

# The Role of Law Enforcement

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coincides with new physical and medical evidence with which they are confronted.

- (3) They will offer improbable or implausible explanations for the child's injuries. This includes variations of the "killer couches" or blaming a three-year-old sibling for shaking the baby.

## Interrogation

One of the most powerful and underutilized tools that an investigator has in these cases is the proper interrogation of the suspect. It has been the author's experience that people who are responsible for fatal child abuse often admit their guilt if interrogated by an experienced investigator. Many times these suspects have no serious criminal history; they are not hardened offenders. They have acted impulsively and later regret their actions. Various strategies that highlight the impulsive nature of the incident can be useful in eliciting confessions. While a voluntary statement from the suspect admitting guilt is powerful evidence, investigators should continue to work and thoroughly investigate the case. Confessions, for reasons too

numerous to mention here, may later be excluded in court. It is advisable to apply the strategy of investigate, interrogate, and investigate some more.

## Summary

Fatal child abuse cases present unique problems for law enforcement. Expertise in both child abuse and investigation is necessary in these cases. Investigators must be prepared for issues and dynamics not found in typical homicide cases. While law enforcement officers should coordinate their investigation with other disciplines, they must realize that they bear the primary responsibility for the criminal investigation.

## References

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- Bill Walsh is a lieutenant in charge of the Child Exploitation Unit of the Dallas Police Department, and a member of the Board of Directors of APSAC.

# PROSECUTING CHILD FATALITY CASES

—by Ryan H. Rainey and Dyanne C. Greer

Most prosecutors, investigators, and physicians are ill-prepared to recognize or deal with abuse-related fatalities. Among the many obstacles facing prosecutors is the need to prosecute and obtain appropriate sentences for perpetrators within a framework of state statutes that do not always take account of the dynamics of abuse-related deaths. However, the challenge begins long before the court is involved.

## Identifying abuse

Proper identification of physical abuse and fatality-related injuries is the first obstacle. Since physicians might not suspect abuse when an injured child presents for treatment, especially if the family

is known to them, investigators must learn the medical and psychological dynamics of abuse in order to effectively conduct a criminal investigation. Prosecutors must work with other disciplines to increase awareness of the problem. No one wants to believe that fatal child abuse occurs. Since society has been conditioned to believe that caretakers are not capable of such brutality, prosecutors must be able to persuade jurors that caretakers can and do physically beat, shake, and starve children to death.

## Establishing culpability

One of the prosecutor's major tasks is to establish that the caretaker had the mental state required for criminal culpability, taking into account the caretaker's educational level and mental abilities. For example, did the individual subjectively know this behavior would be harmful to a child? In Shaken Baby Syndrome

cases, the defense often tries to establish that the perpetrator was unaware of the dangerousness of his or her act. The prosecutor must counter this argument by demonstrating the extreme violence necessary to cause the extensive injuries, thus equating this excuse to a defendant's saying, "I did not know a gun could kill."

## Recognizing children's rights

Parental rights and family preservation policies can be barriers to establishing that a possible crime has taken place. Children do not have the same rights as adults in our society. When one adult assaults another, the crime is ordinarily investigated regardless of the relationship between the parties. Assaults on children, however, are frequently dismissed as simple discipline. This view of parental rights and family privacy is especially evident in less serious physical abuse cases, but is also present in serious injury or death cases.

## Facilitating prompt investigation

The prompt investigation of all child deaths of undetermined cause should be a priority for all jurisdictions. When a child dies suddenly or unexpectedly, authorities are usually hesitant to intrude on the assumed grief of a family. When it is determined that a possible nonaccidental death has occurred, it is often too late for a thorough investigation, as many pieces of evidence may already be lost. Professionals must learn to investigate undetermined deaths with sensitivity and understanding without sacrificing the importance of prompt investigation. A good scene investigation is as useful as an autopsy in determining if a child's death is natural, accidental, or a homicide.

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## Charging and trial strategies

Despite problems these cases present, investigators and prosecutors are using creative charging and trial techniques to obtain convictions. Legislative reform may also assist a prosecutor. Model penal codes for child abuse and fatalities can provide guidance to states in developing appropriate and substantial statutes to protect our youngest citizens.

Once a death or physical abuse case is identified, the prosecutor must decide what crime to charge. Most states have a wide range of possibilities, from misdemeanor child abuse to premeditated murder. Some of the charges available are standard murder as defined in statutes, felony murder, manslaughter, and charges under child abuse statutes including neglect and endangerment statutes. "Common murder" statutes require mental states such as "purposely," "knowingly," and "premeditated"; "lesser murder" statutes might require that homicide be committed under circumstances manifesting extreme indifference to the human life, and would not require premeditation.

"Felony murder" statutes apply to homicides committed during an attempt to commit, or during flight from, an inherently dangerous felony. In states that have legislatively delineated child abuse as an underlying felony contributing to felony murder, felony murder is a possible charge. In states without such legislative intent, the merger doctrine might operate to make a felony murder charge unavailable. The merger doctrine requires that the elements of the underlying felony (e.g., armed robbery) differ from elements of the homicide. In child abuse cases, the only difference is the death of the child. The child abuse elements merge with the homicide, and felony murder is not chargeable.

"Manslaughter" occurs when a criminal homicide is committed recklessly or under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. "Negligent homicide" requires that the homicide be committed with criminal negligence.

In recent years, states have begun to realize the difficulty in proving the requisite intent to obtain murder convictions in these cases, and have responded by developing specialized child homicide statutes. In these statutes, the "intent to kill" requirement has been eliminated when a child's death results from abuse. Instead, the prosecutor must show the perpetrator physically abused the victim and that the abuse caused the child's death. Alaska Statutes section 11.41.100 (1988) provides a good example of this type of statute:

A person commits the crime of murder in the first degree if the person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of

assault or torture of a child under the age of 16, and one of the acts of assault or torture results in the death of the child; for the purpose of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child by at least two separate acts, and one of the acts results in the death of the child.

A few states have added neglect and endangerment to their specialized homicide statutes. West Virginia Code section 61-8D-2 (1988) reads as follows:

If any parent, guardian or custodian shall maliciously and intentionally cause the death of a child under his or her care, custody or control by his or her failure or refusal to supply such child with necessary food, clothing, shelter or medical care, then such parent, guardian or custodian shall be guilty of murder in the first degree.

## Charging multiple caretakers

Since infants and children are unable to care for themselves, they may have many caretakers. It is not uncommon for a child to have multiple caretakers during the period of injury. Many times we see one caretaker inflict abuse while the other fails to intervene. In order to combat the failure to act, states have also developed statutes and case law to allow prosecutors the tools necessary to bring these people to justice. Many states now make failure to intervene a felony. For example, the 1991 Florida case *Leet v. State*, 595 So. 2d 959 (Fla. Dist. Ct. App.), held that the defendant—in this case the boyfriend of the murdered child's mother—had been properly convicted of simple child abuse and third-degree felony murder in the death of a two-year-old boy. The boyfriend had allowed the mother and her son to move into his home and he exercised many caretaker responsibilities. Under Florida's felony murder statute, felony child abuse applies to acts of omission as well as acts of commission. It was not necessary, therefore, for the state to prove the defendant had personal knowledge that his omission would lead to the child's death or great bodily harm: "So long as his conduct would be gross and flagrant, evincing a reckless disregard for human life if committed by the ordinary reasonable man, the issue of guilt must be submitted to a jury. The law does not protect a person from his choice not to notify the authorities in order to protect the victim's mother." Some state statutes go further. West Virginia Code section 61-8D-2 (1988) reads:

If any parent, guardian or custodian shall cause the death of a child under his or her care, custody or control by knowingly allowing any other person to maliciously and intentionally fail or refuse to supply such child with necessary food, clothing, shelter or medical care, then such other person and such parent, guardian or custodian shall each be guilty of murder in the first degree.

Generally a person has no duty to act to stop a crime, and neither passive acceptance of a criminal

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act nor mere approval subjects a person to criminal liability. This principal fails to take into account the special relationship between a caretaker and child wherein the child is by nature dependent on and usually weaker than the parent/caretaker. Therefore, there are strong public policy reasons for imposing a duty on a caretaker to protect children from abuse. When a parent or caretaker has knowledge of abuse and fails to take action to prevent it, this leaves the child victim with no effective means of securing help. In some cases when specific language of state statutes fails to sanction a caretaker for failing to give aid, some courts have interpreted them to make such conduct criminal. Examples include Arkansas Code Ann. section 5-27-221 (1985), which reads:

A person commits the offense of permitting abuse of a child if, being a parent, guardian, or person legally charged with the care or custody of a child, he recklessly fails to take action to prevent the abuse of a child who is less than eleven (11) years old

See also Nevada Revised Statutes section 200 508 (1989), which makes culpable a person who:

[W]illfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect....

Another method of charging multiple caretakers is the use of accomplice liability and/or complicity statutes. An accomplice is a person who is subject to prosecution for the identical offense as the perpetrator. Complicity is determined by the conduct of a second person for which the charged person is legally accountable. Under the California penal code, a person becomes an accomplice to a crime when he or she:

- (1) with knowledge of the unlawful purpose of the perpetrator and
- (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice, aids, promotes, encourages or instigates the commission of the crime.

Under Washington's criminal code, a person is legally accountable for the conduct of another person when:

- (a) Acting with the kind of culpability that is sufficient for the commission the crime, he causes an innocent or irresponsible person to engage in such conduct; or
- (b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or
- (c) He is an accomplice of such other person in the commission of the crime.

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## Other charging options

Even without new legislation and specialized child homicide laws, prosecutors still have tools that may help to obtain appropriate outcomes. While these are seldom used, they should be considered. Many jurisdictions have statutes that deal with torture and mayhem. These statutes are usually associated with adults, but are applicable to many severe child abuse and fatality cases. The torture statute in California Penal Code section 206 reads:

Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury... upon the person of another, is guilty of torture. The crime does not require any proof that the victim suffered pain.

If death occurs during the torture, the charge automatically changes to first degree murder. For most child abuse cases, the applicable element of the statute would be for "sadistic purpose"; physical beatings of children are often so severe they could only be labeled as sadistic. California includes mayhem and aggravated mayhem in its penal code (sections 203 and 205). Since typical child abuse statutes often do not contemplate serious injury or death these statutes help fill these gaps:

Every person who unlawfully and maliciously deprives a human being of a member of his body or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem (section 203).

A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical integrity or disfigurement of another human being, deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole (section 205).

## Conclusion

The complexity of child homicide cases calls for special local agency policies and attention by prosecutor's offices. Development of new partnerships along with increased staff training will result in more thorough investigations, ensuring justice in these heinous crimes. By charging appropriate crimes, advocating for changes in legislation, and being creative, we can take the first steps in mounting a broader community effort to prevent the physical abuse and killing of children.

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