to respond.

For that reason, I worked with the Austin Police Department to add a strangulation supplement to the assault victim statement (AVS). (A copy of that form is at www.tdcaa.com in the journal archive. Just look for this story.) The AVS is a form that responding officers fill out on family violence calls and has been used on the street for many years. When the department revamped the AVS, we added a strangulation supplement that includes the questions I've mentioned in this article, plus checkboxes for signs, symptoms, and injuries, and a diagram of the victim's neck at different angles. It enables officers, who may not have advanced knowledge about strangulation, to ask the questions that will give prosecutors the answers we need to prove our case. While officers may or may not know the significance of every question, they have gathered the evidence we need. This supplement was introduced a few months ago and has significantly added to the quality and quantity of evidence that is gathered on a strangulation call. The advantage of the supplement for patrol officers is that they don't have to memorize the training; they have the supplement on hand to jog their memory.

I regularly teach strangulation at our cadet academy, and in October, for the first time I was able to walk cadets though the actual strangulation supplement they would be using and explain why it was so important to ask and document things they observe in detail. In the training I discuss the unique reactions of trauma victims and how strangulation, despite its lack of external injury, is still a traumatic experience. I point to a victim's common answer ("I thought I was going to die") to questions on the strangulation supplement ("What did you think was going to happen?") as a consideration in evaluating the level of trauma she had experienced, and then I talk about how she might react to trauma. I discuss the phases that a victim goes through during strangulation: disbelief (similar to shock, where it doesn't immediately register what is occurring and the danger she might be in), belief (where she quickly accepts the intense danger she is experiencing), primal (where she starts fighting out of instinct to save her life), resignation (she realizes that she is about to die), and finally thoughts of family and children. I describe how memories are recorded by a person under normal conditions (in the front cortex, which controls abstract reasoning and complex thinking) and compare it to a person experiencing trauma (where the frontal cortex slows down and the limbic system takes over and responds from a survival standpoint). Extracting traumatic memories is different from normal memories; with traumatic situations, it is better to ask sensory questions rather than about the who, what, where, when, why. I then point to various questions throughout the strangulation supplement which use this method to question a victim on a strangulation case (i.e., asking the victim to describe how things felt, sounded, etc.).

"As a power and control tactic, strangulation is tremendously effec-

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tive for abusers. Victims may believe they are being killed and, as a result, feel deeply and justifiably terrified both during the incident and for a long time afterwards."[9] Strangulation epitomizes the power dynamic that exists in domestic violence cases because the physical (and criminal) act sends a clear message to the victim that the abuser has the power to take the victim's life "with little effort, in a short period of time, and in a manner that may leave little evidence of an altercation."[10]

During my training, I also point out the usefulness of obtaining an explanation of how the strangulation occurred and what was used to strangle the victim: Did he use one hand? Two hands? His forearm? His foot? How long was she strangled, and how many times did he strangle her? I find it helpful to ask, on a scale of 1 to 10, how much pressure he used. All of the questions related to signs and symptoms should be asked at this time. Ideally, this type of questioning would take place again a few days later after the victim has had some time to rest and calm down. However, given the nature of domestic violence, I have found that once the officer leaves, it is likely that the victim's cooperation will end, so it is critically important for the officer to gather whatever evidence is available before leaving.

Despite the importance of evidence gathered at the scene, for those cases where victims are cooperative, it is important to have a follow-up investigation. Many of the symptoms that I have listed do not develop immediately, and many of the physical signs may not manifest for some time. I do not intend that the supplement replace a follow-up investigation. I've also found that working with people in the community, from the paramedics who respond to the scene and evaluate the victim, to the emergency room doctors and nurses who may treat her, strengthens the evidence. Anyone whom the victim may encounter should be educated about strangulation.

Step 3: Calling an expert

One of the first strangulation cases I tried before a jury had one of the best visible injuries I have ever seen in a strangulation case, a hand mark. Despite that bruising, the jury convicted the defendant of a lesser misdemeanor assault, not the third-degree felony of strangulation. While there were some other complications with the case, including a previous mistrial, a very uncooperative victim, and missing witnesses, we learned a valuable lesson. When we spoke to the jury about the strangulation, they told us that they didn't know what evidence specifically supported "impeding blood flow or airflow." They were right; there was almost none.

So how do we pass this knowledge of strangulation on to the jury, and how do we show them evidence that's hard to see? Three things have proven to be quite effective, and I will never try another strangulation case to a jury without efforts to include all three. First, start the education in voir dire. Second, use charts and diagrams. Third, end with a strangulation expert testimony.

Voir dire

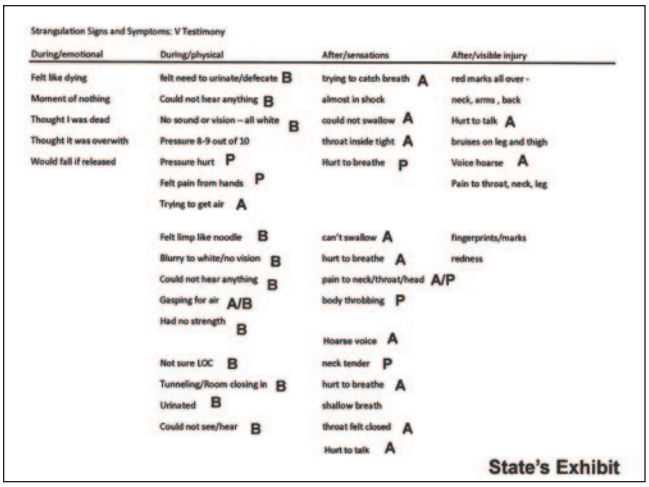
In voir dire, I always do two things. First, I try to get the jury to understand pressure and the neck's sensitivity to it. I will talk about how even a gentle touch on the neck can be uncomfortable, and I usually press my neck, which in turn makes potential jurors press on their own necks. If I can, I talk about the amount of pressure in an adult male handshake (80–160 psi) as a comparison to the amount of pressure it takes to occlude a vein or artery, which is significantly less. Starting this way makes jurors comfortable with the idea of there not being any visible injury.

I'll usually ask them questions about the change in the law and why strangulation is more serious than a slap in the face, for instance. At this point, I will ask if there is a juror who has been in the military or law enforcement or has been involved in mixed martial arts. On every panel I've had, there is someone who fits this category who can talk about being strangled. (I prefer this approach, rather than asking for someone who might have been a victim of strangulation in a personal way.) I have them describe the feelings of helplessness and talk about the sensations (visual, auditory, in the head, in the body) they felt during and after the strangulation. I usually end by asking them whether they had any visible injury as a result of that strangulation. The answer is usually no or "slight redness." What is nice is that the person offering all this good information (which will likely match up to your victim's documented signs and symptoms) is usually a big, tough guy.

Use charts and diagrams

Then I start the trial. Any witness who can describe a sign or symptom

in any way, I call to the stand and jot down the sign or symptom in a chart. (See an example of one such chart below.) Perhaps the 911 call



Strangulation Signs and Symptoms: V Testimony

During/emotional	During/physical	After/sensations	After/visible injury
Felt like dying	felt need to urinate/defecate B	trying to catch breath A	red marks all over -
Moment of nothing	Could not hear anything B	almost in shock	neck, arms , back
Thought I was dead	No sound or vision -- all white B	could not swallow A	Hurt to talk A
Thought it was overwith	Pressure 8-9 out of 10	throat inside tight A	bruises on leg and thigh
Would fall if released	Pressure hurt P	Hurt to breathe P	Voice hoarse A
	Felt pain from hands P		Pain to throat, neck, leg
	Trying to get air A		
	Felt limp like noodle B	can't swallow A	fingerprints/marks
	Blurry to white/no vision B	hurt to breathe A	redness
	Could not hear anything B	pain to neck/throat/head A/P	
	Gasping for air A/B	body throbbing P	
	Had no strength B		
		Hoarse voice A	
	Not sure LOC B	neck tender P	
	Tunneling/Room closing in B	hurt to breathe A	
	Urinated B	shallow breath	
	Could not see/hear B	throat felt closed A	
		Hurt to talk A	

State's Exhibit

can corroborate the victim's raspy voice or coughing. The EMS records and medical records, which are usually admissible even if the victim is uncooperative, often contain a few signs and symptoms. The observations of the responding officer or the testimony of the victim herself all assist in this chart. Even if the victim is describing the same injury, if she uses different words or describes it in various ways, I add it to the list. I offer the chart into evidence. After all the witnesses have testified, I print this chart out and save it for expert testimony.

Calling an expert

Then I call a strangulation expert. A strangulation expert is essentially a medical professional who can tie all the signs and symptoms up into a tidy package of evidence for the jury. If a doctor, nurse, or paramedic treated the victim, I usually start with them because they are already a fact witness. If I don't have one of these people, I reach out to someone in our community with whom I have worked and who has been willing to read articles relevant to the topic. I've been lucky to have a paramedic, who was initially a fact witness on a case, be willing to come in and testify as an expert in cases in which he wasn't directly involved. I've also called a deputy medical examiner and reached out to our SANE nurses who perform the sexual assault exams and had them testify. Most important is to find people in the community who are willing to work with you and to educate them. I've recently connected with the medical director at one of our hospitals who agreed to let me use her as a sounding board and give me access to the hospital's monthly meeting where I spoke on the topic of strangulation to the emergency-room staff. I was able to connect with the doctors and nurses and better educate the medical community who handle such patients about things they could do in their evaluations that would be helpful to a prosecution. The bonus in educating the medical community is two-fold. First, because this evaluation often takes place within hours of the assault, the victim is likely still cooperative. Second, the victim will probably be more cooperative in discussing signs and symptoms for the purposes of medical help as opposed to criminal prosecution. And most of these records are admissible hearsay.

At the most recent cadet training, I had a cadet approach me and say that he was also a paramedic and was ashamed that he had been so cursory in his examinations of strangulation victims. I explained that it was understandable given the misunderstanding of strangulation even in the medical community. We agreed he could help in the future by being willing to testify as an expert for me in court.

After qualifying the expert, I first have them talk about the difference between strangulation and choking. "Choking" is the internal blockage of the windpipe with a foreign object, such as food, whereas "strangulation" is the external obstruction of another's breathing or blood circulation either manually or with the assistance of a ligature or other device. Second, I have them discuss the different kinds of asphyxiation, both strangulation (manual, ligature, and hanging) and suffocation. Both are covered by the Texas Penal Code but are differentiated by the manner and means element of "applying pressure to the person's throat or neck" (strangulation) compared to "blocking the person's nose or mouth" (suffocation).[11] Ligature strangulation is strangulation with a cord-like object (such as an electrical cord or a shoelace). Manual strangulation is usually done with the hands, though I often see abusers who use their forearms, knee, or foot.

Third, I have them give a description of the anatomy of the neck and brain and often introduce a diagram so the expert can document blood flow movement and the location of different anatomy (veins,

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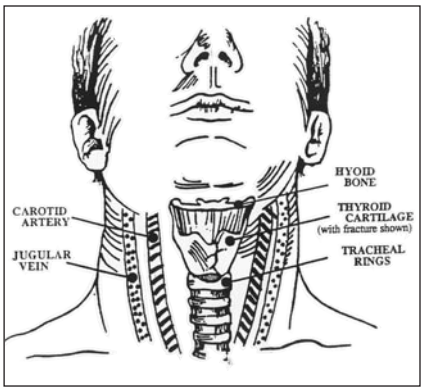
arteries, trachea, hyoid bone, etc.) from the most superficial exterior structures to the most interior. (See the illustration below.) At this point



they usually discuss how little soft tissue exists around the neck and how vulnerable those structures are to external pressure. Fourth, as a point of contrast, I have them discuss blunt force trauma and the types of visible injuries that arise from acts like hitting someone with a bat and how bruises are created. I then have the expert describe how strangulation is different in that it takes very little pressure to occlude the structures around the neck. Ideally, the expert can quote the numbers referring to the amount of pressure it takes to occlude blood flow and air flow (because it is in a medical journal, they are likely to do so if they are adequately prepped). This line of questioning allows the expert to discuss that there usually isn't visible injury in a strangulation case, and it gets the jury comfortable with the fact that this is not out of the ordinary. Often, the expert then discusses soft tissue and bruising and how there isn't much soft neck tissue to be bruised.

Fifth, I have them talk about death from strangulation and discuss the physiology of a fatal strangulation. I make this point for a variety of reasons that have proven to be effective for a jury. It highlights the danger and lethality of what has occurred (i.e., that she could have very easily died as a result of this particular assault) and that what separates life from death is a very thin line. It also creates a pathway to discuss how even in homicide cases where the cause of death is strangulation, there is often no external visible injury.

Sixth, I have them give an example of pain that is non-visible, such as when you hit your funny bone and it burns—but there is no bruise or visible injury. Seventh, we talk about symptoms and signs of strangulation. I usually go through petechiae (whether it exists in this case or not, I have the expert describe what it is, when it occurs, and how often it occurs) and other visible injuries first. Then I discuss the signs and symptoms that aren't considered "visible injuries," such as the change in a victim's vision or urination, and how the act of strangulation can cause that symptom. I usually have them identify whether a particular symptom is a result of lack of blood flow or lack of air flow. I go through every single symptom that I have charted during the trial and have him describe and connect it to strangulation. Finally, I pull the chart out and ask him, symptom by symptom and sign by sign, whether it is evidence of 1) lack of airflow, 2) lack of blood flow, or 3) pain. If it is evidence of impeding airflow, I have the expert mark an "A" next to the symptom; for blood flow, I have the expert put a "B" next to the sign; for pain, I have him put a "B/I" for "bodily injury." (A transcript of one such direct examination is on www.tdcaa.com for readers to check out.)

Jury feedback

After conviction on a lesser-included in the case with finger-mark bruising on the victim's neck, we listened to the jury's feedback on needing evidence of impeded blood and breath flow, and in the next trial, we employed the method above and it was effective. The chart listing the symptoms and the expert's identification of which symptoms correlate as evidence of the different elements, combined with the expert witness testimony, spells it out for a jury. Just like in child sex-assault cases where experts can testify to how common delayed outcry is, calling an expert to explain the absence of visible injuries in a strangulation case makes the jury feel comfortable with convicting a defendant without much visible evidence. The chart and the signs and symptoms become the evidence, and the expert gives it credibility and provides understanding.

I often hand out my email address to jurors and ask them for their feedback on the case and our use of experts. I like to know what helped them with a conviction on the case. Here are a few comments that I've received since we have used the formula described above.

- "[The paramedic] was an awesome witness for you. … His ability to explain the anatomy of the neck and what makes up strangulation

was incredibly helpful in understanding the components of the case that you had to prove. When you were able to match [the paramedic's] comments to what the victim described experiencing, you buttoned up the State's case."

- "Both the paramedic and the social services expert played key roles in our decision. The paramedic provided an invaluable link between the testimony of the witness and the nature of the assault illustrated by connecting the symptoms with the causes. The social services expert drew a clear connection between the profile of an abuser in an abusive relationship and the actions that occurred in the case. The connections established by both of these people were instrumental in validating what we already knew at that point. It really served to shore up any reservations."
- "I found the testimonies of the two expert witnesses to be very helpful. The young man from EMS was very enlightening on the human anatomy. His descriptions of how strangulation affects the human body and what are the common symptoms the victim may experience was very helpful. That witness cemented your case in the jurors' minds from what I observed."

Conclusion

Ultimately, the key to successfully prosecuting strangulation cases is to reach out to the many members of our community who may interact with victims of this crime to educate and train them to overcome common misconceptions. We hope to minimize the dependence we have on victims testifying against their abusers and in turn reduce the pressure, burden, and danger on the victim as a result of the legal process. At a recent conference, I heard great advice: "Don't make a domestic violence victim be the witness to her own crime." Obviously, there are certain impositions we have to make, but ideally, we can learn to prosecute these cases in a less victim-dependent way. Because the reality is that in domestic abuse cases, today's victim is very likely to be a character witness for the defense tomorrow. ❇

Editor's note: The website www.strangulationtraininginstitute.com has an online training for officers as well as many resources for prosecutors. And, the author will be presenting at the Crimes Against Women conference in Dallas March 31–April 2nd. Online registration is now available at www .conferencecaw.org.

Endnotes

1 Texas Pen. Code §22.01(b)(2)(B). For easier reference, "strangulation" will be used as the general term in this article unless otherwise noted.

2 Gael B. Strack, J.D., George E. McClane, M.D., Dean Hawley, M.D., "A Review of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues", *The Journal of Emergency Medicine*, Vol. 21, No. 3, pp. 303-309 (2001).

3 *The Journal of Emergency Medicine*, 2009, 35.4. Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women.

4 Di Maio VJ: Homicidal asphyxia. *Amer. J. Forens. Med. Pathol.* 21(1):1-4, March 2000.

5 "A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues," Gael B. Strack, JD, George E. McClane, MD and Dean Hawley, MD, *The Journal of Emergency Medicine*, Vol. 21, No 3, 2001.

6 Dean A. Hawley, M.D., Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults.

7 *Id.*

8 DiMaio VJ, DiMaio D. Asphyxia. In: DiMaio VJ, DiMaio D, eds. *Forensic Pathology*. 2nd Ed. Boca Raton, FL: CRC Press; 2001: 229-277.

9 Strangulation and Domestic Violence: Important Changes in New York Criminal and Domestic Violence Law. November 19, 2010. Published online by the Empire Justice Center by Amy Schwartz.

10 New York's 2010 strangulation bill, A.10161-a (Lentol); S.6987-a (Schneiderman).

11 Texas Pen. Code §22.01(b)(2)(B).

2013, the year of the writ apocalypse

Legislative creation of Art. 11.073 and Court of Criminal Appeals changes to TRAP Rule 73 made for some upheaval in the usually calm writ world. Here's how to navigate these new waters.

2013 was an eventful year for the writ world. First, the Texas Legislature created article 11.073 applications for writ of habeas corpus ("11.073 writs"), providing relief for new science claims. Second, the Court of Criminal Appeals (CCA) announced major changes to TRAP Rule 73, which governs article 11.07 applications for writ of habeas corpus ("11.07 writs"). With these changes, the district clerk's offices are losing discretion, the trial courts have a new deadline, and the State may or may not have to include a Certificate of Compliance in its responses. Now is definitely an exciting time to be an appellate prosecutor! (How often do we get to say that?)

By Steven W. Conder
Chief, Post-Conviction Writs and DNA, and
Andréa Jacobs
Post-Conviction Writs and DNA, both of the Tarrant County Criminal District Attorney's Office

In reality, there has been very little change to the way post-conviction writs have been processed since the inception of the Code of Criminal Procedure in 1965. The two biggest changes have occurred in the last 15 years: the introduction of the 11.07 writ application form in 2001 and the creation of article 11.072 community supervision writs in 2003. Absent a few modifications to the 11.07 application form in 2005, 2007, 2011, and 2013, the rules of writs have sat stagnant. Until now.

Article 11.073 writs

The new 11.073 writ (nicknamed the "junk science law") became effective on September 1, 2013. It governs post-conviction claims of new relevant scientific evidence.

Is the creation of 11.073 more noteworthy than 11.072?

Yes and no. From a relief standpoint, article 11.073 is more important because it provides a new vehicle for relief for the burgeoning field of exculpatory scientific evidence claims. The legislature created article 11.073 to address concerns that past convictions should be re-evaluated in light of new scientific understandings and discoveries. Cases where these arguments have been made include in *Ex parte Robbins*,[1] (asphyxia), *Ex parte Henderson*,[2] (head trauma), and the Cameron Willingham case (arson).

Article 11.073 treats new, relevant, scientific evidence similar to "newly discovered evidence" of actual innocence. In a *Herrera* actual innocence claim, an applicant must show:

1) by clear and convincing evidence that
2) newly discovered evidence
3) is affirmative evidence of innocence and that
4) no rational juror would have found him guilty had it been presented to them.[3]

In an article 11.073 writ, an applicant must show:

1) by a preponderance of the evidence that
2) new relevant scientific evidence admissible under the Texas Rules of Evidence at a trial held *on the date of the application*,
3) was not available to be offered by the convicted person or contradicts scientific evidence relied on by the State, and
4) if the new scientific evidence had been presented at trial, he would not have been convicted.[4]

The primary differences between article 11.073 and the *Herrera* standard involves the burdens of proof: preponderance of the evidence versus clear and convincing evidence, and would not have been convicted (only one juror would not convict) versus no rational juror would have found him guilty (all jurors would not convict).

How does article 11.073 change the State's practice?

From a "How does the State respond?" standpoint, the only difference between 11.073 writs and

11.07, 11.071, and 11.072 writs is the name. Article 11.073 requires the applicant to file the application "in the manner provided by Article 11.07, 11.071, or 11.072."[5] Therefore, the format of the State's response need not change.

However, due to the nature of the claims, an 11.073 writ will more likely require expert consultation than an 11.07 or 11.072 writ. Prudently, article 11.073 does not limit the term "scientific evidence." It is not bound by what science we currently know. This also means that we cannot prepare or bank canned responses in anticipation of the next scientific claim. The best practice will be to be flexible and prepared to get extensions and consult or hire an expert as the need arises.

TRAP Rule 73

On December 11, 2013, the CCA finalized major changes to Rule 73 effective January 1, 2014. These changes affect every level of the 11.07 writ process.

For district clerks, the rule changes remove any discretion regarding compliance with the application form. If an applicant files an 11.07 writ, the district clerk shall file it.[6] Even if the writ is not filed *on the form,* it appears that the district clerk must process it.[7] Only the Court of Criminal Appeals may dismiss non-compliant applications.[8]

This change puts the dismissal of 11.07 writs for non-compliance in an uncomfortable gray area. On one hand, we are probably not going to see fully litigated, meritorious applications dismissed for non-compliance. On the other hand, it will be difficult to know when the CCA will dismiss the applications. Will the court dismiss writs when the trial court recommends dismissal, or will those be remanded back for litigation? Will the court dismiss for non-compliance fully litigated applications that have no merit? Or will the judges consider only those writs when the State concedes and trial court recommends relief, like in *Ex parte Golden*?[9] Only the CCA knows for sure. In *Ex parte Golden*, the court noted as follows:

> [W]e want it made clear that our holding today should not be interpreted as granting future habeas applicants carte blanche to ignore applicable pleading requirements. Our willingness in this case to address the merits of applicant's claim is grounded on the particular facts of this case: first, the State has not moved to dismiss applicant's application on the ground it is unsworn; second, the State concedes applicant is entitled to relief; third, the trial court has made relevant fact-findings; and fourth, there is adequate proof in the record to support applicant's claim.[10]

For the applicant, the rule changes modify the application instructions and include more pages per ground. More significantly, an applicant's memorandum of law must conform to new rules of word and page limit, typeface, and include a certificate of compliance certifying the word count (if computer generated).[11] It appears that the word and page limits apply to all memoranda combined and not individually.[12] However, as written, these rules do not apply to the State's responses (more on this below).

For the trial courts, the rule changes impose a time limit for resolution of 11.07 claims.[13] Article 11.07 does not place a time limit on the trial court.[14] Before these changes, once the trial court signed an Order Designating Issues (ODI) within 20 days of the State's deadline, there were no further deadlines. The lack of a firm deadline has created concerns that some trial courts were taking too long to resolve 11.07 writ claims.

The trial court will now have only 180 days from the date the State receives the application to resolve the issues.[15] On the 181st day, the district clerk is required to send the application to the CCA unless the CCA has granted the trial court an extension.[16] Put simply:

- The State still has 15 days to respond.[17]
- The trial court still has 20 days from the State's deadline to designate the issues.[18]
- The trial court has 145 days (less than five months) to order affidavits and/or hold a hearing, order proposed findings of fact/conclusions of law, and resolve the issues.

Because this is a hard and fast "lose jurisdiction" kind of deadline, the State should also calendar the 180 days to make sure there are no missed opportunities.

What 11.07 writs do these changes apply to?

The easy answer is all applications filed on or after January 1, 2014. But what about applications filed before January 1, 2014? Well, that answer is unclear, and it's a source of confusion.

Under the new rule changes, the district clerk must now send all ODIs to the CCA once signed by the

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trial court.[19] Two CCA inquiries have yielded diametric responses: that district clerks must send down all ODIs in pre-2014 cases pending on January 1, 2014; and that the 180-day limit will not apply to pre-2014 cases (but those writs will still be subject to petitions for writ of mandamus).

But it is likely that once applicants realize the rule changes, they will be filing petitions for writ of mandamus in older cases to get them to the CCA either way.

It is unlikely that the new 180-day rule will apply to pending pre-2014 writs, but if it does, here are the two possible scenarios:

1) All 11.07 writs over 180 days old must go to the CCA on Thursday, January 2, 2014; or

2) the clock for all outstanding 11.07 writs will start on January 1, 2014, and those writs must go to the CCA on Monday, June 30, 2014.

Either way, the CCA would be inundated with hundreds (if not thousands) of 11.07 writs on one day. It is unlikely that the CCA will choose this path, but such a requirement would get the old 11.07 writs moving.

Effects on the State

With the inclusion of TRAP Rule 73.3, the State is in for big changes. The good news is that "[m]atters alleged in the application not admitted by the State are [still] deemed denied."[20] The proceeding will still not be affected by the State not filing a response. However, if the State chooses to respond, there are some differences.

As stated above, an application will not automatically be dismissed for non-compliance.[21] If your practice is to move to dismiss an application for non-compliance without considering the merits of the case, you may want to rethink it. That being said, there are now two more ways an application may be dismissed: 1) if a ground on the application form goes beyond two pages or 2) the memorandum of law goes over the word/page limit without a trial court finding of good cause.[22] Our plan in Tarrant County is to look at the application on the merits, and if there is no question, based on the application, that he is not entitled to relief, we will move to dismiss it. For example, if the applicant files a non-compliant application and alleges ineffective assistance of counsel because counsel failed to investigate *but* does not present any affidavits, evidence, or specific information that counsel would have discovered had he done more investigation, we will move to dismiss it as a non-compliant application. But like our past moves to dismiss applications that were not on the proper 2011 form, we are prepared for the CCA to remand the writs for resolution.

As of December 11, 2013, the CCA clarified that the formatting requirements placed on the applicants' memoranda will also apply to any State's responses.[23] These changes include:

- 15,000 words (for computer-generated) or 50 pages (if not computer generated) not including appendices, exhibits, cover page, table of contents, table of authorities, and certificate of non-compliance;
- 14-point typeface (12-point typeface for footnotes); and
- certificate of compliance certifying word count.[24]

While the rule refers to "any response by the State," we in Tarrant County are proceeding with the understanding that this refers to any filing, including any proposed findings of fact and conclusions of law.

One small rule change is that both parties are now given 10 days from the date they receive the trial court's findings of fact and conclusions of law to file objections.[25] While the trial court may order the district clerk to transmit the record to the CCA within the 10 days, the CCA will allow the parties that time to object. Likewise, neither party can delay the proceedings by filing objections late. And though the rule does not specifically state it, the fact that the 10 days is listed under the duties of the district clerk, one can conclude that the objections are to be filed with the trial court and not directly with the CCA.

Finally, even if it looks like the trial court will not be resolving the issues within the 180-day limit, try to file all of your responses and proposed findings of fact before that deadline. While the trial court may not make recommendations to the CCA, the CCA still "may deny relief based upon its own review of the application."[26] If possible, take the opportunity to show the CCA why the 11.07 writ should be denied. Regardless of the trial court's involvement, never give up the chance to argue for the finality of a conviction.

Post-script

Ultimately, like any other change in the law or the rules, only time will

tell. We don't know how many 11.073 writs will require serious investigation or lead to overturned convictions. And while the CCA recently clarified whether the new formatting requirements of the application would apply to the State's responses, we hope that January 1, 2014, will bring some answers as to how the new rules will (if at all) apply to old writs.

As full-time writ prosecutors, we are available to answer any questions you may have regarding this topic and any clarifications provided by the CCA. ❇

Endnotes

1 360 S.W.3d 446 (Tex. Crim. App. 2011).

2 384 S.W.3d 833 (Tex. Crim. App. 2012).

3 See *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (citing *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993)).

4 Tex. Code Crim. Proc. art. 11.073(a), (b).

5 Tex. Code Crim. Proc. art. 11.073(b)(1).

6 Tex. Rules App. Proc. 73.2; 73.3.

7 Tex. Rules App. Proc. 73.2; 73.3.

8 Tex. Rules App. Proc. 73.2.

9 991 S.W.2d 859 (Tex. Crim. App. 1999).

10 *Id.* at 862, fn. 2.

11 Tex. Rules App. Proc. 73.1.

12 Tex. Rules App. Proc. 73.1(d).

13 Tex. Rules App. Proc. 73.4.

14 Tex. Code Crim. Proc. art. 11.07 §3(b), (c).

15 Tex. Rules App. Proc. 73.4.

16 Tex. Rules App. Proc. 73.3(b) (5), 73.4.

17 Tex. Code Crim. Proc. art. 11.07 §3(b).

18 Tex. Code Crim. Proc. art. 11.07 §3(c).

19 Tex. Rules App. Proc. 73.3(b) (1).

20 Tex. Code Crim. Proc. art. 11.07 §3(b).

21 Tex. Rules App. Proc. 73.2.

22 Tex. Rules App. Proc. 73.1(d).

23 Tex. Rules App. Proc. 73.3.

24 Tex. Rules App. Proc. 73.1(d)-(f).

25 Tex. Rules App. Proc. 73.3(b) (2).

26 Tex. Rules App. Proc. 73.5.

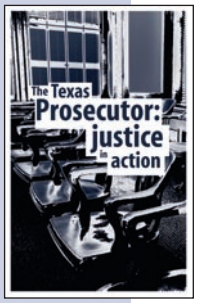
News Worthy

Electronic versions of the CCP and PC available

Two of TDCAA's code books, the 2013–15 Code of Criminal Procedure and Penal Code, are now available for purchase from Apple, Amazon, and Barnes & Noble (for iPads, Kindles, and Nooks, respectively). Because of fewer space limitations in electronic publishing, these two codes include both strikethrough-underline text to show the most recent legislative changes and annotations. Note, however, that these books contain single codes—just the Penal Code and Code of Criminal Procedure—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files. ❇

Prosecutor booklets available for members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at sarah.wolf @tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇



Investigating medical child abuse

It is vital that law enforcement conduct additional investigation in these horrible cases of abuse. Here's where to start when one of these unusual cases comes across your desk.

By Michael C. Weber
Investigator in the Tarrant County Criminal District Attorney's Office

Medical child abuse occurs when a child receives unnecessary and harmful or potentially harmful medical care at the behest of his caretaker.[1] Many refer to this as Munchausen Syndrome by Proxy. As a law enforcement officer, that term was familiar to me, but only from movies and television shows.

That changed shortly after I started at the DA's office when the chief attorney in the Crimes Against Children Unit asked me to investigate an allegation of medical child abuse. Upon completion of that investigation, I approached the chief attorney and explained that a regular detective with 20 or so cases on his caseload would have a very tough time giving this type of case the attention it deserved, and I asked if I could be assigned any future cases. She agreed but informed me that in her eight years of experience in the unit, there had never been another law enforcement referral for medical child abuse.

That was in the early spring of 2009. Since then, I have investigated 12 reported cases of medical child abuse, with four resulting in criminal prosecution of the alleged offender (three convictions and one case pending trial), one referred to an out-of-state jurisdiction because all of the injuries (surgeries) had occurred outside Texas, and one still under active investigation. The four cases that were prosecuted were all reported to Child Protective Services (CPS) by attending physicians at Cook Children's Hospital in Fort Worth. In each case, the offender was the child's mother. The father was either completely uninvolved in the child's medical care or not present in his life.

I have learned several effective techniques through the investigation of these very complicated criminal cases that establish not only probable cause but also proof beyond a reasonable doubt, and I share them with other investigators and prosecutors in the hope that they'll be of assistance.

This is child abuse

The first thing that we must understand is that this is child abuse. Medical child abuse is not a mental health issue, nor is it a "syndrome" from which the defendant suffers. It is a crime, and it is child abuse. Law enforcement, especially criminal prosecutors and investigators, need to understand that anytime they receive a report of Medical Child Abuse, Munchausen Syndrome by Proxy, Factitious Disorder By Proxy, Pediatric Condition Falsification, or Caregiver-Fabricated Illness in a Child, they are receiving a report of child abuse. All the above names mean the same thing.

What doctors can (and can't) tell us

Let's start with comparing medical child abuse to abusive head trauma. In both cases, law enforcement relies heavily on medical professionals to provide the diagnosis of abuse. With head trauma, law enforcement officers rely on doctors to tell us that a parent's explanations for a child's injuries at the time of treatment are inconsistent with the injuries. Law enforcement also relies on doctors to diagnose the closed head injury as abuse. In medical child abuse, law enforcement depends on doctors to tell us that whatever symptoms the parent is claiming are either not confirmed by medical professionals or that doctors suspect the parent of inducing the symptoms. (It is important to note that the parent does not always induce a condition in her child. Many times, the parent simply presents a false medical history to doctors, which leads to invasive surgical procedures.)

After CPS involvement and the separation of the victim from the suspect, doctors will also provide law enforcement with evidence that the victim does not, in most cases, have

any of the symptoms the defendant reported. If the suspect has induced the symptoms, doctors note that after the child was removed from the suspect's custody, symptoms resolved on their own.

In abusive head trauma, does law enforcement rely strictly on doctors to complete the investigation? Of course not. Neither should we in cases of medical child abuse. Are there crime scenes, physical evidence, and witnesses outside the medical community in abusive head trauma cases? Absolutely—and these same elements are also present in cases of medical child abuse. In every such case, there is physical evidence that must be collected and witnesses who must be interviewed (all outside the medical community). Also, a crime scene may exist at the suspect's residence or other locations. Is it the typical crime scene with shell casings and blood? No, but then neither is an abusive head trauma crime scene. A child abuse prosecutor knows the value of processing crime scenes; it is equally important in cases of medical child abuse.

Let's look at the case of Hope Ybarra, a college-educated chemist who was director of laboratories at a food-testing company. Hope presented her youngest female child for years as having cystic fibrosis, anemia, gastric problems (prompting the placement of a gastric feeding tube), constipation, and a host of other ailments. The victim had tested positive on multiple occasions for both *Pseudomonas Aeruginosa*, a bacterial cause of pneumonia, and *Staphylococcus Aureus*, commonly referred to as a staph (bacterial) infection.

As part of any medical child abuse investigation, the investigating law enforcement officer should get an extensive social history from the defendant and interview possible witnesses who have contact with the defendant and victim. They may have information that medical professionals simply cannot provide. For instance, in the Ybarra case, we contacted her former employer to ask why she left that job. There were rumors that she presented herself falsely as a Ph.D., and the employer confirmed that Hope Ybarra had claimed for years that she had a Ph.D., when in reality she had never received a master's degree, much less a doctorate. We also discovered that Ybarra came under investigation by this former employer for ordering pathogens (not a legitimate part of her job duties) when the director of human resources became suddenly ill at work one day and suspected Ybarra of poisoning her water bottle (though it could not be proven through an internal investigation).

The bottle was tested and found to contain *Pseudomonas Aeruginosa*, a pathogen to which Ybarra had access as director of the laboratory. This is the same pathogen found inside her daughter on multiple occasions and is the same cause of pneumonia that is very common in cystic fibrosis patients (but not common in those who do not have the disease). Four of the nine pathogens to which Ybarra had access had appeared inside her daughter at one point or another during her brief five years of life, including *Staphylococcus Aureus*. This information was vital to the investigation and could not have been provided by the medical professionals.

Ybarra's mother also found petri dishes labeled as pathogens (*Pseudomonas aeruginosa* and *Staphylococcus aureus*) in a plastic storage box the suspect had left at her mother's house. The dishes were later identified by food-testing company personnel as stolen from their laboratory. A search warrant was executed at the suspect's residence in which a bottle of liquid laxative was seized; that laxative contained one of the four pathogens found inside the victim during medical testing. (More on her case later.)

What else is helpful

Other items that investigators might find at a non-traditional crime scene include unused prescription medication. A doctor might have prescribed the medication, but the suspect may not have administered it to the child, knowing that he does not have the condition warranting the medicine. The same goes for prescribed (but unused) medical equipment and devices.

What will the suspect's excuse be when it is found that the medical history she has given for the victim at numerous hospitals is inconsistent, or in many cases, just blatantly false? The only available explanation is that the doctors and nurses misunderstood what she reported: "No, I told them I thought she *may* have cystic fibrosis, not that she *does* have the disease. They just wrote it down wrong." Investigators and attorneys can discredit this excuse by talking to the suspect's friends and acquaintances and getting statements regarding exactly what she told them about her children's condition. We then compare that to medical records to

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see if what she told people outside the medical community is consistent with what she told people inside the medical community.

We also ask these friends and acquaintances how the child victim acted in their presence. Did the victim present as ill? What we have found in these cases is that honest witnesses outside the medical community will tell you that the victim always appeared to be healthier than the suspect portrayed. Many will tell you that they were confused by the suspect's reports when they saw the victim in person. This is important because the suspect will almost always portray herself as a victim of a skeptical medical community or that she was just doing what the doctors told her to do in relation to the victim's care. Having witnesses outside the medical community who confirm the suspicions of those inside the medical community is vital to the case.

Social media's importance

Social media is one of the most important aspects of medical child abuse investigations. Although the motives for this type of crime may be case-specific, in just about every situation, the offender is seeking attention. Another characteristic of offenders is that they will try to turn most conversations toward the victims' medical problems.

Early in the investigation, before contacting the suspect, attempt to find her profile on Facebook. In early interviews, ask collateral witnesses if they are Facebook friends with the suspect and if the suspect posts about the child's health condition on her account. Witnesses will normally say that the suspect posts constantly about the health of the victim, but don't stop there. Ask if the suspect kept a blog on any other website and if the suspect was active on any medical blogs or sites. If she was, send a preservation request to every one—Facebook, MySpace, Twitter, Carepages, Instagram, and any other social media site—on which the suspect posted information about the victim's health. Follow up with search warrants for the suspect's account to obtain what the suspect has written about the health of the child.

Facebook was very useful in several medical child abuse investigations, such as the one against Elisabeth Hunnicut, who intentionally drugged her child with Clonidine to simulate symptoms of hydrocephalus (water on the brain), prompting doctors to place a brain monitor inside the child's skull. Hunnicutt shared messages with many Facebook friends about the condition of her child, listing four diagnoses that were just blatantly untrue. In fact, she had been specifically told on numerous occasions that the victim did not have two of those conditions. Hunnicutt also posted on another social website, Meetup.com, that her child suffered from a diagnosed case of hydrocephalus, even though she had been informed three weeks prior that a brain monitor had shown that there was no possibility of the victim having that medical condition.

Her Facebook account presented some challenges. Hunnicutt had time to erase most of her profile due to a very slow investigative response. Just about the only thing remaining on her page were numerous photographs—but also comments from other Facebook users on those photographs. We contacted the people who commented most frequently, and many of them still had private messages from Hunnicutt about the victim's health and were able to forward these messages. Interestingly, Hunnicutt provided different medical information for the victim depending on how close the Facebook friend was to Hunnicutt in real life. The more disconnected the Facebook friend, the more dire the victim's medical condition became.

The child victim in the Hunnicutt case went from (as the defendant reported) sleeping 20 hours a day, suffering from a persistent case of torticollis, previously having a gastric feeding tube, and being prescribed 10 to 20 medications, to being a normal, healthy, active 2-year-old within two weeks of separation from the suspect and removal from all medications. Elisabeth Hunnicutt pled guilty to charges in Texas and California and can have no contact with her two children for four years and extremely controlled supervised contact for six years afterwards.

In a case where medical professionals accuse someone of presenting false medical symptoms, and a credible witness states that the suspect has posted about the child's medical condition on any website, investigators have probable cause for a warrant for those sites. The search warrant affidavit should be extremely detailed about the allegations against the suspect, the victim's improved medical condition after separation from the suspect, and who (preferably more

than one person) gave you information that the suspect was posting about the victim's medical condition. Sometimes suspects leave their social media accounts public and the investigator can establish probable cause from the public portions of the defendant's account. But do not think that you can simply ask a cooperative witness who is Facebook friends with the suspect to pull up the suspect's page and copy the information so that you do not have to get a search warrant. First of all, this will appear lazy to a jury. And secondly, there are private messages and other content to which the Facebook friend will not have access. Get a search warrant.

In the current age of technology, where people routinely put everything important in their lives on the Internet in their own words, law enforcement would be negligent to not capture what the suspect actually typed about the condition of her child. The best evidence in these cases is the suspect's own writings about the child's medical condition. How can a parent defend her own written statements that her child has medical conditions when doctors testify that the child has no such problems—and that they have informed the suspect of such? These records are terrific evidence in a criminal case of medical child abuse.

Correlating the information

Obtaining a complete medical record for the victim is one of the reasons we search for a complete social and medical history from the suspect. These suspects often leave treatment facilities and family doctors once their behavior is suspected, many times crossing state lines to facilitate their need to obtain abusive medical treatment for their children. Once you get these records, they need to be thoroughly examined.

Often, the medical histories for the victim given by the defendant will vary from medical treatment center to treatment center. This is also important evidence in showing a pattern of the suspect's behavior of going from doctor to doctor ("doctor shopping") until the suspect finally finds one who will satisfy the defendant's need.

As you obtain and examine all medical and social history records, enter each relevant piece of information into a Microsoft Excel spreadsheet or an equivalent program. You can set the spreadsheet up to sort by date. If you are not computer-savvy, get someone to help you with the set-up, as it will make your job in this investigation far easier. Enter every relevant piece of information into this program, including dated events described by witnesses, the suspect's social media statements, medical record events, etc. If a board-certified child abuse doctor is consulting on the case, you might talk him or her into entering the medical records into a spreadsheet while you concentrate on the witness and social media events' entry. When you merge the spreadsheets and sort by date, you will have a clear picture of the suspect's deception and abuse over an extended period of time.

The suspect interview

Once an investigator has collected and examined all the medical records, talked to all of the collateral witnesses, and examined all of the social media records for inconsistent statements, it is time for the suspect interview.

When the suspect interview occurs is entirely dependent on the dynamics of each specific investigation. Ideally, the suspect interview, just like in any investigation, should come after the investigator has collected and examined all pertinent information in the case. If possible, the suspect should be interviewed after all search warrants have been served and all witnesses interviewed, unless the witnesses are sympathetic to the suspect. Such witnesses should be avoided until after the suspect interview to prevent their sharing information with the suspect.

The best way to approach a suspect is after she has a scheduled meeting with CPS at a child advocacy center where the interview can be recorded for sight and sound. The interviewer should act as if he is a lazy government employee and say something like, "I just got a bunch of medical records dumped on my desk, and it seems like it would be a lot easier for you to tell me what's going on with your daughter than having to read through all that stuff." Remember, these are skilled offenders who are practiced in fooling medical professionals, so they may believe that fooling an unmotivated civil servant is child's play.

When beginning the interview with the suspect, you first want to get a complete social history and medical history for the child and any siblings. Although CPS and medical professionals have already done this, the suspect may not realize you have

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read any of these files. The suspect may give you a different medical history for the victim or one of his siblings, and this gives you information to use later if the interview turns into an interrogation.

For instance, during the interview of Hope Ybarra, she lied about medical conditions involving her older daughter, denying any medical problems when the medical records showed that Ybarra had presented her for years as having cerebral palsy. We later used the knowledge of this lie to obtain incriminating statements from Ybarra when the interview turned to an interrogation, including the admitted falsification of a sweat chloride test for cystic fibrosis and an admission to putting pathogens into the victim's sputum sample. During the interview, Ybarra first lied about her conduct. Then she minimized her conduct when finally giving admissions, a pattern we've seen in just about every successful abusive head trauma interrogation. This indicates that Ybarra knew that what she was doing was wrong. Again, this is child abuse, and without a law enforcement investigation, there would be no confrontational interview of the suspect and her admissions would have never happened.

As a result, the charge of injury to a child (with SBI) against Ybarra has resulted in a guilty plea. Hope Ybarra, a college-educated woman with no previous criminal history, pled to 10 years in prison. The reason for the pleas in these cases was a thorough law enforcement investigation, which created a mountain of indisputable evidence. Without an extensive investigation, it is very possible that no criminal charges are ever brought and the victim is returned to the suspect through civil courts, which are still grasping to understand the concept of medical child abuse.

Civil courts seem to struggle with some of the expert opinion that suggests that medical child abuse perpetrators are as difficult to rehabilitate as pedophiles[2] and that there are no proven therapies for the abuser.[3] A proper law enforcement investigation can take the decision out of the hands of the civil court and put it into that of the criminal court in the form of bond conditions or plea agreements.

The most frightening statistic comes from a researcher[4] who studied 117 cases of medical child abuse and found a mortality rate of 9 percent. Even the possibility for a rate this high demands a professional and extensive law enforcement investigation. Law enforcement should never label this a "CPS issue" or a mental condition. This is a dangerous form of abuse, and the victims deserve a proper investigation.

Statutory help and caselaw

There is no "abusive head trauma" statute, just as there is no "medical child abuse" statute. They both fall under injury to a child.[5] Again, just as in abusive head trauma cases, the prosecution will rely on doctors to testify whether the abuse is bodily injury or serious bodily injury; the needless medical procedures or surgeries performed on the victim are the method of injury.

A very helpful tool is Art. 13.075 of the Texas Code of Criminal Procedure, which states that any offense of child physical or sexual abuse can be prosecuted in any county where an element of the offense occurred, the defendant is apprehended, the victim resides, or the defendant resides. The statute applies to any case in which the injury occurred on or after September 1, 2011, allowing an agency to file a case if the victim is residing in its county but maybe received one or multiple surgeries or injuries in other Texas jurisdictions. This is extremely helpful for counties in which a children's hospital is located.

There is one case annotation specific to establishing serious bodily injury in these cases that may be helpful to you. In *Williamson v. State*,[6] the First Court of Appeals upheld the jury's verdict that placement of a gastric feeding tube constitutes serious bodily injury. Of course, a child abuse pediatrician and other prosecution medical expert witnesses would need to testify to such at trial, as occurred in the *Williamson* case, where four different medical experts said as much. The same court also upheld the jury's finding that the surgeon's scalpel was a deadly weapon. In all four cases we have prosecuted since 2009 (and the case where the surgeries occurred out of state), a gastric feeding tube had been placed into the victim, so this decision has been important for us.

Another case addressing medical child abuse is *Austin v. State*.[7] This case involved a mother who injected her (non-diabetic) child with insulin, causing the child to go into a deep coma. The interesting aspect of this case is that a sibling had died

previously under suspicious circumstances. The sibling had been brought to hospitals on three separate occasions for accidental overdoses. Medical child abuse was suspected, and the defendant was caught in circumstances suggesting that she was injecting a substance into the child's IV line. The sibling was removed temporarily from the care of the mother but later returned against the advice of the psychologist treating the mother. This sibling died shortly after being returned to the mother. After it was discovered that the mother had poisoned the current victim with insulin, the sibling's body was exhumed and re-examined by the medical examiner, who found an injection site on the body. The cause of death was changed to homicide. *Austin* is significant because the medical records of all of the defendant's children (extraneous victims) were admitted by the trial court in the guilt-innocence phase and the admission upheld by the 14th Court of Appeals.

A concerning aspect of the *Austin* opinion is its continued referral to the defendant as having Munchausen Syndrome by Proxy (MSBP). This would be akin to saying a defendant in an abusive head trauma case had Shaken Baby Syndrome. Again, this is not an illness attributed to a *defendant*. This is a pattern of abusive behavior committed against a *child—by* a defendant. Two researchers[8] say, "The behavior commonly called MSBP is a form of child abuse that takes place in a medical setting. Child abuse is not an illness or a syndrome in the traditional sense but an event that happens in the life of the child." They further state, "Medical child abuse is not an illness. However, it is clear that the recipient of the abuse is a child." Another researcher[9] says that the defendant in a medical child abuse case is not mentally ill but "unmasks herself as a perpetrator, not a patient." Feldman also states that this type of abuse is clearly contained in the Federal Child Abuse Prevention and Treatment Act of 1974.

A thorough review of the *Austin* case illustrates the importance of a complete law enforcement investigation into this type of child abuse. One of Austin's sons was returned to her despite a suspicion of medical child abuse; he was later murdered, and another son was put into a deep coma. Hope Ybarra had told everyone who would listen, including a local news broadcast, that her child had a terminal form of cystic fibrosis, even though she had been told time and again by the victim's pulmonologist that this was not the case. To what lengths would she have gone to prove her diagnosis correct? How long could she continue the lie without having someone question her and having to take action? I am thankful these are questions that we will never have to answer, as Ybarra's victim is now an active, healthy, straight-A student in the gifted and talented program and active in sports.

Reporting abuse

While reports of this type of child abuse may come from teachers, daycare workers, concerned family members, or anyone involved in the victim's life, usually the most viable reports come from the medical professionals involved in the victims' care. Due to the confusion about this type of offense, each district attorney's office in the state should consider a special protocol for reporting it. This is especially true for district attorney's offices whose jurisdictions include children's hospitals. Is the surge in medical child abuses cases in Tarrant County an anomaly, or do doctors now feel comfortable that if they report such abuse, it will be thoroughly investigated?

Police departments and Child Protective Services do not always respond to allegations of this type of offense. The Hunnicutt case mentioned previously was filed with our agency as an intentional over-medication, and it was filed—a full year after the police report—only after the child victim's father pushed the police department for action after being told there had been no offense. Any involvement by a father is very uncommon in these types of cases, so we are fortunate the dad in this case was so proactive.

A protocol suggestion is for medical personnel at the children's hospital to make the normal report through the CPS hotline, as well as reporting to the CPS liaison assigned to that hospital (or if there's no liaison, a pre-appointed hospital social worker), who can then report the suspected offense to a designated member of the district attorney's office. This will ensure that the district attorney's office can coordinate with the police department, CPS, and other members of the multi-disciplinary team to make sure the offense is understood, a proper investigation takes place, and nothing falls through the cracks. And if

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there is a guilty plea or conviction, share this with the physician(s) who reported the abuse to let them know that someone took the time to verify their diagnosis. They will be highly appreciative and encouraged to remain vigilant in recognizing this type of abuse.

The investigation will take a lot of working hours, review of thousands of pages of medical records, and cooperation between many agencies, all for a successful outcome that may still mean only probation for a mother with no previous criminal history (assuming the victim is still alive). Instead of asking yourself, "Is it worth it?" ask yourself, "What will happen to this child if the allegations are true and we do nothing?" ❇

Endnotes

1 Roesler T, Jenny, C. Medical Child Abuse: Beyond Munchausen Syndrome by Proxy. Elk Grove, IL; American Academy of Pediatrics, 2008:43.

2 Alexander R. The Munchausen by proxy family. In: Levin AV, Sheridan MS, eds. Munchausen Syndrome by Proxy: Issues in Diagnosis and Treatment. New York, NY: Lexington Books; 1995:479.

3 Ludwig S. The role of the physician. In: Levin AV, Sheridan MS, eds. Munchausen Syndrome by Proxy: Issues in Diagnosis and Treatment. New York, NY: Lexington books; 1995:287-294.

4 Rosenburg, DA. Web of deceit: a literature review of Munchausen syndrome by proxy. Child Abuse Negl. 1987;11(4):547-563.

5 Tex. Penal Code §22.04.

6 356 S.W.3d 1, 12 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

7 222 S. W.3d 801 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

8 Roesler T, Jenny, C. Medical Child Abuse: Beyond Munchausen Syndrome by Proxy. Elk Grove, IL; American Academy of Pediatrics, 2008:55-56.

9 Feldman, M. Playing Sick? Untangling the Web of Munchausen Syndrome, Munchausen by Proxy, Malingering, and Factitious Disorder. New York, NY; Brunner-Routledge, 2004: 122.