



THE PROSECUTOR

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About the Cover

Old Courthouse (Québec) Now housing the Ministry of Finance, this Second Empire-style building (1883-1887) served as a courthouse for almost a century. On each side of the main entrance, note the coats of arms of Jacques Cartier and Samuel de Champlain.

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Investing as a Community: Analyzing Strangulation Cases & Implementing a MDT Strangulation Protocol to Reduce Domestic Violence Homicides



By **CARVANA CLOUD**, Bureau Chief — Special Victims Bureau
District Attorney's Office, Harris County (TX)

Ashanti Hunter (Ashanti) was a mother, daughter, and cousin with a very bright future. Ashanti's family recalls that she was "the brain of the family, graduating high school at 16 with a perfect GPA."¹ After high school, Ashanti enlisted in the United States Air Force at age seventeen. Unfortunately, this loving mother of three would never realize her ultimate potential because her longtime boyfriend, Albee Lewis (Lewis), brutally murdered her on April 30, 2017.



Ashanti Hunter
June 4, 1984 – April 22, 2017

Earlier that day, Ashanti and Lewis had an argument. Ashanti was trying to get away from Lewis. As she attempted to leave, Lewis strangled her. Ashanti eventually escaped from her apartment with two of her children. As Ashanti sat in the passenger seat of her cousin's car, having finally gained the strength to leave her abuser, Lewis shot her at point blank range in front of her children and family. Ashanti's two children, soaked in their mother's blood, literally watched the life leave their mother's body as she took her last breath right before their innocent eyes.

Before her murder, Ashanti and Lewis dated for five years. And although she would frequently complain of Lewis being verbally and physically abusive, she hadn't tried to leave until that fateful day of April 30, 2017. A thorough review of police reports show that Ashanti called police on multiple occasions, yet no criminal charges were ever authorized. Those reports include incidents of simple assault, harassment, and most importantly **STRANGULATION**, known in Texas as Impeding Breath or Circulation.

A summary of Ashanti's prior abuse allegations reports are listed below:

- **Incident #1, 3/19/14** — Lewis grabbed Ashanti by the neck and **STRANGLED** her and punched her in left cheek three times.
- **Incident #2, 2/25/15** — Lewis **STRANGLED** Ashanti until she felt like she was going to pass out and told her she would die if she left him. Ashanti reports that she starts to lose faith in system.
- **Incident #3, 7/26/15** — Lewis bends Ashanti's arm upward causing pain. Later, Lewis comes back and kicks in the door.
- **Incident #4, 12/10/16** — Lewis argued with Ashanti for money and he threw her to the ground. Ashanti was holding knife in self-defense when police arrive.
- **Incident #5, 2/7/2017** — Lewis struck Ashanti in her face. Ashanti did not want to press charges because she was in fear that Child Protection Services would be involved and didn't want him in jail.

¹ <http://abc13.com/news/sister-of-slain-mother-you-cannot-be-silent/1946053/>

- **April 30, 2017** — 87 days later, Lewis **STRANGLES** Ashanti and although she escapes to a vehicle to flee, he murders her in front of her children and family.

Sadly, the system failed Ashanti. But on May 1, 2017, determined that Harris County, Houston, TX would learn from this tragedy and improve our community's response, District Attorney Kim Ogg, who had just been sworn into office five months prior, assigned me the task of evaluating Ashanti's murder and the series of incidents mentioned above. My task was clear yet comprehensive. As the Division Chief of the Family Criminal Law Division (FCLD), I was asked to determine the systemic gaps that existed within our criminal justice system that allowed Ashanti to suffer in silence for so many years, without the intervention and support of law enforcement. Ashanti's brutal murder, as she was trying to flee her abuser, is a sobering occurrence that happens too frequently within our communities. "With distressing frequency, domestic violence ends, not in escape and reconstruction of the woman's life, but in murder or murder/suicide."² In the United States, three women are killed each day by their intimate partners.³ And while strangulation is not the cause of death for all domestic violence homicides, evidence of prior [non-fatal] strangulation, like that experienced by Ashanti in the years before her death, "inhabits a category all its own in domestic violence as a marker of lethality. A kick, a punch, a slap, a bite — none of these, though terrible, portend homicide like strangulation does."⁴ Accordingly, understanding dangerousness and

lethality factors like strangulation are critical to developing an effective response to domestic violence and preventing domestic violence homicides.

Domestic violence is a pattern of behavior used to establish power and control over another person through fear and intimidation, often including the threat or use of violence.⁵ Best practices suggest that all domestic violence cases should be screened for potential lethality with strangulation being one of the highest rated lethality factors. Harvard Law Professor Diane Rosenfeld notes "strangulation is not only a reliable indicator of future homicide attempts or actual homicides but also as an apt metaphor for the control abusers often exert over their victims."⁶ The mere presence of strangulation in a situation of domestic abuse increases the chances of homicide sevenfold.⁷ Strangulation is a clear trajectory from escalating violence to homicide, of which strangulation is the penultimate act.⁸ Gael Strack, chief executive of the Training Institute on Strangulation Prevention in San Diego, CA, provides "statistically, we know that once the hands are on the neck, the very next step is homicide. They don't go backwards."⁹ And while no police officer, prosecutor or advocate can see into the future nor guarantee that a woman¹⁰ won't be murdered by her intimate partner, domestic violence homicides are so predictable as to be preventable.¹¹

Domestic violence cases that result in murder are not a random sample of domestic violence cases. Death is far

² Diane L. Rosenfeld (2008), "CORRELATIVE RIGHTS AND THE BOUNDARIES OF FREEDOM: PROTECTING THE CIVIL RIGHTS OF ENDANGERED WOMEN," 43 Harv. C.R.-C.L. L. Rev. 257, Harvard Civil Rights-Civil Liberties Law Review.

³ Family Violence Prevention Fund, *Domestic Violence is a Serious, Widespread Social Problem in America: The Facts*, available at <http://www.endabuse.org/resources/facts/>

⁴ Rachel Louise Snyder, *Which domestic abusers will go on to commit murder? This one act offers a clue*, Washington Post, November 16, 2017. https://www.washingtonpost.com/outlook/which-domestic-abusers-will-go-on-to-commit-murder-this-one-act-offers-a-clue/2017/11/16/80881ebc-c978-11e7-aa96-54417592cf72_story.html?noredirect=on&utm_term=.225cd8078ab8.

⁵ <https://nomore.org/learn/resources/>

⁶ Diane Rosenfeld, *The High Risk Team Model and GPS Offender Monitoring: Stopping DV in Its Tracks*, Domestic Violence Report, Volume 17, No. 3, (February/March 2012), 33.

⁷ Kelsey McKay, "A Closer Look at Strangulation Cases," The Texas Prosecutor, Volume 44, Number 1, January-February 2014.

⁸ Rachel Louise Snyder, "Which domestic abusers will go on to commit murder? This one act offers a clue," Washington Post, November 16, 2017. Available at https://www.washingtonpost.com/outlook/which-domestic-abusers-will-go-on-to-commit-murder-this-one-act-offers-a-clue/2017/11/16/80881ebc-c978-11e7-aa96-54417592cf72_story.html?noredirect=on&utm_term=.225cd8078ab8

⁹ *Id.*

¹⁰ My reference to "men" as the abuser and "women" as the victim is supported by the fact that of those persons victimized by an intimate partner, 85% are women and 15% are men. In other words, women are 5 to 8 times more likely than men to be victimized by an intimate partner. See Lawrence A. Greenfeld et al. (1998). *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*. Bureau of Justice Statistics Factbook. Washington DC: U.S. Department of Justice. NCJ #167237. Available from National Criminal Justice Reference Service.

¹¹ Diane Rosenfeld, "Law Enforcement Sends Mixed Signals," Chicago Tribune, July 30, 1994, 19.

more likely when certain factors [such as strangulation and weapons are present] than when they are absent.¹² “While the number of women murdered by their intimate partners is only a small percentage of women who report being beaten and abused, these murders have enormous symbolic value. They are the background against which so much sub-lethal violence is committed. [Like Ashanti], many battered women do not know whether the next beating will be a fatal one.”¹³ Because batterers wield power and control over their victims, they constantly manipulate their victims, making them acutely aware that murder is always a possibility. Harris County internal case research proves that victims who experience non-fatal strangulation by an intimate partner, are at the highest risk for escalating violence or homicide. Recognizing this, communities should prioritize domestic violence by developing coordinated community responses that include innovative prosecution strategies that consider “the level of potential dangerousness in any domestic violence case [particularly strangulation] and creates an effective response that focuses on offender containment to keep the victim safe.”¹⁴ Accordingly, this article will focus on the dynamics of strangulation, effective prosecuting strategies for non-fatal strangulation cases, and how a coordinated community response can effectively support strangulation victims, while achieving the ultimate goal of preventing domestic violence homicides.

I. UNDERSTANDING THE DYNAMICS OF STRANGULATION

In 2014, the U.S. Sentencing Commission recognized strangulation as a marker of dangerousness and recommended increased prison time — up to 10 years — for those convicted of it.¹⁵ Currently, 45 states, including Texas now recognize strangulation as a felony.¹⁶ In 2009, the Texas Legislature passed a law codifying family violence strangulation or suffocation as a third degree felony punishable from 2 to 10 years for the first offense and 2 to 20 years for subsequent convictions. Texas Penal Code Section 22.01 provides, in part,

that “...the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person’s throat or neck or by blocking the person’s nose or mouth.”¹⁷ In a pamphlet designed to educate advocates and survivors about strangulation, the Texas Council on Family Violence explains:

“Strangulation is impeding the normal blood flow and/or the airflow by applying external pressure to the neck or throat. Depriving oxygen (via the blood) to the brain causes unconsciousness in as little as 10 seconds, then permanent injury (such as difficulty in concentration and loss of short-term memory capacity). If uninterrupted, strangulation may lead to death in as little as two minutes. Strangulation can be accomplished in various ways including: ligature, manual, and hanging. Ligature is the use of an object such as a piece of rope, chain, clothing, phone cord, or other material to strangle another person. Manual is the use of one’s body parts as weapons, such as hands or arms, to strangle another person. Manual strangulation can also be accomplished by placing the neck of the victim in the crook of an arm or leg, or by placing a foot or other body part onto the victim’s neck or throat. Hanging is suspension by a cord wrapped around the neck. Suffocation is another method of stopping the flow of air to the brain. It involves covering the mouth and/or nose and can be done with hands or with an object such as a plastic bag or pillow. Suffocation is just as potentially lethal as strangulation.”¹⁸

After the Texas strangulation law was passed, law enforcement and prosecutors were given the authority to investigate and charge offenders for this potentially lethal crime as a third-degree felony. Gone were the days where a man could strangle a woman and he’d only be arrested for a Class A Misdemeanor — Assault Family Member charge. Thus, it can be inferred that the legislature’s intent was to prioritize the safety of strangulation victims, by holding their abusive

¹² *Id.*

¹³ *Id.*

¹⁴ Diane Rosenfeld (February/March 2012), “The High Risk Team Model and GPS Offender Monitoring: Stopping DV in Its Tracks,” Domestic Violence Report, Volume 17, No. 3, 33.

¹⁵ Rachel Louise Snyder, “Which domestic abusers will go on to commit murder? This one act offers a clue,” Washington Post, November 16, 2017. Available at https://www.washingtonpost.com/outlook/which-domestic-abusers-will-go-on-to-commit-murder-this-one-act-offers-a-clue/2017/11/16/80881ebc-c978-11e7-aa96-54417592cf72_story.html?noredirect=on&utm_term=.225cd8078ab8

¹⁶ *Id.*

¹⁷ Texas Penal Code Section 22.01 (b)(2)(B).

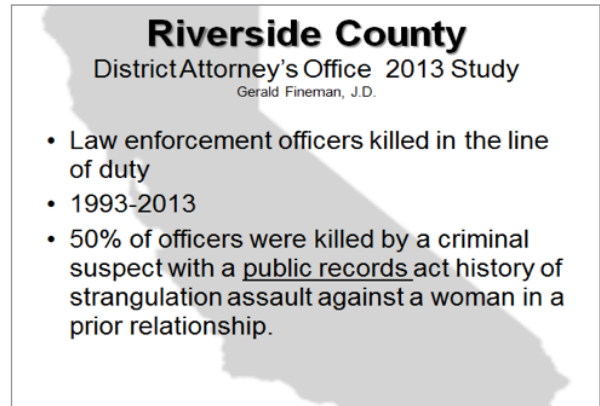
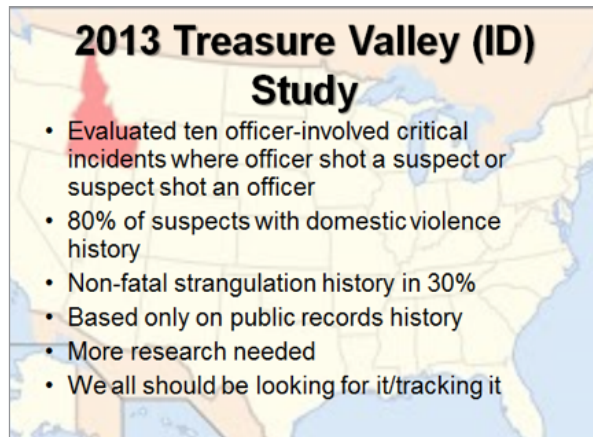
¹⁸ http://tcfv.org/pdf/resource-center-assets/Strangulation_Advocates.pdf

family members accountable at a felony level. After all, when an abuser strangles a victim, he takes on the role of “God” demonstrating to the victim that he can take her life, at any given time, which makes terrorizing the victim that much easier. Notably, although Texas enacted a powerful statute designed to increase offender accountability and protect strangulation victims, the legislature did not provide the requisite framework for law enforcement officers and prosecutors who are charged with enforcing the law. Accordingly, nine years later, non-fatal strangulation cases *aren’t being investigated* (because they don’t know what/how to ask), *aren’t being filed* (because prosecutors don’t understand the evidence), and *are getting dismissed*.¹⁹ Sadly, this means that abusers are not being held accountable and continue to wield power and control over their victims.

a. Strangulation Poses a Safety Threat to Law Enforcement Officers

The failure to establish a consistent investigative framework for strangulation cases is also concerning because studies indicate that 30–50% of perpetrators who kill police officers have a documented public record of intimate partner strangulation. See *Diagram 1*.

Diagram 1



In 2017, more officers were shot responding to domestic violence than any other type of firearm-related fatality, according to the National Law Enforcement Officers Memorial Fund.²⁰ This statistic is no doubt due to the fact that domestic violence offenders (including stranglers) tend to lack respect for authority. So when confronted by law enforcement, batterers often react violently and become defensive when they perceive that they are losing power and control. The propensity for stranglers to explode and harm or kill an officer is greater since strangulation is an escalating form of violence, only second to homicide.

b. Mass Shooters Have History of Intimate Partner Strangulation

Research also shows that mass shooters often have a history of intimate partner strangulation. An example of this correlation can be seen in the Sutherland Springs, Texas mass shooting in November 2017. In 2012, gunman, Devin Patrick Kelley, was convicted of domestic violence while stationed at Holloman Air Force Base in New Mexico. Notably, during the 2012 assault, Kelley also strangled his wife. In her Washington Post editorial, Rachel Snyder powerfully opines, “if the particular severity of his violence had been better understood

¹⁹ Kelsey McKay, A Coordinated MDT Response for Victims of High Risk Interpersonal Violence Cases, March 1, 2018.

²⁰ <https://www.usatoday.com/story/news/nation/2018/04/09/domestic-abusers-dangerous-women-and-lethal-cops/479241002/>



and recognized in New Mexico, 26 people, including a 17-month-old baby named Noah, might not have been killed in Sutherland Springs, Tex., this month.” While some may argue that Synder’s opinion is conjecture, she substantiates my aforementioned position that many jurisdictions and keepers of justice are unfamiliar with the severity of strangulation and often miss opportunities to identify strangulation, which poses a great threat to public safety. Synder also highlights the following mass shooters who had a history of intimate partner of strangulation²¹:

- **Omar Marteen** — On June 12, 2016, the Orlando Pulse nightclub shooter, choked both of his wives, yet was never charged or prosecuted for strangulation.
- **Cedric Ford** — Prior to fatally shooting three of his co-workers and injuring 14 others in Kansas on February 25, 2016, Ford was charged only with misdemeanor domestic violence for choking his ex-partner.
- **Esteban Santiago** — On January 6, 2017, Santiago killed five people and injured six in a shooting at the Fort Lauderdale Airport. He had been charged with a misdemeanor after strangling his ex-partner.

These case studies demonstrate that intimate partner strangulation is a characteristic of mass shooters. Yet strangulation, as a signal of dangerousness, is overlooked by most law enforcement officers. As discussed below, most strangulation injuries are not visible enough to photograph, and police often don’t know to look for other non-visible signs.²² As a result, injuries are often downplayed in police reports. In sum, Synder correctly states “it wasn’t that Kelley operated under the radar; it was that authorities failed to see and then act on the clues he was leaving,” and as a result, innocent lives were lost.²³ By strategically prosecuting strangulation offenders, we can deter future violence and prevent homicides, which ultimately makes our communities safer.

²¹ Rachel Louise Snyder, “Which domestic abusers will go on to commit murder? This one act offers a clue,” *Washington Post*, November 16, 2017. Available at https://www.washingtonpost.com/outlook/which-domestic-abusers-will-go-on-to-commit-murder-this-one-act-offers-a-clue/2017/11/16/80881ebc-c978-11e7-aa96-54417592cf72_story.html?noredirect=on&utm_term=.225cd8078ab8

²² *Id.*

²³ *Id.*

II. STRANGULATION REQUIRES EVIDENCE-BASED PROSECUTION

Domestic violence cases can be multi-dimensional and time-intensive, yet often follow a familiar pattern. Successfully evaluating high-risk felony and recanting victim cases requires specialized knowledge in law and victim/perpetrator behavior. Furthermore, a county's size and/or the complexity of the systems providing services coupled with the sheer number of victims who need access to services and safety, can create unintended barriers to communication, coordination, and collaboration to improve the systemic responses to victims of domestic violence. Thus, there is a need to centralize services and systems, improve communications across disciplines, and develop written formal protocols that seek to improve access to services and safety for victims, hold perpetrators accountable, and reduce and prevent future incidents of violence. This is particularly true with regard to strangulation cases where there is little to no evidence of obvious injury.²⁴

a. Visible Injuries

A Harris County police report, pre-May 2018, may provide the following statements from a strangulation victim — “I couldn’t breathe,” or “My neck is sore.” Those statements, alone, are not enough to prove a strangulation case beyond a reasonable doubt. And because the majority of strangulation cases will not have external injuries visible to the human eye, prosecutors are often left with insufficient evidence to meet their burden of proof. However, if strangulation victims were offered a forensic medical exam, a trained medical professional could identify signs and symptoms not easily noticed by law enforcement or an advocate. Kelsey McKay, former Travis County Asst. District Attorney and

national strangulation expert explains, “a half-moon-shaped abrasion may exist on the back of the victim’s neck, hidden under her hair if her hair is long.”²⁵ 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.²⁶ McKay also notes that defensive marks on the perpetrator are also evidence that can corroborate a victim’s strangulation account. For example, photos of a bite mark on an offender may be presented by the defense to argue that the victim was actually the aggressor. McKay skillfully explains that “victims often bite their assailants in an attempt to get them to release their grip.”²⁷ Accordingly, having a good understanding of the positions of both parties can help a prosecutor explain to a jury how the strangulation occurred and why a bite mark would be consistent with a victim’s account.²⁸

The presence of petechiae can also aid prosecutors in proving strangulation cases. Petechiae is a phenomenon that suggests a particularly vigorous struggle between the victim and assailant. Petechiae may present due to ruptured capillaries — the smallest blood vessels in the body — and sometimes may be found only under the eyelids (conjunctivae).²⁹ However, petechiae may also be found around the eyes, anywhere on the face, on the neck, and above the area of constriction.³⁰ Petechiae tend to be most pronounced in ligature strangulation.³¹ This is significant because for petechiae to occur, some amount of pressure had to be placed on a victim’s neck that occluded the jugular vein.³² At the same time, the absence of petechiae does not mean that strangulation didn’t occur. Like many other visible injuries consistent with strangulation, petechiae can often be overlooked.³³

²⁴ San Diego Police department reported that in 50% of Strangulation cases, there were no visible injuries. In another 35%, the injuries were too minor to photograph. Thus, in only 15% of the cases, were there obvious signs of injury.

²⁵ Kelsey McKay, (March 2018), “A Coordinated MDT Response for Victims of High Risk Interpersonal Violence Cases,” at 21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Strack and McClane (1999), “How to Improve Your Investigation and Prosecution of Strangulation Cases,” at 5.

³⁰ *Id.*

³¹ *Id.*

³² Kelsey McKay, (March 2018), “A Coordinated MDT Response for Victims of High Risk Interpersonal Violence Cases,” at 21.

³³ *Id.*

b. Non-visible signs & symptoms

There are many ways a batterer can strangle a victim. The level of injuries and symptoms will depend on many different factors including the method of strangulation, the age and health of the victim, whether the victim struggled to break free, the size and weight of the perpetrator, the amount of force used, etc.³⁴ Therefore, it is important to ask the victim to demonstrate how she was strangled and to ask follow-up questions that will elicit specific information about the signs and symptoms that can corroborate strangulation. This is helpful evidence for prosecutors to rely upon since 50–60% of domestic violence victims either recant or minimize their criminal episodes. Follow-up questions can be easily asked by a responding officer, advocate or a forensic medical provider.

Research shows that forensic nursing can also enhance the prosecution of strangulation cases.

In an effort to gather better evidence for the investigation and prosecution of non-fatal strangulation cases in Harris County, the Harris County Strangulation Taskforce worked with Kelsey McKay to develop the Harris County Strangulation Supplement, which is used by every law enforcement agency when responding to a strangulation crime scene. Effective May 4, 2018, the District Attorney's Office mandated the use of this supplement before intake prosecutors can accept strangulation charges against a intimate partner or family member. The strangulation supplement includes open-ended questions, checkboxes for signs, symptoms, and injuries, and a diagram of the victim's neck at different angles³⁵ and has drastically enhanced the investigation of our non-fatal strangulation cases. Officers are identifying

the signs and symptoms of strangulation without visible injuries and are appropriately engaging local paramedics as needed. As a result, Harris County prosecutors now have sufficient evidence to prosecute stranglers and gain convictions, which work to decrease recidivism. A 2017 v. 2018 YTD comparison shows that since implementing countywide strangulation training and the strangulation supplement, the District Attorney's Office is filing on average 50% more strangulation cases every month. This increase, while sobering, is proof that prior to 2017 our community was not properly recognizing strangulation nor appreciating the severity of the offense, which can be directly attributed to our incredibly high domestic violence homicide rate.

c. Utilizing Medical Forensic Testimony to Prosecute Strangulation Cases

Medical forensic examinations are an important part of any coordinated community response to interpersonal violence. Sexual Assault Nurse Examiner (SANE) programs have become the standard of care for many jurisdictions around the country.³⁶ Medical forensic services are proven, in literature, to be an important link between the victim and other services and entities, including law enforcement. Studies have also demonstrated an improved patient experience when specially trained forensic nurses are utilized.³⁷ Forensic nurses, more commonly known as SANE nurses, typically perform sexual assault examinations. However, research shows that forensic nursing can also enhance the prosecution of strangulation cases. Forensic nurses are the missing link in many domestic violence investigations. Because nurses have been named the most trusted professionals for 16 years in a row, it stands to reason that a strangulation victim would be more comfortable sharing their criminal episode with a nurse during the course of medical treatment than with a police officer.

Post-exam, forensic nurses can provide a detailed forensic record to investigators and prosecutors, which

³⁴ Strack and McClane (1999), "How to Improve Your Investigation and Prosecution of Strangulation Cases," at 6.

³⁵ For inquiries regarding the use of the strangulation supplement, please contact Kelsey McKay at <https://www.mckaytrainingconsulting.com/>

³⁶ OVC Bulletin (April 2001), https://vawnet.org/sites/default/files/assets/files/2016-09/OVC_SANE0401-186366.pdf.

³⁷ Campbell, R., Patterson, D., Adams, A.E., Diegel, R., & Coats, S. (2008). A participatory evaluation project to measure SANE nursing practice and adult sexual assault patients' psychological well-being. *Journal of Forensic Nursing*, 4(1) 19-28.

will enhance the charging and prosecuting offenders. Forensic nurses can also provide prosecutors a consistent team of experts to interpret medical records and answer questions related to strangulation symptoms, and DNA collection etc. Establishing a supportive relationship with your community's forensic nurses will empower forensic nurses to provide expert witness testimony on strangulation cases at trial, which will improve conviction rates. Even when the victim has not obtained medical treatment, it is important to use forensic nurses or medical experts like paramedics, to educate the jury and the judge about the seriousness of strangulation.³⁸ Jurors and judges need to know that strangulation can cause unconsciousness within seconds³⁹ and death within minutes⁴⁰. They also need to know that symptoms are important evidence of strangulation and that victims can die from strangulation without a single mark.⁴¹ Medical forensic testimony is one of the most effective tools in a prosecutor's toolbox. The victim's history, which is taken for the purpose of medical diagnosis and treatment, is admissible and can be later utilized by prosecutors, even if the patient decides not to participate in the criminal justice process.⁴²

III. COORDINATED COMMUNITY RESPONSE MODEL FOR STRANGULATION & DOMESTIC VIOLENCE HOMICIDE PREVENTION

When the state intervenes effectively in a domestic situation, it can prevent violence from escalating.⁴³ On the other hand, the lack of a coordinated community response will leave battered women in a more dangerous situation — even worse off than if she had not sought help from the criminal justice system in the first place.⁴⁴

a. Strangulation Taskforce

The Harris County Strangulation Taskforce is an example of how a community can design systems and protocols to maximize resources and reduce complexity to access for domestic violence survivors. Prior to the establishment of the Harris County Strangulation taskforce, approximately 47% of all strangulation cases were being dismissed or no billed for lack of evidence. Recognizing that a concise and coordinated strangulation protocol is critical to victims' survival, the taskforce is developing a strangulation protocol that encompasses a coordinated response by law enforcement, forensic nurses, EMS providers, hospitals, and the District Attorney's Office concerning strangulation cases. Criminal justice partners and community stakeholders who have identified clear gaps in service support the taskforce's work and are hopeful that the successful implementation of the strangulation protocol will lead to a decrease in the county's homicide rate.

To develop an effective coordinated community response, communities should incorporate a strangulation protocol that:

1. Develops, trains and enforces policies and service delivery standards for law enforcement and first responders who respond to strangulation crime scenes.
2. Removes barriers to access services offered by criminal justice system and community-based advocates such as obtaining protective orders, the court process, and general education about the cycle of violence and effects of domestic violence and strangulation on a victim and their family unit.

³⁸ Strack and McClane (1999), "How to Improve Your Investigation and Prosecution of Strangulation Cases," at 11.

³⁹ Deaths Allegedly Caused by the Use of "Choke Holds." E. Karl Koiwai, M.D.

⁴⁰ State v. Carter, 451 S.E.2d 157 (1994), [where expert testified manual strangulation would have taken four minutes for death to occur]; State v. Bingham, 719 P.2d 109 (1986) [three to five minutes]; and People v. Rushing, case no. SCD 114890 (1986), [court transcript where Deputy District Attorney Dan Goldstein elicited the following expert testimony from Dr. Christopher Swalwell: "The minimum amount of time to strangle somebody is somewhere around a minute to two for them to die, but obviously it could be longer."]

⁴¹ Strack and McClane (1999), "How to Improve Your Investigation and Prosecution of Strangulation Cases," at 11.

⁴² In Texas, expert witness testimony is admissible if A) made for — and is reasonably pertinent to — medical diagnosis or treatment; and B) describes medical history; past or present symptoms or sensations; their inception; or their general cause. See Texas Rule of Evidence 803 (4).

⁴³ Diane L. Rosenfeld (2008), "CORRELATIVE RIGHTS AND THE BOUNDARIES OF FREEDOM: PROTECTING THE CIVIL RIGHTS OF ENDANGERED WOMEN," 43 Harv. C.R.-C.L. L. Rev. 257, Harvard Civil Rights-Civil Liberties Law Review.

⁴⁴ When the state intervenes effectively in a domestic situation, it can prevent the violence from escalating. On the other hand, weak state intervention will leave battered women in a more dangerous situation — even worse off than if she had not sought help from the criminal justice system in the first place.

3. Supports efforts to restore the strangulation victim's well-being by decreasing the amount of time to triage the victim for services.
4. Facilitates the coordination of services such as medical forensic treatment, crisis counseling, and shelter/alternative housing placement offered by community partners and domestic violence agencies.
5. Enhanced offender accountability via aggressive and innovative prosecution strategies that include early case evaluation, expanded offender containment options, intensive supervision, and increased conviction rates.

b. Loss of Life is the Catalyst for Change: Planning to Prevent Domestic Violence Homicide

Harris County has the highest number of domestic violence homicides than any other county in Texas. In 2017, 36 citizens were killed as a result of domestic violence. In 2016, 28 women were murdered. In 2017, the Harris County District Attorney's Office filed an unprecedented 7,809 domestic violence charges.⁴⁶ Approximately 1,407 of the 7,809 cases were non-fatal strangulation cases. By utilizing research-based analysis of these cases, we also discovered that victims in specific, underserved cultural communities are less likely to seek domestic violence services due to religion, customs, or family obligation. As a result, domestic violence victims in these communities do not receive the education, training, protective order services, or outreach needed for comprehensive care and sustainable safety, which makes the need for a coordinated community response even more evident.

1. Cultural Outreach Program (COP)

Currently, the Harris County District Attorney's Office's family violence social service staff can only assist domestic violence victims if they come to our office. However, due to the overwhelming number of victims traumatized by domestic violence in Harris

County and our large geographical footprint, we discovered that one centralized office to serve all domestic violence victims is not the most effective service model. Additionally, due to Hurricane Harvey, our office was relocated from the downtown courthouse complex to a location not easily accessible due to a lack of public transportation and other barriers such as finances and childcare. As a result, District Attorney Kim Ogg authorized our division to create the Cultural Outreach Program (COP), which allows the division to extend its throughout Harris County and particularly to underserved communities that are plagued with domestic violence. Specifically, COP will provide protective order services to culturally specific immigrant and minority communities who are more vulnerable to intimate partner violence due to factors unique to their nationalities. The COP program will allow family violence social workers to co-locate in community agencies to offer protective order services, criminal justice education, crisis intervention, and safety planning.

2. Domestic Abuse Response Team (DART)

Although best practices suggest that danger assessments be conducted on all domestic violence cases, equally important, is what happens to that information once a [danger] assessment is complete. When a case screens in as high risk, there must be a team, to create a safety net around the victim and hold the offender fully accountable."⁴⁷ To that end, the Harris County District Attorney's Office is also working with law enforcement officers to support high-risk domestic violence survivors through the development of the Harris County Domestic Abuse Response Team (DART). DART is a mobile crisis response team that will engage high-risk domestic violence victims, thereby closing the gap that currently exists and often inhibits victims' access to resources to facilitate their safety. DART is modeled after the Los Angeles Police Department's response team, which has been a key component of Los Angeles' coordinated community response to

⁴⁶ Statistics provided by the Harris County District Attorney's Information Technology Division.

⁴⁷ Diane Rosenfeld (February/March 2012) "The High Risk Team Model and GPS Offender Monitoring: Stopping DV in Its Tracks," Domestic Violence Report, Volume 17, No. 3, 34.

domestic violence. For purposes of this pilot, DART teams will be dispatched to “high risk” crime scenes involving 1) strangulation, 2) continuous domestic abuse, and 3) non-fatal weapons-involved offenses committed against an intimate partner or family member. Each DART team will include one victim advocate and one law enforcement officer who will be specially trained in safety, crisis intervention, and the dynamics of domestic violence.

DART teams will be dispatched at the request of a DART Prosecutor or the primary responding officer at a high-risk domestic violence crime scene. If a primary responding officer requests DART assistance, a DART team will be dispatched to a secured crime scene to meet the victim and provide immediate crisis counseling, victim stabilization, and coordinate community based services. By utilizing DART teams to triage high-risk domestic violence cases, we can facilitate the sharing of information with our newly established Domestic Violence High Risk Team and other community partners who provide long-term services for domestic violence victims, thereby empowering victims to make self-care decisions that prioritize safety. It is proven that early contact with an advocate creates a positive experience for a crime victim. Abused women who apply and qualify for a 2-year protection order, irrespective of whether or not they are granted the order, report significantly lower levels of violence during the subsequent 18 months.”⁴⁸ Therefore, we can infer from this research that early intervention efforts like COP and DART will greatly contribute to victim safety and will work simultaneously to reduce Harris County’s domestic violence homicide rate, which is a goal all communities should strive to achieve.

IV. CONCLUSION

Ashanti Hunter’s death was the catalyst for systemic change in Harris County. Having reported strangulation at least two of the five times she called police, the signs were evident that she was a high-risk for homicide. Strangulation is often the

highest predictor of future fatality as well as an indicator for lethality to law enforcement. Through a targeted, intentional approach, Harris County has developed and implemented a strangulation supplement across law enforcement jurisdictions and is designing protocols for response by medical and advocacy personnel, to achieve improved safety, a decrease in deaths, and an increase in accountability. See *Diagram 3*.

Diagram 3



And while we acknowledge that the sheer magnitude of victims and a lack of resources may prohibit communities from developing a coordinated response for strangulation victims, the potential lethality of the crime and its effects on a community should be enough for stakeholders to develop relationships among responding systems and build a solid foundation to plan and implement strategies for systemic improvement. Communities should strive to bring practitioners together to promote dialogue and resolve problems, develop a shared philosophy for how strangulation cases can be processed, and ultimately work to create a system that shifts responsibility for victim safety from the victim to the system because one life lost is one life too many.

⁴⁸ McFarlane, Judith, Dr.PH; Gist, Julia, PhD; Watson, Kathy, MS; Batten, Elizabeth, BA; Hall, Iva, PhD. (2004). Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women. *American Journal of Public Health*, 94(4), 613-618.

Dosage Probation: Enhancing Public Safety by Rethinking the Structure of Probation Sentences

By PETE ORPUT, Washington County (MN) Attorney



Those of us who work in criminal justice cannot go long without hearing questions such as “When are you folks going to reform your probationary strategy?” We are heartened somewhat by the meme shifting from “mass incarceration” to “probation reform”, yet many of us pause and ask ourselves what is broken about probation? The answer, our reform minded friends are quick to point out, is the numbers they cite: 4.5 million people in this country are considered to be on some form of supervision from parole after prison to probation supervision in local communities. Critics of our common probation supervision programs tell us that there are more people on probation in this country than the population of Kentucky. They go on to point to a tripling of probationers in the last 30 years. These numbers are apparently so shocking to some that they demand change—often any program that will shrink the numbers. But why?

Recent census statistics show that America has a population of 328.2 million people. Yet in one year alone, 2017, Uniform Crime Report (UCR) data indicates that there were 1.2 million violent crimes and 7.7 million property crimes (including home burglaries). In just one year in the United States there were 8.9 million crimes reported. In years before 2017, there has been a steady rise in crimes along with the steady rise in population. Therefore, it seems quite plausible to find 4.5 million Americans not in prison but on community based supervision programs in order to protect society and hold offenders accountable.

Having a bit more than 1 percent of our national population on probation for millions of crimes committed annually does not necessarily shock the conscious or even give rise to a clarion call for change. However, there are in many legislatures around the country bills to limit the use of probation, time spent on it or in the words of Professor Phelps,

“[I]nstead of diverting people from prison, probation often ‘widens the net’ by expanding formal supervision for low-level offenses that would otherwise garner little to no punishment. This matters because the very fact of being on probation puts individuals under heightened scrutiny, restricts their behavior, and eases the path to imprisonment.”

Notwithstanding Professor Phelps’ suggestion that we perhaps forgo supervising criminal offenders in lieu of jail, public safety insists on at least some accountability for offenders so that they may reconsider reoffending again. Perhaps then, instead of all-or-nothing probation alternatives, we consider an innovative and promising probation supervision program called Dosage Probation.

Dosage probation relies on a client’s internal motivation to change their behavior.

Washington County Minnesota Community Corrections is one of two sites in the nation working on a new way of delivering probation services to adult probationers. This model, called dosage probation, is a new initiative from the National Institute of Corrections (NIC). Dosage probation relies on a client’s internal motivation to change their behavior. The probationer can shorten the time they are under probation supervision by actively participating and completing programming to reduce the likelihood of their future criminal behavior.

HOW IT WORKS

A probationer is sentenced to a term of probation, say five years. At the first meeting with their probation officer, the client participates in a risk assessment that scores them on how likely they are to commit another crime. This assessment is an actuarial tool similar to what the insurance and banking industry uses. Each level of risk has a defined number of “targeted dosage intervention hours” (referred to as dosage hours) the probationer must complete in order to be discharged from probation. The bar for what counts towards these hours is high making the standard quite rigorous. Once the probationer has served at least one year of probation, has



completed the dosage hours along with their conditions of probation, they are granted a discharge from their sentence. If the probationer chooses not to participate in the dosage program, they remain on probation for the duration of their sentence. Targeted dosage hours must address the top five areas that lead to criminal behavior. These areas are: 1) criminal thinking patterns and values, 2) poor decision-making skills, 3) anti-social peers, 4) family/marital stressors and 5) chemical abuse. Probationers are referred to program providers who have been identified by the Community Corrections Department that offer research based services directly related to these areas. Probation Officers are also trained to administer cognitive-behavioral interventions which count toward the required dosage hours.

Each probationer is held accountable to fully participate in all aspects of programming. If a probationer does not participate or fails to attend, credit will not be given toward their dosage hours. Sex offenses, domestic abuse and felony level driving under the influence cases are not eligible to participate in dosage probation. A sentencing judge may also choose to remove the option for any case based on the individual circumstances surrounding the offense.

GOAL

Dosage probation attempts to tap into a probationer's motivation to get off of supervision. Tapping into this motivation gets clients to actively participate in the programming they need to reduce the likelihood of future criminal justice system involvement. Research indicates this kind of targeted intervention enhances public safety and

reduces criminal justice systems costs making a “win-win” situation for both offenders and tax payers.

Moreover, and perhaps more important, dosage probation puts the onus for changing criminal behavior on the offender rather than the probation agent tracking down the offender to determine whether he/she is following directives. Essentially, dosage posits to the offender how long they wish to be on probation supervision. If the offender is motivated to change then they are given the opportunity to prove it by completing cognitive skills lessons, therapy, chemical dependency treatment, anger management or other criminogenic factors that are identified through risk assessment.

Currently, Washington County, Minnesota, and Napa County, California, are two jurisdictions implementing this model with guidance from the National Institute of Corrections. For more information, please contact Terry Thomas, Deputy Director-Washington County Community Corrections at terry.thomas@co.washington.mn.us or Pete Orput, Washington County Attorney at pete.orput@co.washington.mn.us.



MARY-ALICE DOYLE

Deputy First Assistant
District Attorney and Chief
of District Courts
Essex District Attorney's
Office, Salem, MA

Job Responsibilities

Supervise all district courts; oversee all diversion programs (Juvenile, Youthful and Drug); coordinate all hiring and training of assistant district attorneys; and advise the District Attorney on policy matters.

Conduct trainings for police, community groups, and the Massachusetts and National District Attorneys Associations in the areas of domestic violence and ethics. Currently serves on the Massachusetts Sentencing Commission, Massachusetts Trial Court Education Domestic Violence Task Force, the Superior Court Working Group on Best Practices in Criminal Sentencing, and the Essex County Child Fatality Review Team.

Qualifications

Mary-Alice served as the deputy director of the Juvenile Justice Unit while attending law school at night. She graduated from Suffolk University Law School Evening Division cum laude in 1993 and has been a prosecutor for over 25 years. Prior to her appointment as Deputy First Assistant District Attorney by DA Jonathan Blodgett in 2003, she was a Superior Court Assistant District Attorney and Chief of Domestic Violence Prosecutions for Essex County. In 2008, she was awarded the William C. O'Malley Prosecutor of the Year Award by the Massachusetts District Attorneys Association.

MEET A NDAA MEMBER

1

What does a typical day look like for you?

Before I leave the house, I respond to inquiries from ADAs concerning new cases which continue throughout the day. Upon arriving at the office, I meet with the District Attorney. I then review cases for diversion, supervise ongoing prosecutions, and review judicial decisions for appeal.

2

What is your favorite part about working as a prosecutor or for your office?

Working with other dedicated professionals who care deeply about public safety, crime victims and the law.

3

What do you like most about being a NDAA member?

Training opportunities for ADAs.

4

What are your hopes for the prosecution profession?

There is a national conversation taking place about our profession that has over-simplified our role in the criminal justice system and ascribes a lot of society's ills to the prosecutor. My hope is that we can improve the public's understanding of the system and our role as ministers of justice.

5

What's the best meal you've ever had?

Chicken Marsala in Boston's North End.

6

What book did you read last?

Fall River Dreams by Bill Reynolds

7

What is your favorite movie and book?

Remember the Titans and *To Kill a Mockingbird*

8

What music is on your cell phone?

Billy Joel, Luke Bryan and whatever my kids are listening to since we have family share on Apple.

Remembering Those Who Never Forget: Keeping Contact With Cold Case Survivors



By **DR. WENDY L. PATRICK,**
Deputy District Attorney, San Diego County (CA)

CNN reported in February 2019 that over one year after the arrest of the Golden State Killer, victims and family members of victims shared a collective “wave of relief” that Joseph James DeAngelo, the then 72-year-old former law enforcement officer believed to be linked to 12 killings and at least 50 rapes in California, was finally apprehended. Having matched his DNA to the horrific crime spree in the 1970s and 1980s, NPR reported that DeAngelo was arrested without incident at his Citrus Heights home.

But not all victims and survivors of the slain are lucky enough to see an arrest of the perpetrator — no matter how long they wait.

The men and women who swear to protect and serve know that fighting crime involves both seeking justice for the slain, and caring for the survivors. This is particularly true in cases where there is no suspect . . . at least not yet.

Although there is no such thing as a victimless crime, and all crime impacts victims, their families, and the community at large, unsolved crime is in a category of its own. Cold cases present unique challenges for investigators, prosecutors, and survivors. This is particularly true for surviving family members of homicide victims, who suffer through birthdays, holidays, and the anniversary of the death of their loved one — every year.

Unlike Hollywood crime dramas, where a murder is solved and the perpetrator brought to justice in less than one hour, in the real world, the wheels of justice turn much more slowly. With scant suspect information and a lack of forensic evidence, they appear to grind to a halt — at least in the minds of those left behind.

This of course is never true in reality. Consider the fact that in 2011, the *Los Angeles Times* in a piece entitled “DNA testing sheds new light on Original Night Stalker case,” opened with the caveat: “Whether the serial killer known as the Original Night Stalker is still alive, nobody knows.” Yet investigators and prosecutors continued to work diligently behind the scenes, pursuing every lead. In the case of the Golden State Killer, it paid off.

During the waiting game, however, for surviving family members of the victims in such cases, research shows that the frequency and quality of communication by law enforcement can prevent survivors from feeling like justice delayed is justice denied.

REMEMBERING THOSE LEFT BEHIND

Law enforcement and prosecutors pursue cold cases with patience and persistence. The challenge is to express this reality to survivors, to ensure them that their loved one is important, and their case matters. Good communication with the families of victims can make all the difference when it comes to ensuring that survivors feel validated, and valued. Research corroborates the importance of law enforcement communication with survivors of the slain.

Paul B. Stretesky et al. in a piece entitled “The Police have Given Up” (2016) examined how law enforcement communication was perceived by families in cold case homicide cases. They observed that frequency of police contact, perceived importance of information communicated, and satisfaction with police efforts to communicate inversely correlated with perception that the police gave up on the investigation. In other words, good communication serves the dual purpose of keeping the families informed, and assuring them about the importance of the ongoing investigation.

**But not all victims and survivors of
the slain are lucky enough to see
an arrest of the perpetrator — no
matter how long they wait.**

Research by Katie A. Jacobs et al. (2016) also examined the familial impact of cold case homicides, including suggested methods of coping for victims. Exploring the experiences of twelve homicide survivors from four families through conducting in depth interviews, the researchers uncovered



five themes. These included spending time with related survivors, a tendency to become overprotective, experiencing an impact on existing relationships, having difficulty with family traditions, and feeling pressure to “stay strong.”

The researchers note that their data suggests several methods of coping during the grieving process. These include recognizing and addressing changes in emotions and behaviors, openly discussing the impact of the loss on existing relationships, and engaging in both private and collective grieving. The authors note their research yields a framework for understanding how cold case homicide impacts survivors of the victim, as well as related practitioners — who can use the information to provide support and assistance.

THE PRICELESS GIFT OF HOPE

Every crime matters; so does every crime victim, and every survivor. Through good communication and regular case updates, the families of victims, although grieving, are comforted with the fact that their loved one is gone but not forgotten. Compassionate communication also bestows one of the most valuable gifts a survivor can receive — the priceless gift of hope.

A version of this article originally ran in
Law Enforcement Quarterly.

Essex County Drug Diversion Program: Offering Treatment with Accountability to Non-Violent Drug Offenders

By JONATHAN BLODGETT, District Attorney, Essex County (MA)



The District Court in Lawrence, Massachusetts, like many urban courts, is busy with a wide variety of cases. Many of the people who appear are struggling with a substance use disorder and they have been arrested for possession or a non-violent offense related to their drug use. Typically, these individuals will be given pre-trial probation. Even those defendants with multiple arrests for possession or minor charges such as shoplifting or larceny will most likely receive a term of probation with some conditions. All too often, this is the beginning of a long trek through the criminal justice system, fueled by a substance use disorder, resulting in a slow escalation of criminal activity until jail time is the only response the court can offer.

In 2007, when the spike in opioid-related activity was just beginning, I introduced the Essex County Drug Diversion Program to help address this dynamic. The Essex County Drug Diversion Program is a pre- and post-arraignment program for offenders with substance use disorders who are charged with non-violent offenses. The program provides candidates the opportunity to receive comprehensive substance use treatment services in lieu of going through the traditional court process. To date, over 1,050 people have availed themselves of the treatment services offered by this program.

At the time, it was a unique tactic to try to intervene at the beginning of the addiction cycle, which we are trying very desperately to break. Rather than watch the very predictable revolving door of drug-addicted offenders, we sought to interrupt that process by offering treatment on demand to non-violent offenders. This approach does not fit the traditional role of the prosecutor, in that we are offering services to the defendant rather than prosecuting them. However, based upon my 16 years of experience as District Attorney, when a person who is addicted to drugs is given a chance at treatment and overcoming their addiction, public safety is improved.

A critical element of this program is the close collaboration between the Essex District Attorney's Office and substance use treatment provider Bridgewell. My juvenile diversion staff, in consultation with assistant district attorneys, review criminal complaints in all eight district courts each morning to identify eligible cases for diversion. Non-violent offenders with substance use as an underlying issue are offered the opportunity to participate in the program.

If the offender accepts this opportunity, they meet with a clinical case manager from Bridgewell in the courthouse that same day. They receive a substance use assessment followed by immediate access to treatment. In many cases, the individual has a mental health disorder in addition to their substance use disorder. A thorough intake by the clinical case manager ensures that these issues are identified and addressed in the treatment plan. Treatment options include medical detox, emergency psychiatric evaluation, medically assisted treatment, an intensive outpatient program, or residential program. Other services may include addressing homelessness or an unsafe home life. The minimum length of treatment is six months. Although insurance will be used to pay for some of the services, no one is denied services based on an inability to pay.

If a participant fails to complete all treatment components, they will be prosecuted. However, if the participant relapses, but remains committed to recovery, their treatment plan is adjusted and they remain in the program. Once the clinical case manager informs the District Attorney's Office that the participant has completed the treatment program, the charges against them are dismissed.

Recovery is hard work but with support and services, many people do succeed. Our program provides participants with multiple sources of support and services. The clinical case manager serves as the liaison among the program participant,



the District Attorney's Office and the treatment providers. They also often work with a participant's family to ensure that the participant has the support they need to achieve sobriety. In addition to the clinical case manager, participants are also assigned a recovery coach who provides additional support throughout the treatment period. A recovery coach provides a unique perspective and can assist the program participant in identifying appropriate NA/AA meetings and help them build a support network.

Diversion participants are also provided with various "aftercare" services including assistance with housing, employment, and education, as well as special peer-lead support groups consisting of other diversion program graduates.

When dealing with the disease of addiction, it is difficult to define success. It can take four to five attempts at recovery for a person addicted to opioids, to achieve one year of sobriety. So even for those who try this program and do not succeed, they are one step closer to recovery. And for those who do achieve sobriety, it is nothing less than life-changing.

For example, a 46-year old woman was charged with possession of Class A (fentanyl), a misdemeanor in Massachusetts. She reported a 20 year history of substance use and was very resistant to and afraid of detoxing. After meeting with the clinical case manager, she agreed to go to detox. Following detox, she was given an intensive outpatient treatment program which involved medically assisted treatment, twice weekly meetings with a therapist, 12-step recovery group meetings and drug testing. She had no support from her family after so many years of active addiction to the point where her daughter, who was about to have a baby, refused to speak to her. Her case manager and her recovery coach provided support and encouragement.

After several months of staying clean, she reached out to her daughter and has begun to re-build their relationship. She has successfully completed diversion, and the charges against her have been dismissed. She continues to remain clean and is now babysitting for her granddaughter.

A 19-year old woman charged with possession of Class A (fentanyl) was struggling to stay clean. She was homeless and unemployed. In addition to a treatment plan, her case manager assisted with job applications, and enrolling in a food assistance program. Her recovery coach gave her rides to 12-step recovery group meetings and appointments. She successfully completed diversion and the charges against her have been dismissed. She is now a manager of a local Starbucks.

My duty as District Attorney is to uphold the law and make sure the residents of Essex County are safe. I believe I am fulfilling this duty by offering drug-addicted offenders the chance to modify their behavior and get the help they need, while keeping them out of the court system. We know that when it comes to addiction, every day is critical. When we can get someone who is charged with a possessory or other minor offense to go into treatment, we are quite frankly saving lives.

Jonathan W. Blodgett has been the elected District Attorney of Essex County since 2003. He is currently the President of the National District Attorneys Association.

The Essex Country Drug Diversion Program was recently recognized by the Addiction Policy Forum as an Innovative Program. For more information, please visit: <http://www.mass.gov/essexda>.



First Look: Creating Pathways for Positive Change

By JON TUNHEIM, Prosecuting Attorney, Thurston County (WA)



“Every case presents the opportunity for change.”

In 2016, the Thurston County (WA) criminal justice system was facing challenges related to managing substantial criminal caseloads and increasing jail populations. In response to these trends, the county Prosecuting Attorney’s Office developed a strategy to address certain types of criminal offenses and joined with the Thurston County Office of Public Defense, Thurston County Superior Court and the Thurston County pre-trial services agency to adopt a collaborative approach to addressing criminal behavior now known as the “First Look” program.

Research has shown that public safety is enhanced by programs that divert low-level offenders out of the criminal justice system and into community-based resource referrals. First Look is a differential case processing program that benefits the entire justice system by identifying individuals who may not benefit from traditional prosecution and attempts to direct them away from criminal justice involvement. Although the program is only in its third year, data confirms that the First Look program generates returns to the community in terms of cost savings, public safety, long-term health and personal stability for justice-involved populations.

The title refers to the “First Look” a prosecutor takes at a defendant’s file when they enter the criminal justice system. Under the First Look philosophy, prosecutors examine each case independently to proactively assess the goals of prosecution. Each case represents a unique individual and factors such as prior violations, cooperation with law enforcement, substance use disorder and mental health are taken into account as prosecutors work in partnership with the defense to determine whether an offender is a good fit for the program.

The ideal candidate for First Look is a low-risk/low-level offender and/or high-risk/low level offender who is willing to accept responsibility for their criminal behavior and work with the prosecution to modify the behaviors that brought them into the criminal justice system. Once they agree to participate, pre-trial services assesses the needs of the offender, provides continued supervision and develops personalized alternatives to incarceration, such as referral to therapeutic courts, substance use disorder treatment,

mental health treatment and a myriad of connections to community services. Through connection to community resource providers, pretrial services offers individuals with substance use and mental health issues an appropriate balance of supervision, accountability, community treatment and support. The collaboration between non-traditional criminal justice partners is a driving factor in what sets the nature of this case prosecution effort apart from standard criminal prosecution.

When participants complete the program requirements, there are a number of potential resolutions available to resolve the case. If the agreed-upon conditions have been followed and the supervision plan has been completed, the charges could be reduced or dismissed entirely and the individual can continue forging a pathway to success with the skills, resources and support they received while engaging in the First Look program with the goal of not returning to the criminal justice system.



The individual pictured separately from the group is Wayne Graham, Senior Deputy Prosecuting Attorney and First Look lead for the Thurston County Prosecuting Attorney’s Office. L-R on in the top right photo are Wayne Graham, Rosemary Hewitson, Criminal Division DPA, Joseph Wheeler, Senior Deputy Prosecuting Attorney and Ali Abid, Criminal Division DPA. They comprise the First Look team for the prosecutor’s office.

Background: From the Origin of the Office of the Attorney General in England to the Creation of the Office of Director of Criminal and Penal Prosecutions in Québec (Canada)



By MTRE. PATRICK MICHEL, Chief Prosecutor, Director of Criminal and Penal Prosecutions and MTRE. JOËLLE HUOT, Criminal and Penal Prosecutor, Director of Criminal and Penal Prosecutions

(English Translation of the Original French Version)

The coming into force of the *Act respecting the Director of Criminal and Penal Prosecutions (ADCPP)*¹ on March 15, 2007, marked a major turning point in the evolution of the justice system in Québec. Since that date, the Director of Criminal and Penal Prosecutions (DCPP) directs criminal and penal prosecutions in Québec on behalf of the State, under the general authority of the Minister of Justice and Attorney General. Since the functions and powers exercised by the DCPP, as public prosecutor, were originally the responsibility of the office of the Attorney General,² it seems relevant to look into the history of this office.

THE ORIGINS

The origins of the office of Attorney General are controversial and its evolution is no less complex, with some authors even suggesting that its exact origin is actually unknown.³ A Supreme Court of Canada judge wrote that the origins of the principal powers traditionally vested in the Attorney General, primarily that of prosecuting or terminating proceedings, “are lost in history.”⁴ In fact, it appears that the Attorney General’s assumption of a role in the administration of justice in England dates back to the end of medieval times.⁵

In the 13th century, penal prosecutions in England were mainly conducted by citizens. However, the Crown could take the initiative, especially where the crimes being prosecuted were detrimental to the peace and order of society. The sovereign was then represented by prosecutors

who acted individually, and whose functions were limited to handling the criminal prosecutions on his behalf and to see to the respect of his rights and prerogatives before the courts of justice. These prosecutors’ mandates were generally restricted, as were their powers. At that time, the judicial system was decentralized and the courts were locally constituted.

However, it was increasingly common for a single Crown prosecutor to be appointed to defend the sovereign’s interests before the royal courts. This prosecutor had the power to appoint assistants.

In 1461, the title of “attorney general” officially appeared for the first time in a *Writ of Attendance* ordering the attorney general to run for parliament to play a role as legal advisor to the Upper House (House of Lords).

In the 16th century, the King’s Attorney (attorney general) was the advocate responsible for overseeing the sovereign’s legal interests throughout the kingdom. He was assisted in doing so by a deputy, the King’s Solicitor (the predecessor of the Solicitor General). He was then called the King’s Attorney, since, in accordance with British constitutional law, the king was empowered by the constitution and vested the attorney general with his powers, powers that the latter exercised in the king’s name.⁶

With the development of the parliamentary system and the principle of responsible government, the predominant role that the attorney general was called on to play within parliament and the government, notably with respect to

¹ *Act respecting the Director of Criminal and Penal Prosecutions*, [CQLR, c. D-9.1.1](#), hereinafter “ADCPP”.

² *Nelles v. Ontario*, [1989] 2 S.C.R. 170, pp. 191–192.

³ John. Ll. J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) pp. 12–13.

⁴ *R. v. Hauser*, [1979] 1 S.C.R. 984, 1028.

⁵ J. Ll. J. Edwards, *supra* note 3; *Rapport du comité d’étude sur la rémunération des substituts du procureur général du Québec*, September 1985 (hereinafter, the *Rapport Rouleau*, named after its chairperson, Alfred Rouleau), pp. 4–6, 11–13; André Buteau, *Les fonctions de poursuivant, de gardien de l’intérêt public,*

de représentant de l’État devant les tribunaux et de conseiller juridique exercées par le ministre de la Justice et Procureur général du Québec, Conférence des juristes de l’État, January 2002, p. 245; Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and Crown Prosecutor* (1990) p. 3; *R. c. Smythe*, (1970) 3 C.C.C. (2d) 97, 70 D.T.C. 6382; *Nelles v. Ontario*, *supra* note 2, pp. 191–192; *Krieger v. Law Society of Alberta*, [2002] 1 S.C.R. 65, paras. 24–26.

⁶ See *R. v. Smythe*, *supra* note 5. It was in this same case that the Supreme Court upheld the public prosecutor’s discretion to elect to proceed by summary conviction or indictment, *Smythe v. The Queen*, [1971] S.C.R. 680.

law-making, caused him to have to abandon his functions as Crown representative before criminal courts. These functions were assigned to advocates designated to represent him, who were later considered “Crown prosecutors.”

The functioning of the English criminal prosecution system however long remained founded on prosecutions undertaken by individuals, the so-called “private” prosecutors, and on prosecutions undertaken by the police, themselves considered private prosecutors, who gave advocates mandates to represent them. It went unchanged, despite the creation of the office of Director of Public Prosecutions (DPP) in 1879. The DPP was an indirect predecessor of the different directors of criminal and public prosecutions through common law jurisdictions, but its beginnings were full of obstacles. First, the position of DPP had few resources; it was established by a conservative government mindful of limiting public spending.⁷ At that time, it was said that the DPP’s role was not to supplant but only to supplement the system in place in England and in Wales. That system still relied primarily on private prosecutors or on the police, acting in that capacity, represented by advocates. Furthermore, the cases in which the DPP could intervene were limited, being able to intervene and conduct a prosecution only if the proceeding’s degree of complexity or difficulty justified doing so, or if specific circumstances so dictated.⁸

In 1985, the functioning of the British system became founded, in principle, on State prosecutors acting as public prosecutors.⁹ It was in that year that the Crown Prosecution Service (CPS) was established, a structured prosecution service acting under the supervision of the DPP and present throughout the territory of England and Wales to conduct the majority of criminal prosecutions.

Since the office of the attorney general was created, the attorney general has exercised two fundamental powers

traditionally vested in that office: the power to institute penal proceedings and the power to terminate proceedings.¹⁰

IN CANADA

The British colonies established in Canada essentially replicated the British judicial system with, however, some adaptations. One such adaptation consisted in the Attorney General of Canada holding a more important role in judicial proceedings, taking part in prosecutions that, in England, would have been private.¹¹

In 1857, the *County Crown Attorneys Act* was passed in Upper Canada. This legislation, which drew on the public prosecution system then in effect in Scotland, instituted a publicly funded Crown attorney (local Crown attorney) in each county. The attorney was responsible for all criminal matters as well as supervising the prosecutions of private prosecutors within the county. This distanced it from the British system of prosecution which was still largely founded on private prosecutors. The law established a hybrid system of prosecutions, that is, a system of public prosecutions in which the citizen’s right to initiate a private prosecution was conserved.¹²

After Confederation, the *Act respecting the Department of Justice* was passed in 1868, establishing the Department of Justice. The Act stated that the Minister of Justice was *ex officio* Attorney General of Canada, thereby significantly distinguishing it from the British model, where the equivalent functions of Minister of Justice and Attorney General were exercised by different position holders.¹³

IN QUÉBEC

Prior to 1962, the advocates who represented the Attorney General in criminal prosecutions came from private practice.

⁷ James Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain* (Oxford University Press: 2013) p. 191.

⁸ *Idem* J. Ll. J. Edwards, *supra* note 3, chapter 16: Evolution of the Office of Director of Public Prosecution and chapter 17: The Modern Development of the Office of Director of Public Prosecutions.

⁹ J. Ll. J. Edwards, *supra* note 3, chapter 16: Evolution of the Office of Director of Public Prosecution and chapter 17: The Modern Development of the Office of Director of Public Prosecutions; The Crown Prosecution Services, *The History of the Crown Prosecution Service*.

¹⁰ *R. v. Hauser*, *supra* note 4, pp. 1029–1030 (J. Dickson).

¹¹ Law Reform Commission of Canada, *supra* note 5, p. 5; Lori Sterling and Heather Mackay, *Constitutional Recognition of the Role of the Attorney General in Criminal Prosecution: Krieger v. Law Society of Alberta*, (2003) 20 S.C.L.R. (2d) 169, p. 171.

¹² Marvin R. Bloos, *The Public Prosecutions Model From Upper Canada*, 1990 32 C.L.Q. 69.

¹³ A. Buteau, *supra* note 5, p. 254; *Rapport Rouleau*, *supra* note 5, p. 6–7; John Ll. J. Edwards, *Ministerial responsibility for national security as it relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada*, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (Ottawa, 1980) pp. 8, 35.

They exercised their functions on a part-time basis and were remunerated by the government on a per-file or contract basis. Any changes in government were thus likely to affect whether their services were retained. Beginning in 1962, the political parties agreed to respect a list of permanent prosecutors in order to depoliticize the function. The practice of nominating part-time prosecutors continues, but in parallel.¹⁴

In 1965, the ministry of the Attorney General was replaced by the Department of Justice.¹⁵

In 1969, the *Act respecting Attorney General's prosecutors*¹⁶ was passed, establishing the permanency of the function of attorney general's prosecutors, as they were thereafter appointed under the Public Service Act.¹⁷ In doing so, the sustainability of the public prosecutions service was ensured and the development of expertise within the institution promoted.¹⁸ The law introduced certain fundamental principles related to the exercise of the office of attorney, namely, the exclusivity of the function and the need to be politically neutral.¹⁹ It stipulates the primary powers that prosecutors exercise under the authority of the Attorney General. These powers, including that of authorizing the initiation of a prosecution, today remain essentially the same.²⁰ This law can be seen to have legislatively laid the foundation for the independence of the institution that was to become the DCP. ²¹

In 1972, the *Act respecting Attorney General's prosecutors* was amended.²¹ It allowed, in particular, the Attorney General to appoint “chief prosecutors” and “assistant chief prosecutors” from among the permanent prosecutors and to determine their duties and functions.²² It also changed the oath to be taken by attorney general's prosecutors when entering upon their duties, adding the duties of objectivity and impartiality.²³

It also added to the permanent prosecutor's duty of political neutrality by prohibiting them from voting in a federal, provincial, municipal or school election.²⁴ However, in 1979, the right of vote was re-established.²⁵

In 1993, the *Act respecting Attorney General's prosecutors* was again amended, prohibiting prosecutors from being a member of a political party or paying a contribution to one.²⁶ The prosecutors continue to be subjected to these restrictions.

In 2002, a further amendment was made to the *Act respecting Attorney General's prosecutors*, mainly to establish a special labour relations plan for the prosecutors, but also to provide that their appointment would thereafter be the responsibility of the Attorney General.²⁷ Previously, the prosecutors were, in principle, government-appointed (according to the law of 1969, by the “lieutenant governor in council”).

In 2005, the *ADCP* was adopted in the context of implementing a governmental plan which aimed at modernizing the Québec's State.²⁸ It created the office of Director of Criminal and Penal Prosecutions, for the purpose of distinguishing the functions of the Attorney General, assumed by the Minister of Justice, from those tied to public prosecutions in criminal and penal matters.

The *ADCP* contains a number of measures aimed at ensuring that the principle of the public prosecutor's independence is respected, in particular the irremovability of the office of the director, the appointment of prosecutors by the director him or herself and the publication of the general directions of the Minister of Justice and instructions of the Attorney General concerning the conduct of a particular case.

¹⁴ *Rapport Rouleau*, *supra* note 5, p. 34; Comité de la rémunération des procureurs aux poursuites criminelles et pénales, *Rapport sur la rémunération et certaines conditions de travail des procureurs aux poursuites criminelles et pénales*, September 25, 2015, p. 8.

¹⁵ A. Buteau, *supra* note 5, p. 261.

¹⁶ *Act respecting Attorney General's prosecutors*, S.Q. 1969, c. 20, hereinafter the *Act respecting Attorney General's prosecutors* (1969).

¹⁷ *Ibid.*, s. 9.

¹⁸ Frank Armstrong and Kenneth L. Chasse, *The Right to an Independent Prosecutor*, (1975) 28 C.N.R.S. 160, pp. 181–182.

¹⁹ *Act respecting Attorney General's prosecutors* (1969), *supra* note 16, s. 7.

²⁰ *Ibid.*, s. 4.

²¹ *An Act to amend the Act respecting Attorney General's prosecutors*, S.Q. 1972, c. 13, hereinafter the *Act to amend the Act respecting Attorney General's prosecutors* (1972).

²² *Ibid.*, s. 5.

²³ *Ibid.*, s. 2.

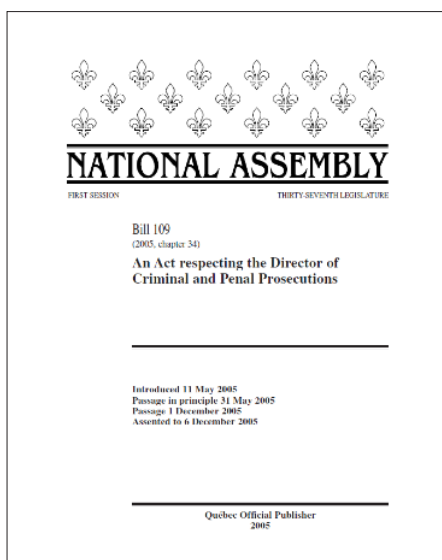
²⁴ *Ibid.*, s. 7.

²⁵ *Loi modifiant ou abrogeant certaines dispositions législatives*, S.Q. 1979, c. 32, s. 11.

²⁶ *Act to amend the Act respecting Attorney General's prosecutors*, S.Q. 1993, c. 29, hereinafter the *Act to amend the Act respecting Attorney General's prosecutors* (1993).

²⁷ *Act to amend the Act respecting Attorney General's prosecutors*, [S.Q. 2002, c. 73](#).

²⁸ *Moderniser l'État — Pour des services de qualité aux citoyens — Plan de modernisation 2004–2007* (Québec, Secrétariat du conseil du Trésor: May 2004) p. 53.



The then Minister of Justice, Mtre. Yvon Marcoux, described the objectives of the Act during the parliamentary debates that led to its adoption:

[Translation]

The office of the Director of Public Prosecutions should better meet the fundamental imperatives of justice, in particular by ensuring the independence of the prosecution in criminal and penal matters and by ensuring the transparency of the prosecution process. [...] Also, the office of the Director of Public Prosecutions should strengthen public confidence in the Québec criminal and penal judicial system and thus eliminate the possibility of citizens perceiving that such prosecutions could be influenced by considerations that would not serve the best interests of justice.²⁹

The challenge that the creation of the office of a Director of Public Prosecutions represented, Mister President, was that of striking a fair balance between the director's independence and accountability toward the government. The Attorney General's accountability with regard to the National Assembly and the general public must be preserved. I believe that the bill achieves this balance and even enhances the accountability of the Attorney General by ensuring the transparency of any potential intervention with the director.³⁰



The ADPCP was recently amended, making the appointment of the director subject to approval by a two thirds vote of the members of the Legislative Assembly.³¹

By the adoption of the *ADPCP*, Québec joined a community of countries, including England,³² Ireland³³ and Australia,³⁴ that have institutions providing an autonomous prosecutions service, independent of political institutions. In Canada, Nova Scotia³⁵ and British Columbia³⁶ also enacted laws to create an independent prosecutions service. At the federal level, since December 12, 2006, there has been a Public Prosecution Service of Canada headed by a director of public prosecutions.³⁷

²⁹ Bill 109 (*Act respecting Attorney General's prosecutors*), Debate concerning the passage in principle of the bill, *Journal des débats de l'Assemblée nationale*, 37th Legislature, 1st session, Vol. 38, No. 158, May 31, 2005.

³⁰ Bill 109 (*Act respecting Attorney General's prosecutors*), Debate concerning the consideration of the report of the Commission des institutions, *Journal des débats de l'Assemblée nationale*, 37th Legislature, 1st session, Vol. 38, No. 191, November 30, 2005.

³¹ *Act to amend the rules governing the appointment and dismissal of the Anti-Corruption Commissioner, the Director General of the Sûreté du Québec and the Director of Criminal and Penal Prosecutions*, S.Q. 2019, c. 6 ([Bill 1](#)).

³² England, *Prosecution of Offences Act*, [1985, c. 23](#).

³³ Ireland, *Prosecution of Offences Act*, [1974, No. 22](#).

³⁴ Australia, *Director of Public Prosecutions Act*, [1983 No. 113](#).

³⁵ *Public Prosecutions Act*, [1990, c. 21 of the Acts of 1990 am. 1999 \(2nd Sess.\), c. 16](#).

³⁶ *Crown Counsel Act*, [RSBC 1996, c. 87](#).

³⁷ *An Act respecting the office of the Director of Public Prosecutions*, [S.C. 2006, c. 9, s. 121](#).

Laws and Prosecutions in Criminal Matters in Canada: The Example of Québec

By **MTRE. CHLOÉ ROUELLE**, Criminal and Penal Prosecutor,
Director of Criminal and Penal Prosecutions

(English Translation of the Original French Version)

In Canada, as in other federations, there is a division of legislative powers between the principal orders of government. The federal Parliament holds the powers that relate to the areas of national interest, which are enumerated in the Constitution.¹ In terms of justice and public safety, they include national defence, penitentiaries (which are responsible for the custody of adult offenders serving imprisonment sentences of two years and more) and criminal law, including the related procedure.²

As regards the provinces, their exclusive powers concern matters of local or private nature. With reference to the subject at hand, it should be noted that they have jurisdiction over prisons (which are responsible for the custody of adult and juvenile offenders serving sentences of less than two years) and the administration of civil and criminal justice.³

THE ADOPTION OF LAWS IN CRIMINAL MATTERS

As per the constitutional distribution of legislative powers, the federal Parliament adopts criminal laws, which are enforced across the country. In doing so, the federal Parliament determines the behaviours that constitute a criminal offence in Canadian law. The *Criminal Code*,⁴ in particular, codifies most of the criminal offences such as impaired driving, fraud, assault, sexual assault, bribery, murder, etc. The federal Parliament also provides in its legislation provisions relating to police powers and judicial authorizations (e.g. arrest, search, seizure, etc.), procedures and evidence (e.g. appearance, mode of trial, motions, etc.) as well as sentences (e.g. objectives and principles, aggravating factors, maximum or minimum sentences, etc.).⁵

CRIMINAL PROSECUTIONS

Given their legislative powers over the administration of justice, the provinces are responsible for the organization and maintenance of provincial courts, including those of criminal jurisdiction. The provinces also oversee the exercise of the power of their attorney general,⁶ whose authority as a prosecutor in criminal matters (and that of their lawful deputies) is recognized by the federal legislator in section 2 of the *Criminal Code*.⁷

In Québec, the enabling Act of the Director of Criminal and Penal Prosecutions (DCPP) provides that the latter is the office responsible for bringing, for the State, criminal prosecutions in the province. In exercising this role, the DCPP directs prosecutions under the *Criminal Code*, the

**The federal Parliament
adopts criminal laws, which are
enforced across the country.**

*Youth Criminal Justice Act*⁸ and any other federal Act in respect of which the Attorney General of Québec has the authority to act as prosecutor.⁹ In this context, between April 1, 2017 and March 31, 2018, over 110,000 criminal files (adult offenders) were opened, some of which may concern more than one accused. In addition, as of March 31, 2018, the DCPP had approximately 219,000 active criminal cases (adult offenders).¹⁰

¹ *Constitution Act*, 1867, [30 & 31 Victoria, c. 3 \(U.K.\)](#).

² *Ibid.*, s. 91.

³ *Ibid.*, s. 92.

⁴ [S.C.R. \(1985\), c. C-4](#).

⁵ In addition to the *Criminal Code*, see in particular the *Canada Evidence Act*, [R.S.C. \(1985\), c. C-5](#).

⁶ *Ontario v. Criminal Lawyers' Association of Ontario*, [\[2013\] 3 S.C.R. 3](#), paras. 33 to 36; *R. v. Bebaui*, C.S. Montréal, No. 500-01-110889-141, November 2, 2018, J. Cournoyer, para. 218.

⁷ *Criminal Code*, s. 2, definitions “attorney general” and “prosecutor”; see also *R. v. Wetmore*, [\[1983\] 2 S.C.R. 284, p. 303](#).

⁸ [S.C. 2002, c. 1](#).

⁹ *Act respecting the Director of Criminal and Penal Prosecutions*, [CQLR, c. D-9.1.1](#), ss. 1 and 13.

¹⁰ Director of Criminal and Penal Prosecutions, *Rapport annuel de gestion 2017-2018*, 2018, p. 69.

Therefore the province takes charge of criminal prosecutions, which are brought and conducted under laws passed by the federal government. This led to the implementation of formal and informal discussion forums between the federal and provincial governments. This dialogue is doubly useful, both for the purpose of criminal law reforms as well as for sharing inspiring practices in criminal prosecutions.

It should be noted that, in Canada, there is also a federal institution prosecuting criminal offences, namely, the Public Prosecution Service of Canada.¹¹ The latter is the national prosecuting authority and conducts mainly regulatory and economic prosecutions, as well as in matters pertaining to national security and drugs.¹² In some of these areas, both the federal prosecutor and the provincial prosecutor may have jurisdiction to act. A range of factors, including the agreements reached or the police force involved in the investigation, will be considered in determining which of the two prosecution services will be in charge of the criminal proceedings. For example, prosecutions for offences under the *Controlled Drugs and Substances Act*¹³ are generally the responsibility of the federal prosecutor, except in the provinces of Québec and New Brunswick.¹⁴ It should also be noted that the federal prosecutor is solely responsible for criminal prosecutions in all three Canadian territories (Yukon, Nunavut and the Northwest Territories).¹⁵

PENAL PROSECUTIONS

The *Act respecting the Director of Criminal and Penal Prosecutions*¹⁶ also provides that, in Québec, the DCPD acts as prosecutor in all proceedings taken under the *Code of Penal Procedure*¹⁷ and some hundred other penal laws, the majority of which are enacted by the provincial legislator. Among them are, for example, the *Highway Safety Code*,¹⁸ the *Act respecting offences relating to alcoholic beverages*,¹⁹ the *Act respecting labour relations, vocational training and workforce management in the construction industry*,²⁰ the *Lobbying Transparency and Ethics Act*,²¹ the *Environment Quality Act*²² as well as the *Act respecting the conservation and development of wildlife*.²³ Excess speeding,

hunting without a permit or working at a construction site without a competency certificate are examples of penal offences provided by the provincial legislation. During 2017–2018, in collaboration with the Offences and Fines Office, the DCPD opened nearly 285,000 files.²⁴

There may be situations where, for a given conduct, a person may be prosecuted both under a criminal law (passed by the federal Parliament) and under a penal law (passed by the provincial legislature). In such cases, in accordance with the principle of restraint, the DCPD recommends recourse to penal law, unless the particular circumstances justify proceeding otherwise.²⁵

¹¹ *Act respecting the Office of the Director of Public Prosecutions*, S.C. 2006, c. 9, s. 121.

¹² Public Prosecution Service of Canada, *Annual Report 2017–2018*.

¹³ S.C. 1996, c. 19.

¹⁴ Public Prosecution Service of Canada, *Who we are, “Areas of prosecution”*, on-line: https://www.ppsc-sppc.gc.ca/eng/bas/index.html#section_1_9.

¹⁵ *Criminal Code*, s. 2, definition “attorney general”, para. (b).

¹⁶ *Supra* note 9, s. 13.

¹⁷ CQLR, c. C-25.1.

¹⁹ CQLR, c. I-8.1.

²⁰ CQLR, c. R-20.

²¹ CQLR, c. T-11.011.

²² CQLR, c. Q-2.

²³ CQLR, c. C-61.1.

²⁴ Director of Criminal and Penal Prosecutions, *Rapport annuel de gestion 2017–2018*, *supra* note 10, p. 70.

²⁵ Director of Criminal and Penal Prosecutions, *ACC-3 : Accusation — décision d’intenter et de continuer une poursuite*, paras. 18 and 19.

Use of Third-Party Algorithms with BWC: Trading Ethics for Efficiency?



By JAMES BAGLINI, JR., Sandra Day O'Connor College of Law,
Juris Doctor Candidate, Class of 2020

With the ubiquitous integration of video streaming and recording technology into nearly all facets of public and private interaction, it is not unreasonable to believe that soon most human activity will be captured as video data. In addition to the many public and private video cameras which constantly monitor traffic intersections, storefronts, and neighborhoods, many law enforcement personnel now implement body-worn cameras (BWC) to generate video data during criminal encounters which can provide objective evidence that once resided only in the memory of witnesses, perpetrators, and officers. The tremendous number of man-hours required to evaluate video data can disincentivize the use of BWCs, while retarding the prosecutor's ability to bring charges and efficiently litigate.¹ Given the tendency towards "paralysis by analysis"² regarding large amounts of data, a modern solution is the implementation of third-party software to classify and sort BWC video files into manageable and coherent "clips", which serves to: 1) improve recall, precision, and speed of evidentiary review compared to traditional manual review; 2) facilitate the strict allocation of manual review hours for high value "clips" with a high probability of containing material information; and 3) reduce the prosecutorial risk of committing Brady or ethical violations.

METHODOLOGIES FOR DATA ASSESSMENT USING ALGORITHMS

Any algorithm that would replace the majority of manual video review would need a superior methodology for identifying and presenting "clips" with a high probability of containing: 1) a "smoking gun" to implicate the alleged perpetrator(s); and 2) material evidence "favorable to the defense, either because it is exculpatory or... impeaching".³ The efficacy of extracting relevant information from large data sets is typically measured by "Recall (percentage of relevant documents retrieved) and Precision (percentage of retrieved documents)".⁴ It is the second category which presents a unique dilemma for prosecutors, who have a constitutional duty to avoid a Brady violation by "[making] available... all existing material or information that tends to mitigate or negate the defendant's guilt," with an additional ethical duty to "make timely disclosure" of such information.^{5,6}

To highlight the inherent bias of lawyers to overestimate the efficacy of their own database queries, a study in 1985 demonstrated that lawyers utilizing paralegals to query a database of full-text electronic documents were only able to retrieve 20% of the relevant documents (Recall), when the lawyer's goal and belief was that his paralegals had retrieved

¹ Charles M. Katz, et al., *Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department*, Phoenix, AZ: Center for Violence Prevention & Community Safety, Arizona State University 23 (2014).

² Ann Langley, *Between "paralysis by analysis" and "extinction by instinct"*, 36(3) Sloan Management Review (1995).

³ *United States v. Dado*, 759 F.3d 550, 559 (6th Cir. 2014).

⁴ David C. Blair & M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-text Document-Retrieval System*, 28(3) Communications of the ACM. 289, 291 (1985). (Imagine there is a data set of 100 documents, containing a subset of 10 documents which are materially relevant. A search which returns 9 relevant documents has a Recall of 9 out of 10, or 90%. If that same search also returns 11 non-relevant documents, then the Precision is 9 out of 20, or 45%.)

⁵ Ariz. R. Crim. P. 15.1(b)(8).

⁶ AZ ST S CT Rule 42 RPC ER 3.8(d).

75% of the documents material to the search criterion.⁷ Furthermore, the search Precision was 79%, meaning that 21 documents out of every 100 retrieved by the search were ultimately deemed irrelevant. The ability of humans to extract relevant information from a large data set more effectively than a machine is a fallacy that persists to this day.⁸ The lawyer in this study had a good faith, albeit grossly mistaken, belief that his team had extracted 75% of all documents relevant to the query, the minimum threshold to successfully support litigation.⁹ This reality suggests that lawyers should pursue technology that optimizes: 1) Recall, to ensure that constitutional and ethical duties are met; and 2) Precision, to minimize manual review of irrelevant data.

To achieve these optimizations, the current methodology utilized heavily in electronic discovery (e-discovery) — supervised machine learning — limits manual review to development of seed sets of data, which the algorithm uses to teach itself what information is relevant, while relegating bulk assessment entirely to the algorithm.¹⁰ Since some lawyers may question whether this burden shifting of data review is ethical, it is critical to understand the framework in which the algorithm operates. While the data sets to be reviewed are concrete, they exist merely as “symbols that represent properties of objects, events and their environment... the products of observation.”¹¹ It is the job of law enforcement to filter the data into useful “descriptions... [which answer] who, what, when and how many,” existing now as information relevant to the facts of a case.¹² This information flows naturally to the prosecutor in preparation for a case, who in turn must take all the relevant information and transform it into knowledge and wisdom that answer the questions of how and why.¹³ The algorithm

should accomplish in minutes (or hours) what a team of paralegals could accomplish in days (or weeks) with respect to combing through data troves to identify, categorize, and parse out potentially relevant items. This automatic process is enhanced by random human checks on relevancy determinations which are fed back into the seed set of data, allowing the algorithm to learn and drive the Recall rate higher. Finally, the smaller subset of relevant information with a high degree of Precision can be presented by the algorithm to the skilled prosecutor’s team to “ferret out the most meaningful or actionable content.”¹⁴

The current methodology utilized heavily in electronic discovery — supervised machine learning — limits manual review to development of seed sets of data.

Current algorithms utilized in e-discovery have been shown to have marked improvements in recall and precision compared to traditional keyword search review, on the order of 95% Recall and 70% Precision.¹⁵ The methodologies implemented by modern algorithms with respect to e-discovery provide an excellent basis for arguing that prosecutors could realize an equally massive improvement in data evaluation, specifically applied to the recent influx of BWC data on the order of hundreds of terabytes (TB) per year, while also providing a higher level of ethical

⁷ David C. Blair & M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-text Document-Retrieval System*, 28(3) Communications of the ACM. 289, 293 (1985).

⁸ Dan Mangan, *Lawyers could be the next profession to be replaced by computers*, CNBC Future of Work (Feb. 17, 2017), <https://www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html>.

⁹ David C. Blair & M. E. Maron, *supra* note 7, at 291.

¹⁰ Jason R. Baron, et al., *Perspectives on Predictive Coding: And Other Advanced Search Methods for the Legal Practitioner*, 9 (2018).

¹¹ Jennifer Rowley, *The wisdom hierarchy: representations of the DIKW hierarchy*, 33 Journal of Information Science. 163, 166 (2007).

¹² *Id.*

¹³ *Id.* at 167.

¹⁴ Jason R. Baron, et al., *Perspectives on Predictive Coding: And Other Advanced Search Methods for the Legal Practitioner* 9–10 (2018).

¹⁵ Eugene Yang, et al., *Effectiveness Results for Popular e-Discovery Algorithms*, In *Proceedings of International Convention on Artificial Intelligence and Law*, London, UK 3 (2017).



accomplishment by reviewing more relevant information than previously performed by manual queries.¹⁶

ALGORITHMS FOR VIDEO ANALYTICS AND THE VALUE TO LAW ENFORCEMENT

The benefits of BWC data are apparent in many jurisdictions that can afford the capital expense, with one study identifying specific key improvements: increased evidentiary quality, approximately 22% less time spent on paperwork, substantial support in domestic violence cases, and advantages in professional development and officer accountability.¹⁷ Unfortunately, a study undertaken by the Phoenix Police Department identified several challenges with embracing the technology, namely the costs and man-hours associated with locating and retrieving a video for a specific event or redaction of personal identifying information (PII), along with a decrease in the ease of working with the prosecutor's office when submitting evidence.¹⁸ The challenges fall into the category of tasks that a supervised machine learning algorithm could handle with equal Recall and Precision as those used in e-discovery. A human user would submit a seed

set of video clips with relevant data to the algorithm, which in turn would begin identifying, categorizing, and parsing out potentially relevant clips, including video that contains data likely to be PII. If only the smaller subset of clips is delivered to the prosecutor's office, then the ease of work improves and the enormous cost of reviewing all video data is shifted to the algorithm, just as in e-discovery.

The algorithmic technology to review video data with the same effectiveness as automatic document review is not simply a thought-experiment, but rather a technology which is already in serious development by an MIT-IBM team, working under the title of "Moments in Time Dataset".¹⁹ The algorithm assessed one million 3-second video clips, corresponding "to the average duration of human working memory... [and] a temporal envelope which holds meaningful actions between people, objects and phenomena..."²⁰ This type of algorithm could be easily adapted and simplified for use in review of BWC data, especially since the classification of meaningful or actionable content should still be set aside for the prosecutor's team.

¹⁶ Kristine Hamann, et al., *Police Body-Worn Cameras: What Prosecutors Need to Know*, Prosecutor's Center for Excellence 14 (2018).

¹⁷ Charles M. Katz, et al., *Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department*, Phoenix, AZ: Center for Violence Prevention & Community Safety, Arizona State University 5 (2014).

¹⁸ Id. at 23.

¹⁹ Mathew Monfort, et al., *Moments in Time Dataset: one million videos for event understanding*, Massachusetts Institute of Technology 1 (2019).

²⁰ Id.

MITIGATING PROSECUTOR'S ETHICAL RISK OF USING PREDICTIVE ALGORITHMS

The largest risk to prosecutors does not lie with the efficacy of the supervised machine learning methodology nor with the availability of video analytics technology, rather, as stated earlier, the risk lies in committing a Brady violation by failing to “[timely] make available... all existing material or information that tends to mitigate or negate the defendant’s guilt,” after relying on algorithms to sort out all data identified as irrelevant.^{21,22}

In *U.S. v. Stirling*, the district court ordered a new trial on defendant’s motion, finding that the prosecutor had committed a Brady violation when it turned over a 214-page log of Skype correspondence obtained from Stirling’s laptop as evidence on the last day of trial.²³ The Government argued that there was no violation, since an exact replica of the laptop hard drive was provided to the defense during the discovery period, but it had utilized a special program to extract the Skype data.²⁴ The court reasoned that if the defendant requires computer forensics experts or a special program to retrieve undetectable information embedded in a larger mass of disclosed evidence, the prosecutor must timely disclose such information or risk a Brady violation by disguising what it has available “in its arsenal of evidence that it intends to use at trial.”²⁵

At first glance, it appears that perhaps the use of a third-party algorithm is similar to the special program utilized by the prosecutor in *Stirling* to extract data which was non-apparent to the defense. Furthermore, as in *Stirling*, it is possible that a larger mass of video data may be disclosed to the defense while the prosecutor derives more insight after later reviewing the evaluation of the algorithm. The ethical issue present here is that through special software, the prosecutor can become aware of material information that is buried in a large data set and perhaps disguise what it has available. Fortunately, the solution is simple for the prosecutor — when the massive video data transfer to the defense occurs, the prosecutor simply discloses that the algorithm was utilized in developing the strategy against the

defendant, thereby avoiding the *Stirling* issue of obfuscating the use of a computer forensic expert.

The prosecutor may be questioned on the use of third-party algorithms whose functions are proprietary, thereby unavailable for examination which a forensic expert could be subjected to. Fortunately, this concern has also been addressed in at least one jurisdiction with *State v. Loomis*, where the court held that a trial court’s use of a risk assessment algorithm in sentencing did not violate the defendant’s due process rights even though the methodology used to produce the assessment was disclosed neither to the court nor to the defendant. A risk assessment algorithm is commonly used by judges to expedite and harmonize sentencing from case to case. There is significant ethical risk associated with a judge shifting sentencing determinations to an algorithm, which is also present when a prosecutor shifts relevance determinations to an algorithm reviewing video data, but for now it is not a due-process violation to utilize third-party proprietary algorithms whose results may have a material impact on a defendant’s outcome.

CONCLUSION

Prosecutors should embrace the use of algorithms to (1) improve Recall, Precision, and speed of evidentiary review compared to traditional manual review; (2) facilitate the strict allocation of manual review hours for high value “clips” with a high probability of containing material information; and (3) reduce the prosecutorial risk of committing Brady or ethical violations. The technology is readily becoming available to extend algorithms to video data and there are protections in place that help prosecutors maintain a strategic advantage in processing more cases without absorbing too much risk of crossing the line, as with *Stirling*, or breaking the budget with manual review.

²¹ Ariz. R. Crim. P. 15.1(b)(8).

²² AZ ST S CT Rule 42 RPC ER 3.8(d).

²³ Order on Defendant’s Mot. For New Trial, 2, *U.S. v. Stirling*, No. 11-20792-CR-ALTONAGA (S.D. Fla. Miami Div.).

²⁴ Id.

²⁵ Id. at 4-5.

The Emerging Public Safety Issue of Treating Drug Endangered Children

By **TIM CRUZ**, District Attorney, Plymouth County (MA)



Ten years ago, our office received a call from a guidance counselor at one of our elementary schools. There had been an armed home invasion — a drug rip off — where the burglars hit the wrong apartment in a triple decker. Instead of the third floor, where the drugs and money were, the burglars busted down the second floor door, where a single mom and three children under the age of twelve were sleeping. Unaware that their “intelligence” was off, the burglars drew their guns on the family. After pistol whipping the mother and shoving the oldest child, the burglars realized their mistake and fled — not, however, without leaving a trail of trauma.

Exposure to opioid addiction in the home is the fastest growing Adverse Childhood Experience (ACE) for children.

Remarkably, the three children showed up to school the next morning, hand-in-hand and on time. The problem was the school and the police never communicated, and the children went unnoticed. A missed opportunity for intervention.

In an effort to close the gaps, and better equip the community to better respond to child victims and witnesses of violence, our office partnered with the Trauma and Learning Policy Initiative (TLPI) — a collaboration of Harvard Law School and the Mass Advocates for Children. TLPI led the training for educators on how to provide trauma-sensitive responses for children exposed to violence, and our office worked with police departments to improve communication with schools. The result was the adoption of the Handle with Care protocol created by the West Virginia Center for Children’s Justice. Ten years later, we would return to our previous work as an answer to one of the emerging public safety issues resulting from the opioid crisis — drug endangered children.

I have served as the chief law enforcement official in Plymouth County, Massachusetts for the past 17 years. During my tenure, we have been tireless in our commitment to pursue justice for victims of crime, and prosecute those who take advantage of them. Our work is ever evolving, and this is especially the case with the dramatic increase in substance use disorders and drug-related fatalities, which continue to devastate our families, schools and neighborhoods. There are misconceptions by some who believe those of us working in law enforcement are attempting to arrest our way out of this issue and are targeting for prosecution those suffering from addiction. This could not be further from the truth. At the end of the day, our job is to protect the community and



respond to its needs. The science has improved and we in law enforcement need to adjust our response to the drug crises hurting our communities — especially as we identify new classes of victims.

In Plymouth County and across Massachusetts, exposure to opioid addiction in the home is the fastest growing Adverse Childhood Experience (ACE) for children. As depicted by ripples flowing from a stone dropped in water, the ripple effect after an overdose can spread wide, with those closest to the overdose victim — children and families — being the first and hardest hit.¹ The effects of the opioid epidemic on children and families are just starting to be recognized as children lose parents, enter foster care, and experience the significant trauma of ACEs related to parental substance use. Of the overdoses in Plymouth County in 2018, 65% were experienced by individuals ages 20–39 — the ages most frequently associated with having children. In addition, 65% percent of overdoses occurred at home, where children are often present. The children in these families are exposed to overdose trauma, drug use and paraphernalia, and the parental mental health disorders associated with addiction.²

In addition to experiencing trauma at home, more and more children's lives are being disrupted with out-of-home placement and foster care. The 284% increase in opioid overdoses statewide from 2010–2017³ coincided with a 55% increase in relatives taking over caregiving responsibilities of children.⁴ Last year, more than 12,000 children in Massachusetts were being raised by grandparents as a result of their parents' opioid addiction.⁵ Since 2012, the number of care and protection cases in the state increased by 56%.⁶

The Massachusetts Trial Court acknowledges that parental opioid addiction is a leading reason for this increase, with 30–40% of child protection orders due to parental addiction.⁷ Furthermore, 60% of cases involving opioid addiction do not end in child/parent reunification.⁸

The effects of ACEs, like familial substance use disorders on an individual's future health were first studied by Kaiser Permanente's Department of Preventive Medicine in 1997. What researchers found is that the trauma resulting from ACEs disrupts neurological development in a way that produces social, emotional, and cognitive impairment. Such impairment can eventually lead to physical and behavioral health problems including addiction, delinquency, depression, and suicide.⁹

At the conclusion of their research, the original ACE authors found two glaring conclusions: ACEs are prevalent and often are unrecognized.¹⁰ Hidden and untreated ACEs can lead to a substantial public safety risk, as youth experiencing trauma are more likely to develop their own addiction, delinquent behavior, and mental health disorders. Yet, researchers are clear that while “young children are particularly sensitive to toxic environments, including high levels of stress that can disrupt healthy development,” children are capable of building resilience to overcome such adversity.¹¹ Thus, in order to help youth build resilience, Plymouth County is working to first, identify youth experiencing trauma as a result of living with familial opioid addiction, and second, implement a range of trauma-sensitive responses.

Specifically, this past year we were fortunate to receive funding from the U.S. Department of Justice's Office for Victims of

¹ Suzanne C. Brundage and Carol Levine, *The Ripple Effect: The Impact of the Opioid Epidemic on Children and Families*, United Hospital Fund, March 2019, https://uhfnyc.org/media/filer_public/17/2c/172ca968-43aa-45f9-a290-50018e85a9d8/uhf-opioids-20190315.pdf.

² Id.

³ Data Brief: Opioid-related Overdose Deaths Among Massachusetts Residents, Massachusetts Department of Public Health, May 2018, <https://www.mass.gov/files/documents/2018/05/22/Opioid-related%20Overdose%20Deaths%20among%20MA%20Residents%20-%20May%202018.pdf>.

⁴ Grandparents Step in When Addiction Leaves Thousands Without Parents, Boston 25 News, November 22, 2017, <https://www.fox25boston.com/news/grandparents-step-in-when-addiction-leaves-thousands-without-parents-1/652113438>.

⁵ Id.

⁶ Dan Glaun, *Children Taken from Massachusetts Homes Spiked 56 Percent Since 2012, Driven by the Opioid Crisis*, MassLive.com, January 14, 2017, https://www.masslive.com/news/index.ssf/2017/01/child_removal_cases_have_spike.html.

⁷ Id.

⁸ Id.

⁹ *About the CDC-Kaiser ACE Study*, Center for Disease Control and Prevention, June 14, 2016, <https://www.cdc.gov/violenceprevention/acestudy/about.html>.

¹⁰ Id.

¹¹ Suzanne C. Brundage and Carol Levine, *The Ripple Effect: The Impact of the Opioid Epidemic on Children and Families*, United Hospital Fund, March 2019, https://uhfnyc.org/media/filer_public/17/2c/172ca968-43aa-45f9-a290-50018e85a9d8/uhf-opioids-20190315.pdf.



Crime to support our Drug Endangered Children Initiative. Funding will be used to partner with The Family Center at Community Connections of Brockton, a program affiliated with the United Way of Greater Plymouth County, as well as the school districts and police departments throughout the county, to provide a trauma sensitive response for drug endangered children. Through training, direct services, and building community partnerships, we can help identify these children and help them build the resilience to overcome this adversity. The ultimate goal is to have trauma sensitive learning environments built into the curriculums of every school in Plymouth County.

Our roles as District Attorneys have certainly evolved over the years. In addition to prosecuting criminal cases, we have a responsibility to offer what support we can to provide a more holistic response to community safety. We are not social workers, nor educators, nor doctors, but as District Attorneys, we are learning to use our roles to bring the necessary people and experts to the table to find out what the best practices are to tackle the public safety issues we face. Specifically, District Attorneys have the ability to provide the necessary financial support, through state or federal grants, or drug forfeiture money, to communities to address prevention, services for traumatized children, education, intervention, enforcement, and treatment. I am proud of the tremendous steps we have taken here in Plymouth County and look forward to continuing our work with our community partners.

Child Abuse Prosecutors and Pediatricians Pursuing Justice in Abusive Head Trauma and Child Homicide Cases

By PAK KOUCH, Deputy District Attorney, Los Angeles County (CA)

Ms. Kouch is the Deputy-in-Charge of the Complex Child Abuse Section of the Family Violence Division in the Los Angeles County District Attorney's Office. District Attorney Jackie Lacey created the unit in 2016 to handle Abusive Head Trauma (AHT) and complex child homicide cases.

INTRODUCTION

"We must do everything in our power to protect our children," declared Los Angeles County (CA) District Attorney Jackie Lacey, following the horrific torture and murder of an eight-year-old boy at the hands of his mother and her boyfriend. This declaration and her call to be "innovative" were the catalysts in the formation of our office's Complex Child Abuse Section, one of the first of its kind in the nation. Although I have had the privilege of handling a variety of interesting and significant cases, none have been more intellectually challenging or emotionally rewarding than those involving AHT and complex child homicides. In the almost three years since the unit was created, we have learned some important lessons, including the realization that the best evidence in a complex child physical abuse case is the medical evidence. This insight is the basis for our innovative work with our child abuse pediatricians. Once we collaborated with them and focused on working as a multidisciplinary team with law enforcement and other criminal justice allies, we began to build stronger cases. Consequently, we have been able to hold more abusers accountable for their crimes.

THE CASE THAT CHANGED EVERYTHING

I will never forget that Friday afternoon in September 2016 when I learned about a one-year-old child, whom I will call Tim. I was in my office and received the first of many calls from board certified child abuse pediatrician Dr. Sandra Murray, who told me that she was treating a baby who was extremely abused and dying. She had not heard from law enforcement yet, so I made a few calls to connect them. Rather than waiting to read about the investigation in a pile of paperwork during the filing process months later, I went to meet Dr. Murray and law enforcement at the hospital.

As I entered the Pediatric Intensive Care Unit, I saw little Tim laying lifeless, hooked up to tubes and machines that were sustaining basic life functions. He looked at peace. Despite the injuries all over his tiny body, there seemed to be a palpable sense of relief that this beautiful baby no longer had to endure the terrifying pain that his mother's boyfriend inflicted upon him.

When the unsuspecting patrol deputy responded to the hospital to interview Dr. Murray, I asked if I could stand by just to observe. Dr. Murray carefully described Tim's medical condition as simply as she could, but I still had to encourage the deputy to ask, "What does that medical term mean?" Among his many injuries, Tim had severe subdural hematomas (brain bleeds), diffuse retinal hemorrhages (eye bleeds), and massive cerebral edema (swollen brain) caused by acceleration-deceleration forces commonly seen as a result of violent shaking or throwing. I was grateful to receive a crash course on the medical evidence, and Dr. Murray was pleased to connect with a prosecutor at the onset of an investigation.

We have learned the best evidence in a complex child physical abuse case is the medical evidence.

A Department of Children and Family Services social worker appeared soon thereafter. She disclosed Tim's family history: his mother had been in the system as a victim of physical, sexual, and emotional abuse. Next came the Crime Scene Investigator who was tasked with taking photographs of the baby's bruises and scars, which were "too numerous to count." After securing the residence where Tim was abused, the homicide detectives arrived just in time to receive further updates on the baby's deteriorating condition from the hospital social worker, who served as a liaison between the doctors caring for Tim and law enforcement.



Finally, around 10:00 p.m., Tim's mother was transported to the hospital to see him and be re-interviewed to determine if she had any liability as an accomplice or if she were a victim as well. The injuries on her body and the items recovered at the scene helped to corroborate her statements and establish that she truly was a victim of domestic violence. There is a strong nexus between child abuse and domestic violence that is all too common in our cases.

With little emotion, Tim's mother recounted how her boyfriend beat Tim for over two months. He had found out that she aborted his baby and he was going to make her pay. He started beating her and, when he realized that hitting Tim hurt her more, the torture began. He punched Tim on his face and head countless times; stepped on his back; kicked his privates, and hit him with a charging cord and any other object he could find in their 8-by-12-foot bedroom prison. He did this on a daily basis, whenever he was bored. Sadistically, he also trained his teething pit bull to bite Tim all over his body, turning the baby into a chew toy for the dog. At first, Tim cried and struggled in response to the violence. Later, he just stared off into the distance. When Tim's mother tried to stop the six-foot, 250-pound construction worker from abusing her son, he beat her as well, often into unconsciousness.

My hospital visit ended just after midnight, but the events of that day and Tim's eventual death left indelible marks

on me as a prosecutor and human being. We can read about such horrors in police reports, but if we are able to contemporaneously observe interviews, help figure out the truth as the investigation unfolds, and facilitate communication between experts and law enforcement, we can experience our cases on a more engaging and impactful level.

THE NUMBERS

Since this first call, we have received more than 100 contemporaneous calls for assistance from child abuse pediatricians and law enforcement throughout Los Angeles County, which has a population of 10 million residents. We have responded to twenty percent of these calls, half of which have resulted in immediate prosecutions. When our unit launched in September 2016, my team and I (three prosecutors in an office of approximately 1,000) began with 12 active complex cases and five cold cases. As of June 2019, we are handling approximately 30 active cases and are involved in nearly 70 pending investigations. Those numbers do not reflect over 30 completed cases which have successfully been tried or pled, or the many declinations, referrals for reevaluations, and numerous consultations on noncomplex cases.

If we are able to help figure out the truth as the investigation unfolds ... we can experience our cases on a more engaging and impactful level.

BEST PRACTICE TIPS

1. We need to learn as much as we can about the victim's medical condition from the experts because children are just as likely to receive certain injuries accidentally as they are from non-accidental trauma. However, certain injuries have a high specificity for abuse. We know most abuse is inflicted when no one else is around to witness it. Therefore, the key evidence in the initial investigation is often the pediatrician's medical opinion that the story provided by a caregiver, (i.e., baby fell from the three-foot killer bed or couch), is actually inconsistent with the baby's injuries. Attend medical conferences with your expert. Delve into the medical literature and scientific research so that you can effectively cross-examine defense experts who misconstrue studies and frequently give the same unsubstantiated opinions case after case. Contact other prosecutors for resources, transcripts, reports, and, most importantly, moral support.
2. We can facilitate communication between child abuse pediatricians, law enforcement, and medical examiners. Sometimes, detectives are unaware that the victim is in critical condition and that they need to respond immediately to investigate, rather than waiting until Monday. Communicate with social workers to ensure that surviving siblings are medically examined and forensically interviewed. Ask the medical examiner's office to expedite the autopsy, particularly in complex homicides where there is no apparent cause of death. As difficult as it might be, attend the child's autopsy to gain critical medical information and then encourage detectives to confront suspects immediately with this powerful evidence.
3. We should work with social workers and county counsel who handle the dependency cases. Even though they conduct separate investigations and are frequently mandated to reunite the family, we can still exchange valuable information in order to protect the victim and surviving siblings, without jeopardizing the criminal investigation or prosecution.

SUMMARY

Once I actually went out to hospitals to meet with child abuse pediatricians, walked through crime scenes, attended autopsies, and viewed reenactments, I saw firsthand that "doing justice" requires vigorously seeking the truth about what happened to our victims. Child abuse pediatricians are frontline truth seekers as they meticulously examine their patients. We have so much to learn from these experts that cannot wait until the eve of jury trial. Partnering together, we can build stronger cases and achieve justice more often. Two-and-a-half years after Tim was killed, the defendant finally pled guilty to murdering him. Rest well, precious child.

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Dear NDAA Colleagues: Wish You Were Here — Instead of Me!

By **AMY WEIRICH**, District Attorney General,
Shelby County (TN)



I have been trying to think of something that could be more challenging and disruptive than to move 167 employees to new offices in seven different locations while at the same time rolling out a wholesale restructure of the way we handle cases.

I'm coming up blank.

For the past month, there has been much wailing and gnashing of teeth coming from the third floor of 201 Poplar in downtown Memphis, TN which the Shelby County District Attorney's Office has called home for almost 38 years.

But we survived. Two vertical moves in one month: one physical, the other procedural.

Our recent move has been years in the planning, with equal parts anticipation and dread. The biggest part of the move was to the 11th floor in the same building, but it also included new offices on the 1st, 8th and 12th floors, as well as relocating some employees to two nearby office buildings.

The anticipation was because we would be getting bright, newly renovated, dust-free offices with panoramic views that include the beautiful mighty Mississippi River. (Of course, that's only if your office faces west. Those facing east get a less-scenic view of shirtless prisoners playing basketball on the jail's fifth-floor rooftop.)

The dread was because, well, let me count the ways. Nearly every day for weeks I sent basically the same reminder to staff members: It's time to start packing for the move. This is not a drill. This is really going to happen. Now also would be an excellent time to take home those things in your office you haven't used in the past 10 years!

Large cardboard boxes, rolls of clear tape for sealing them and rolls of blue painter's tape for labeling destinations soon were everywhere. Nothing like last-minute deadlines to get procrastinating prosecutors packing. And what could be more fun after a full day in court?

Since thousands of criminal case files also had to be moved, a background check had to be done on each member of the moving crew. Of the 20 prospective movers, only three

were disqualified: two who had active cases being handled by our prosecutors, and another who had an active warrant. He wisely did not show up for work.

When moving day arrived, however, the young workers from the moving company surprised us all with their willingness to work, their upbeat attitude, and their careful handling of tons of desks, chair and file cabinets.

The moving began at 8 a.m. on May 20, 2019 with two eight-man crews working in shifts until midnight. Teams from the office oversaw the massive project, both to keep files secure and to ensure that the right furniture and files got to the right destination. Somehow, the planned 14-day moved was completed in 10. Total man hours to move: 2,432.

The young workers from the moving company surprised us all with their willingness to work, their upbeat attitude, and their careful handling of tons of desks, chairs and file cabinets.

The movers did gouge a 6-inch piece of plaster from the wall near my office, but that was a small price to pay because they did so in the process of maneuvering a 400-pound, 12-foot-long table onto an elevator, through the hallways, around a tight corner and into the conference room. Just the previous evening, most of us had concluded there was no way it would fit — and sawing it in two was rejected as an option.

As I said, most of the office now resides on the 11th floor, while some others are on the 8th or 12th. We still have prosecutors and staff in two other office buildings nearby, an arrangement that unfortunately will not change in the foreseeable future.



I am most happy, however, that our General Sessions team members are now out of the lower level of 201 Poplar, a place where defendants, victims, witnesses and family members all share the same volatile space waiting for court. In just the past year, several of our staff members have been accosted by defendants who freely wandered into their unsecured offices and work areas.

Some of those prosecutors are doubling up in offices on the 11th floor, but only until renovations are completed on the 10th floor where they will have offices of their own, hopefully by the end of the year. That will be two moves for them in less than a year, but the important thing is that they are out of the basement offices for good.

As disruptive and sometimes chaotic as this moving process has been, there has been a specific plan in mind for some time, complete with blueprints, spread sheets and staff assignments diagrammed on poster boards like a family tree.

Amidst the physical move, we also have revamped how cases are handled, going to an all-new vertical prosecution model from the longstanding horizontal model. We now have six vertical teams of prosecutors who handle their cases from arraignment in General Sessions to Grand Jury to trial in Criminal Court.

Two other special teams do the same, including the Domestic Violence Prosecution Unit and the Crime Strategies Prosecution Unit, while two teams with the Special Prosecution Unit handle repeat felony offenders in two Criminal Courts.

Our Special Victims Unit — which handles cases involving sexual and physical abuse of children, the elderly and vulnerable adults — will continue to prosecute its cases wherever assigned by the court clerks' office.

Achieving this arrangement could only be done with the cooperation and approval of no less than 18 judges and two court clerk's offices. They are to be commended.

To make life — and prosecution — less complicated, we moved the teams to adjoining offices as much as possible, including team leaders, prosecutors, investigators, victim/witness coordinators and secretaries.

Now that the heavy lifting is over and the reassignments are complete, there's a lot of team togetherness in place. The primary beneficiary of the moves, however, will be the public as justice is served in a more consistent and timely manner — and that's what these moves are all about.



MEET THE TEAM

FRANK W. RUSSO JR.

NDAA Director of Government and Legislative Affairs

Job Responsibilities

- Advocate for legislation that improves the resources available for state and local prosecutors and assists our members in their day to day work.
- Provide technical assistance to Congressional staff to ensure the prosecutor's perspective is represented as Congress takes on its legislative priorities.
- Write and edit a "View from the Hill" update for *The Prosecutor* magazine to ensure our members are up to date on the latest news from Capitol Hill.
- Plan and host the Capital Conference in Washington, D.C. The annual fly-in event features a conference day with speakers from the Administration, Congress, and the White House followed by a full day of meetings with members of Congress and their staff.

Qualifications

University of Georgia, 2015, BA Political Science

The Catholic University of America,
Columbus School of Law, J.D., 2018

Law Clerk, Senate Committee on the Judiciary,
Subcommittee on the Constitution, 2018

Law Clerk, Americans for Prosperity, 2017

Law Clerk, House Judiciary Committee, Subcommittee
on Crime, Homeland Security, Terrorism, and
Investigations, 2016–2017

Research Analyst, FedConsultants, 2014–2015

Comment published in the Catholic University Law
Review, Vol. 67 Iss. 1, Clearing the Air: Does Choosing
Agency Deference in Security Clearance Rulings
Dilute Constitutional Challenges?, 2018

1 Before working at NDAA, what was the most unusual or interesting job you've ever had?

The most interesting job was serving as a Clerk for the U.S. House Judiciary Committee as I was responsible for working directly with members of Congress to write and pass legislation.

2 What are 3 words to describe NDAA?

Committed, Valuable, and Assisting.

3 What do you like most about NDAA?

The comradery between our staff despite working on such a wide array of projects has made me successful in my job. The staff work as a team and provide much needed expertise and advice to ensure NDAA is providing accurate and useful information to policy makers throughout Washington, D.C.

4 What guidance do you have for NDAA members?

Continue to be involved! From a legislative perspective your member of Congress and their staff want to hear from you. By providing your day to day perspective alongside NDAA's broader legislative goals, Capitol Hill staff will develop an understanding of why the prosecutor's perspective should be prioritized as legislation comes together.

5 Where is your hometown?

I was born in West Palm Beach, Florida and grew up outside of Atlanta in Roswell, Georgia.

6 What is your favorite thing to do in the Washington, DC area?

Attend Nationals baseball or D.C. United soccer games — they're right in my backyard!



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NDAA's magazine, *The Prosecutor*, is the premiere publication for prosecutors around the country. To make sure that the publication's content aligns with NDAA's mission to be the voice of America's prosecutors, we would like to invite you to contribute content.



For more information, please visit

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