

The Criminal Prosecution of Child Abuse and Neglect Cases

Why Do We Lose Child Abuse Cases?

- ▶ Why do we lose child abuse cases?
 - ▶ Gaps in investigation filled with *believable and soothing untrue defenses*
 - ▶ We underestimate weight of **expert testimony**
 - ▶ We overestimate how jurors view child abuse and their **willingness to hold a *non-stranger* perpetrator accountable.**

Reality

- ▶ Jurors do not want to believe that
 - ▶ Biological parents
 - ▶ People who look like them
 - ▶ People without criminal histories
- ▶ Hurt their children.

Reality

- ▶ Two holdout jurors didn't want to convict because they could not understand how a father would fight so hard for custody of a child only to hurt that child.



Issue Confusion

- ▶ **Prepare!**
 - ▶ Character attacks on non-offending parent who supports child
 - ▶ "He's a good man!"
 - ▶ Character attacks on vulnerable child
 - ▶ Big brother defense: government intrusion on our right to discipline



Casey Anthony: Saying It Doesn't Make It True

Defeating Untrue Defenses

Defenses: Child Physical Abuse
Accident / Other Medical Condition

- ▶ Injury has accidental cause or natural / disease-based cause
 - ▶ Injuries inconsistent with explanation
 - ▶ Mechanism
 - ▶ Force
 - ▶ Pattern
 - ▶ Overlooks constellation of injuries

Defenses in Child Abuse Cases:
“It was an accident, not a crime!”

- ▶ **The Couch Did It!**
 - ▶ If not the couch: immunizations, bleeding disorders, anemia, brittle bone disease, falling down stairs
 - ▶ Solution: Find an expert who knows about mechanisms of injuries
- ▶ **Encourage common sense**
 - ▶ Everyday child-rearing doesn't lead to situations like this one
- ▶ **Look for prior abuse: Marcus Chappell**
 - ▶ This is not the unluckiest child or perpetrator in the world!!

Defenses: Child Physical Abuse
Accident / Other Medical Condition

- ▶ **Accident / Other Medical Condition**
 - ▶ Surrounding circumstances
 - ▶ nature, number, location of constellation of injuries
 - ▶ what was said when injury triggered
 - ▶ triggering event
 - ▶ prior acts
 - ▶ failure to obtain treatment
 - ▶ failure to mention injuries

Defenses Child Physical Abuse:
Accident / Other Medical Condition

- ▶ Accident / Other Medical Condition
 - ▶ Medical Expert
 - ▶ narrow time frame
 - ▶ calendar of care takers
 - ▶ calendar of time frame and pre-symptomatic activities

▶

Defenses CPA:
Accident / Other Medical Condition

- ▶ Accident / Other Medical Condition
 - ▶ Victim's medical history
 - ▶ diagnoses
 - ▶ treatment
 - ▶ genetic disorders/family history
 - ▶ testing at birth

▶

Defenses CPA:
Accident / Other Medical Condition

Medical Records

- ▶ EMT notes
- ▶ Admitting notes
- ▶ History and progress notes
- ▶ Nursing notes
- ▶ Discharge summary
- ▶ Social worker notes
- ▶ Lab reports
- ▶ Doctor's orders
- ▶ Consultation notes
- ▶ X-ray/CT scan/MRI

▶

Defenses CPA:
Other Medical Condition

- ▶ Accident / Other Medical Condition
 - ▶ Consult with medical personnel
 - ▶ non-injury symptoms of claimed condition
 - ▶ contrary medical evidence exists?
 - ▶ medical history necessary
 - Newborn screens
 - Well-child visits
 - ▶ Family history
 - Birth parents
 - Family of birth parents
 - Siblings



Defenses in Child Abuse:
Accident / Other Medical Condition

- ▶ Child's History
 - ▶ Was this child wanted?
 - ▶ How did this child impact parent's life?
 - ▶ Who has cared for child throughout life?
 - ▶ Interview these people where long-term abuse is an issue!
 - ▶ Has child lived in different places?
 - ▶ Frequent moves without clear need / reasons
 - ▶ Moves to accommodate partner (s) of biological parent
 - ▶ Did anyone interviewed every consider calling CPS?
 - ▶ "What would you have reported, if you had it to do over?"



***"Yes, I hit her, but
I didn't mean to hurt her"***

- ▶ Get the Defendant to demonstrate what exactly he / she did
 - ▶ How many blows
 - ▶ How forceful
 - ▶ What objects
- ▶ State of mind
 - ▶ Anger
 - ▶ Resentment
 - ▶ Prior abuse
- ▶ Remember Emporia Pirtle
 - ▶ 50 blows
 - ▶ DIE, DIE
 - ▶ Hiding body
 - ▶ Threats to sister
- ▶ Key:
 - ▶ Admissions are good
 - ▶ Child interviews!!!
 - ▶ Demonstrations!



Defenses in Child Abuse:
Accident / Other Medical Condition

▶ **Phone records**

- ▶ Incoming and outgoing calls
- ▶ What is in the cell phone?
 - ▶ Contacts
 - ▶ Messages received and sent
 - ▶ Missed call log
 - ▶ Has history been erased?
 - ▶ When was phone in use?
- ▶ Looking for patterns
 - ▶ Did use suddenly increase?
 - ▶ Frantic attempts to reach someone?
 - ▶ Was there a call that precipitated the violent event?



Defenses: Child Physical Abuse
Identity of Abuser

▶ **Child was injured by someone else (you can't prove it was me)**

- ▶ Often seen in "crowded" households
- ▶ Gets play when injuries are chronic
- ▶ Problematic when asymptomatic injuries would not have triggered a "normal" parent to react
- ▶ Abuse may be attributed to siblings



Defenses in Child Abuse:
Identity of Abuser

▶ **Medical Investigation**

- ▶ What warning signs would have existed to show that this child needed care?
- ▶ If caregiver *isn't* the abuser, why not seek medical attention?



Defenses: Child Physical Abuse
Identity of Abuser

- ▶ Child was injured by someone else (you can't prove it was me)
 - ▶ Must Establish Time Line:
 - ▶ Access to child
 - ▶ Evaluate motivation
 - ▶ Last normal:
 - When did child last appear normal
 - Who was present then
 - ▶ Last visit to family doctor
 - ▶ Are there old injuries?



“It wasn’t me!”

- ◎ Get necessary admissions
 - Agreement that it would be wrong to do this to a child
 - Acknowledgment that this behavior would be harmful
 - Times when AP was with child
 - People who could not have hurt child
- ◎ Get list of “real perps” from AP
- ◎ Lock in time frame for injury
 - Investigate to rule out / include others as having access to child
- ◎ Look for instances of prior abusive behavior
 - Schools, day cares
 - Other jurisdictions
 - Prior partners of AP



Defenses: Child Physical Abuse
Identity of Abuser

- ▶ Timelines are crucial in child abuse cases:
 - ▶ detailed as possible
 - ▶ as far back as possible
 - ▶ 72 hours to a week
- ▶ Information can be obtained before abuse suspected or known
 - ▶ Also helpful if cause is not abusive
 - ▶ May use medical personnel to assist



Defenses: Child Physical Abuse
Identity of Abuser

Child's activities:

- ▶ Eating
- ▶ Playing
- ▶ diaper changes
- ▶ Vomiting
- ▶ Altered consciousness
- ▶ crying/signs of distress
- ▶ sleeping
- ▶ signs of injury
- ▶ last visit to MD

Defenses: Child Physical Abuse
Identity of Abuser

▶ Non-confrontational interviewing example

- ▶ Please describe for me your child's daily routine
- ▶ What developmental milestones had your child achieved?
- ▶ Take me through the last 24 hours of your child's life
- ▶ Anyone who you would ever suspect of hurting your child?
- ▶ Ever any concerns about child's safety with _____.

Defenses: Child Physical Abuse
Identity of Abuser

Ⓞ Interview all witnesses

- Reporting person
 - Person who obtained child's disclosure
- Interview all individuals present or nearby at time of the offense
 - Parents/siblings/other children/caretakers/those who live in the home
 - Lock into initial story
 - Should be done as soon as possible

Defenses: Child Physical Abuse Identity of Abuser

- ▶ **Talk to other children:**
 - ▶ Use trained forensic interviewer
 - ▶ Get to the child before offender / accomplice does
 - ▶ Was this child-interviewee physically capable of causing injury?

▶

Defenses: Child Physical Abuse Cultural Defenses

- ▶ **"This is part of our culture"**
 - ▶ Likely to be seen in "discipline" cases
- ▶ Is it true?
- ▶ What exactly is it that is "cultural?"
 - ▶ The behavior or the child?
 - ▶ The behavior of the parent?
- ▶ Is it cultural or abusive? Both?
 - ▶ Stoning is cultural but not permitted here ...

▶

Defenses: Child Physical Abuse Cultural Defenses

- ▶ **DEFEAT "This is part of our culture"**
 - ▶ May need expert witness
 - ▶ Need to question jurors
 - ▶ Proportionality
 - ▶ Does defendant follow all cultural dictates?
 - ▶ Letter to Dr. Laura ...
 - ▶ Hidden conduct?
 - ▶ Why cover it up?

▶

Defenses: Child Physical Abuse
Reasonable Discipline

▶ Reasonable Discipline:

- ▶ Plays upon legal right to discipline
- ▶ Plays open older generation "well when my parent"
- ▶ Defendant must come across as calm parent who is simply attempting to correct a problem



Defenses: Child Physical Abuse
Reasonable Discipline

▶ DEFEAT IT:

- ▶ Show contrast in physical size
- ▶ Use of object / weapon
- ▶ Loss of control
- ▶ Targeted child

▶ Why would this be OK?

- ▶ Less physically harsh alternatives?
- ▶ Sources of help exhausted?
- ▶ What if a stranger did it?
- ▶ What if a juror watched it happen?



Defenses: Child Physical Abuse
Reasonable Discipline

▶ Witness Interviews:

- ▶ Other family members/relatives
 - ▶ How do parents discipline children?
 - ▶ May help to identify possible triggers
 - ▶ Have they seen or heard things that raised suspicion?
- ▶ Neighbors/others who may have seen incident
 - ▶ Canvass neighborhood
 - ▶ What have they seen or heard?



Defenses: Child Sexual Abuse
Sloppy Police Work

- ▶ Sloppy Police Work Defense
 - ▶ Used to explain how child has been coerced into making a false statement
 - ▶ Suggestibility arguments
 - ▶ Why wasn't more evidence collected?
 - ▶ Including DNA evidence, even when victim and abuser lived in same residence
 - ▶ "Railroading an innocent person."



Defenses: Child Sexual Abuse
Sloppy Police Work

- ▶ Sloppy Police Work:
 - ▶ For defense to succeed, you need defensive, unprepared police officer
 - ▶ Admit mistakes
 - ▶ Know how to respond to defense questions
 - ▶ Remain polite and professional
 - ▶ Tell court that disapproval of police work does not change evidence
 - ▶ Sometimes, desired "evidence" would prove nothing
 - "Pretend the evidence is favorable to the defendant. Does that diminish our proof?"



Defenses in Child Abuse Cases:
Sloppy Police Work

- ▶ Don't let nerves make you equivocate
 - ▶ "I think the child said ... But I don't remember"
 - ▶ I'm not sure ...
 - ▶ I think I did, but ...
- ▶ Don't let nerves make you mean and argumentative
 - ▶ "You're trying to put words in my mouth"
 - ▶ "You're trying to trick me"



Thwarting the Defense: Mental Health Defense

▶ Mental health defenses

- ▶ Distinguish between attempts to mitigate responsibility and true insanity defense

- ▶ What is defense permitted to offer in case-in-chief if not pleading insanity?

- ▶ Limine out evidence that is will confuse or create undue sympathy



Thwarting the Defense: Mental Health

▶ Prepare for experts

- ▶ Research experts
 - ▶ NDAA
 - ▶ Prosecutor Encyclopedia

- ▶ Research the condition
 - ▶ DSM

- ▶ Research the defendant
 - ▶ Suddenly become a criminal?



Thwarting Defenses: Mental Health

▶ Scenario 1:

- ▶ Defense is legitimate. Facts don't meet defense
 - ▶ Establish criteria for defense

 - ▶ Those criteria not met by facts of case
 - Or criteria meant only to assess mental health... Not "diagnose" criminal intent



Untrue Defenses:
Mental Health

▶ Scenario II:

- ▶ Defense is not legitimate

- ▶ E.g. Defendant is trying to circumvent "intoxication is not a defense" with "sleepwalking defense"

- ▶ Point out: core of defense is behavior by defendant –conscious choice – that caused ultimate consequence



Untrue Defenses:
Mental Health

▶ Defense is not legitimate

- ▶ Parental Alienation Syndrome
 - ▶ Not recognized by DSM-IV (or Revised)
 - ▶ Created solely for the purpose of litigation

- ▶ Anti-social personality disorder
 - ▶ Aren't they just defining "criminal behavior?"



Untrue Defenses:
Mental Health

▶ Where defense is not legitimate

- ▶ Even if criteria for "diagnosis" exists, still not defense to crime
 - ▶ Being an alcoholic will not cause drunk-driving death.
 - ▶ Behavior that causes death is drinking.



Thwarting Defenses:
Mental Health

- ▶ Key in on witness's language
 - ▶ "possibility" vs. "probability";
 - ▶ "likely" vs. "to a reasonable degree of scientific certainty"
- ▶ Have expert define terms used and understanding of legal concepts



Thwarting Defenses:
Mental Health

- ▶ Mental Health Defenses:
 - ▶ Look for examples of functionality
 - ▶ Is criminal behavior the defendant's only "break?"
 - ▶ When defendant is at work, does he "lose it?"
 - ▶ Has defendant ever "lost it" when hearing a child cry in public?
 - ▶ Emphasize the rationality of the crime
 - ▶ In private
 - ▶ Attempts to cover
 - ▶ Position of trust
 - ▶ Behavior of child



Thwarting the Defense
Mental Health

- ▶ Mental Health Defenses
 - ▶ Post-traumatic stress disorder
 - ▶ Offender may meet criteria
 - ▶ Offender may be uber-sympathetic
 - BUT
 - ▶ Was offender a criminal BEFORE
 - ▶ Behavior isn't crazy, it's just criminal
 - ▶ Offender has resisted efforts to treat or diagnose
 - ▶ Behavior exacerbated by other criminal choices (e.g. drug use)



Thwarting the Defense: Mental Health

▶ Post-partum Depression

- ▶ Real condition

- ▶ It does not make mothers hurt their children
 - ▶ No hallucinations
 - ▶ No command voices

- ▶ Diagnosis exist?

- ▶ If condition present, show how offender knew right from wrong



Anticipating Defenses

▶ Go watch each other's cases

- ▶ What are the questions you would have asked

- ▶ Develop lines of questioning for each other



Anticipating Defenses

▶ SURPRISE defenses

- ▶ a) May I have a minute?
- ▶ b) Co-counsel
- ▶ c) Paralegal
- ▶ d) Police officers

▶ Reach out:

- ▶ NDAA
- ▶ NYPTI
- ▶ NCPTC
- ▶ UPC
- ▶ List-serves



Whisper Sweet "That's Not Abuse" In My Ear

Everyone's An Expert . . .
For the Right Price

DO YOUR HOMEWORK

- The "Expert"
 - Subject of testimony
 - Qualified to say it?
 - Resources reviewed by witness as foundation for opinion?
 - Admissibility of testimony?
 - Review of prior testimony



PREPARATION

- ▶ Must become an expert yourself
 - ▶ Know expert's area of expertise in order to cross well



PREPARATION

- Obtain all written reports and notes from defense expert
 - Use pretrial motions
 - Use discovery procedures

- Know all documents, reports and physical items relied on by expert in forming opinion

- Interview defense expert if possible

- FACEBOOK!!!



PREPARATION

- ▶ Look at and investigate CV
 - ▶ Education
 - ▶ Employment
 - ▶ State board of licensing / certification
 - ▶ Organizations
 - ▶ How to become a member (some must only pay)
 - ▶ Other members
 - ▶ Publications (attempts to publish)
- ▶ Any civil actions, grievances, unethical conduct?



PLANNING / STRATEGY

- ▶ Contact between expert and defense team
 - ▶ Check visitor's log at jail
 - ▶ Billed hours

- ▶ Was this more than paper review?
 - ▶ Examine police reports, exhibits, interview witnesses

- ▶ Find points of agreement between your witness and theirs



DO YOUR HOMEWORK

- Reputation is key:
 - Consult with other experts
 - Investigate expert
 - Social media
 - Blogs
 - Online journals / forums
 - Transcripts of prior testimony
 - Critique of expert
 - Contact other prosecutors
 - Prosecutor Encyclopedia



DECISION TIME

What am I going to do with this witness?

Strategy for Attack

- ▶ Don't just throw darts and hope something sticks
- ▶ Strategy must be planned in advance and flexible
- ▶ If you telegraph punch, witness will most likely duck blow
 - ▶ Try an indirect approach
- ▶ Make your points and sit down



STRATEGY

- ▶ Draw distinctions between “hard” & “soft” sciences
- ▶ Identify sources of opinions



Attention to Detail

- ▶ Things that expert might miss
 - ▶ Information about child's history or injuries that should have been considered in expert opinion
 - ▶ Specific facts that contradict defendant's theory
 - ▶ Access to witness statements, particularly those not favorable to defendant
 - ▶ **DID EXPERT EVEN ASK?**
 - ▶ Procedures / safeguards that should have been followed



Attention to Detail

- ▶ **Attention to detail: Missing information**
 - ▶ *It would be important in your diagnosis of x to know about y?*
 - ▶ *In this case, you reviewed a, b, and y?*
 - ▶ *Did not have any other information?*
 - ▶ *Did not need any other information?*
 - ▶ *Could have asked for it?*
 - ▶ *Did not ask for it?*
 - ▶ *Still came to a conclusion?*



**OBJECTIVES OF
CROSS-EXAMINATION**

- ▶ Enhance and support your case
- ▶ Demonstrate unreasonableness of defense
- ▶ Discredit witness or their testimony

▶

CROSS-EXAMINATION OBJECTIVE

- ▶ **Enhance and support your case**
 - ▶ **How can witness**
 - ▶ Advance your case theory
 - ▶ Make your witnesses look more credible
 - ▶ Amplify weaknesses in defense theory

▶

CROSS-EXAMINATION OBJECTIVE

- ▶ **Demonstrate Unreasonableness Of Defense**
 - ▶ **E.g.**
 - ▶ Defendant was impotent so could not molest
 - ▶ Defendant received Cialis from doctor
 - ▶ Defendant got repeat prescriptions

▶

CROSS-EXAMINATION OBJECTIVE

▶ **Excluding / Testing Expert Opinions**

- ▶ *Motions In Limine*
 - ▶ Precluding admission of / mention of certain evidence, theories, opinions, etc
 - ▶ BUT not final rulings
 - ▶ Need to ensure strong record for trial itself

▶

CRITERIA UNDER *DAUBERT*

- Theory / technique can be or has been tested.
- Theory / technique has been subjected to peer review or published.
- Theory / technique has known or potential rate of error and what it is.
- Existence and maintenance of standards controlling technique's operation.
- Theory or technique is generally accepted in relevant scientific community.

▶

CROSS-EXAMINATION OBJECTIVE:
Excluding Evidence

- ▶ **Tactical decision:**
 - ▶ If you attempt to exclude at pre-trial hearing, you have "shown your hand" to defense
 - ▶ What is real likelihood of exclusion AND
 - ▶ Will decision to exclude be upheld on appeal

▶

CROSS-EXAMINATION OBJECTIVE:
Excluding Evidence

- ▶ Tactical decision:
 - ▶ If you merely challenge evidence at trial, how prejudicial is it to case
 - ▶ Once the jury hears evidence, even if discredited, will jury still be able to reach correct conclusion?
 - ▶ May want to simply limine out evidence and make its admissibility contingent on certain facts
 - ▶ E.g. "three guys in three days"



Cross-examination In Trial

Conducting Your Well-Researched, Well-Planned Cross-Examination

CROSS-EXAMINATION TECHNIQUES

- ▶ Tone
 - ▶ Don't have to bury witness to score points useful in closing
 - ▶ Friendly, low-key approach and tone will elicit cooperation
 - ▶ Once confrontational approach is begun you will not get concessions
 - ▶ Remember audience



CROSS-EXAMINATION TECHNIQUES:

▶ **Listening**

- ▶ What did witness actually say
 - ▶ What would witness refuse to say?
 - ▶ Does witness use qualifiers?
 - ▶ Points where expert balks?
- ▶ Look for gaps
 - ▶ Something you expected, but did not hear?

▶

CROSS-EXAMINATION TECHNIQUES

▶ **Assessing damage done on direct**

- ▶ Did witness hurt me?
- ▶ Need to cross?
- ▶ Gains & risks?
- ▶ Perception by jurors?

▶

CROSS-EXAMINATION TECHNIQUES

▶ **Gaining Concessions**

- ▶ Emphasize conclusions, theories, testing results that advance State's case
- ▶ These might not just come from testimony in this case, but from witness's prior writings, research, etc

▶

CROSS-EXAMINATION TECHNIQUE

- Consensus based cross
 - Corroborate state's case by obtaining concessions from defense expert
- Any points of agreement?
- Bolster state's expert
- Defense expert know state expert?
- Defense expert recognize state expert as authoritative?
- Defense expert ever consulted with state expert?

▶

CROSS EXAMINATION TECHNIQUE

- ▶ Discrediting witness or testimony
 - ▶ Relationship to Defendant
 - ▶ Lack of knowledge of Defendant
 - ▶ Extent of bias / motives for testimony
 - ▶ Failure to abide by rules / standards of profession / licenses

▶

**CROSS-EXAMINATION TECHNIQUES:
Hunting Your Prey**

- ▶ Narrow escape routes
- ▶ Bait the trap
- ▶ Spring the trap

▶

CROSS-EXAMINATION TECHNIQUES:
Hunting Your Prey

▶ **Narrow escape routes**

- ▶ Lock the witness in to their theories, ideas, and conclusions

- ▶ E.g. "Dr. Stevens, you have stated on a number of occasions, that in order for an offender to be "safe" to release into the community, he must have accepted responsibility for his crimes."



CROSS-EXAMINATION TECHNIQUES:
Hunting Your Prey

▶ **Bait the trap**

- ▶ "Hype" prior occasions on which they used theory, relied on method, etc

- ▶ E.g. "In fact, just last month Professor, you published a book in which you wrote a whole chapter on criteria for declaring an offender "safe," and you devoted 20 pages to the importance of accepting responsibility for the crime!"



CROSS-EXAMINATION TECHNIQUES:
Hunting Your Prey

▶ **Spring trap**

- ▶ Ask leading question about that closes trap firmly!

- ▶ Review every occasion on which offender has denied responsibility
- ▶ Highlight phrases from facts of case that directly contradict expert's theories



Do I Need An Expert?

When Cross Isn't Enough

Using Rebuttal Experts

- ▶ When should I use one?
- ▶ What am I refuting?
- ▶ Is this the right person for the job?
- ▶ Will I create additional issues?

Rebuttal Experts

- ▶ WHEN should I use one?
 - ▶ Did the defense raise issue / make point that needs expert testimony to refute?
 - ▶ Even where civilian might be able to refute, what is juror expectation?

Using Rebuttal Experts

- ▶ What am I refuting?
 - ▶ Know your specific purpose in calling expert
 - ▶ Be cautious about raising new issues
 - ▶ Tread carefully on "ultimate issue" experts
 - ▶ Refuting a specific point or a red herring?
 - ▶ May not really matter if it rang true with jurors

▶

Using Rebuttal Experts

- ▶ Is this the right person for the job?
 - ▶ Level of expertise?
 - ▶ Ability to relate concept succinctly and in plain English?
 - ▶ Not a whore

▶

Using Rebuttal Experts

- ▶ Will I create additional issues?
 - ▶ Do not draw additional attention to flaws in your case
 - ▶ Will rebuttal witness give testimony that helps defendant?

▶

When Your Abuser Looks Like Your Jurors

Addressing Juror Misconceptions

Why Do We Lose Abuse Cases

- ▶ Jurors believe that abuse should be obvious
 - ▶ Clear external injuries
 - ▶ Ability to put a date and time-stamp on the injuries
 - ▶ Definitive mechanism of injury
 - ▶ Corroborating witnesses
 - ▶ Agreement by medical professionals about the injury

Why Do We Lose Child Abuse Cases

- ▶ And when the abuse doesn't reach up and smack them, the emotional reaction is lacking
- ▶ And when they don't feel the outrage, they acquit.

Why Do We Lose Child Abuse Cases

- ▶ When the victim, witnesses, evidence, etc. don't meet their expectations, they think that their disappointment is reasonable doubt



Why Do We Lose Child Abuse Cases

- ▶ **Bad Mom Cases:**
 - ▶ When adults in child's life do not respond appropriately to disclosures / discovery of abuse, jurors hold it against state
- ▶ **How damaging will it be to your case when**
 - ▶ Victim's mother testifies for defense that defendant was never violent with child?
 - ▶ When victim's mother has gotten pregnant by defendant pre-trial?
 - ▶ When victim's father pays bail for defendant and hires her lawyer?



Why Do We Lose Child Abuse Cases

- ▶ They don't understand why parent would defend person who hurt her child unless defendant was truly falsely accused



Why We Lose Child Abuse Cases

- ▶ Jurors think that
 - ▶ A child abuser should look like an abuser
 - ▶ A certain type of / class of person hurts kids
 - ▶ An offender who is polite, charming, and nice must be falsely accused!



General Advice on Public Sentiment on Child Abuse Cases

- ▶ **Keep media and public comments**
 - ▶ Show the judge that the need for specialized voir dire
 - ▶ "the defense of consent is not so intensely controversial that the general rule against questions about specific defenses should be disregarded." People v. Boston, 893 N.E.2d 677 (Ill. Ct.App.) 2008
- ▶ Reminder to your investigators that we NEVER have "enough" evidence
- ▶ Great project for interns!



Assessing Your Case

- ▶ **You need to know where your case is weak**
 - ▶ Not just legitimately weak but where your case lacks jury appeal
- ▶ **Quote from a prosecutor:**
 - ▶ "There are only 2 questions a jury must answer before convicting: "Did the defendant do it?" and "Why do I care?"



Assessing Your Case

- ▶ What reasons will the jury have to not care about this child and his / her fate?
 - ▶ Poor child
 - ▶ Child of illegal immigrants
 - ▶ Perception that the child's own parent / parents didn't care about the child (so why should we care?)
 - ▶ Doesn't remind the juror of his / her own child

PowerPoint Interruption!

WEAKNESSES

- ▶ **Here's the deal:**
 - ▶ Your case has weaknesses.
 - ▶ Usual weaknesses are listed in your materials.
 - ▶ Identify your weaknesses.
 - ▶ Find clever ways to address those issues with jurors.

FALSE DEFENSES

- ▶ **There are also usual defenses that are presented in abuse cases**
 - ▶ They seem "plug-n-play" to you.
 - ▶ They are novel and relief-inducing to your jurors.
 - ▶ You must address the *psychology* of believing false defenses with jurors

Let's Play Jury Consultant

- ▶ What do people think about parents who kill their own children?
- ▶ So if jurors are sympathetic to parents who kill their own kids, how do we deal with that?

Dealing With Juror Sympathy?

- ▶ Keep in mind these perceptions throughout your investigation
 - ▶ There is no such thing as "enough" evidence
- ▶ Use interviews to provide motives
 - ▶ Highlight stressors, vulnerability of the victim, and prior abuse
- ▶ Gather evidence / interview witnesses knowing that jurors will be looking for reasons to acquit!
 - ▶ I'd appreciate a little bit of sympathy for the DEAD VICTIM!



Leading the Jury to Guilty

Themes That Resound with Jurors

Jury Persuasion Strategies:

- ▶ Reduce the Law to "Real Life" to Address Trouble Spots
 - ▶ Take broad concept and relate it to something within juror's own experiences
 - ▶ They will hold your victim and case to unrealistic standards unless and until they realize how similar the case is to their everyday experiences



Reducing the Law:
Disbelief and Reasonable Doubt

- ▶ We work to disbelieve painful things
 - ▶ Describe to me something in your life that when you first heard it, you didn't want to believe it. (think cancer diagnosis)

▶

Reducing the Law:
Disbelief and Reasonable Doubt

- ▶ Painful things:
 - ▶ Why didn't you want to believe it?
 - ▶ What things did you do to try to find an alternate explanation?
 - ▶ Were there signs of the illness / the event that preceded the ultimate diagnosis / final event that were ignored?
 - ▶ Why do you think that people sometimes ignore warning signs?

▶

Reducing the Law: Disbelief and Doubt

- ▶ We work to disbelieve painful things
 - ▶ What type of things in life do we work not to believe?
 - ▶ Why do we try not to believe certain things?

▶

Reducing the Law:
Disbelief and Doubt

- ▶ Is anyone here familiar with the facts of the Jaycee Dugard case?
 - ▶ Have them describe.
 - ▶ Do you have any trouble believing that this guy kidnapped her and held her hostage for years?
 - ▶ Is your reaction to child sexual abuse different when the child isn't abused by a stranger, but rather is abused by a loved one?
 - How is your reaction different?
 - Why do you think that your reaction is different?



Reducing the Law:
Disbelief and Doubt

- ▶ **The burden of proof doesn't change just because the defendant isn't a stranger**
 - ▶ Does anyone here want to believe that a parent would hurt his / her child?
 - ▶ Why not?
 - ▶ What is easier to believe, that we made a "mistake" or that a parent / caregiver would hurt a child?
 - ▶ Knowing that, how can you assure the state that you wouldn't hold us to a higher burden of proof than if the person accused of the abuse was a stranger?



Reducing the Law:
Disbelief and Doubt

- ▶ **The burden of proof doesn't change just because the defendant isn't a stranger**
 - ▶ In other words, if the person sitting here accused of abusing this child was a stranger, do you think it would be easier or harder to believe that this person abused the child?
 - ▶ Why or why not?



Reducing the Law:
Disbelief and Doubt

- ▶ **The burden of proof doesn't change just because the defendant isn't a stranger**
 - ▶ So as I stand here, trying to pick a jury who can be fair to the defendant and fair to this child, I need to know honestly whether you would hold me to a higher standard because the defendant is someone who is related to this child?
 - ▶ How would I know that?



Reducing the Law:
Medical Experts

- ▶ **How Does Your Juror Resolve Conflict of Opinions?**
 - ▶ In everyday life, we hear conflicting and sometimes confusing accounts of very important matters
 - ▶ What criteria do you use to evaluate whether you believe what someone tells you?
 - ▶ What factors make a person believable?
 - ▶ What factors make a person unbelievable?



Reducing the Law:
Medical Experts

- ▶ **How Do You Decide Who to Believe?**
 - ▶ You assess the biases of the people providing the information in deciding what to believe
 - ▶ You sort through the information and use common sense to decide which information is accurate
 - ▶ BUT YOU MAKE A DECISION!!!!



Reducing the Law:
Medical Experts

▶ We Can Rely on Experts But We Need to Assess Their Credibility

- ▶ Are there things in everyday life that you do without understanding exactly how it works?
 - ▶ Examples: driving a car, flying, taking medication
- ▶ And would you agree with me that these are decisions with potentially life-altering consequences?
 - ▶ How do you make those decisions?



Reducing the Law:
Medical Experts

▶ We Can Rely on Experts But We Need to Assess Their Credibility

- ▶ In making those decisions, do you have to rely on someone with expertise?
 - ▶ Because the mechanics behind that decision are things that you don't understand? (how a plane works, how a drug can heal, how a car starts)



Reducing the Law:
Medical Experts

▶ We Can Rely on Experts But We Need to Assess Their Credibility

- ▶ How comfortable are you in evaluating competing opinions when one of the opinions is something that you want to believe?
 - ▶ E.g. buying a car that you really want. Are you more likely to believe the opinions that support your desire to buy a certain car?



Reducing the Law: Benign Motive

▶ Attributing a Benign Motive

- ▶ Deal with excuse-making
 - ▶ If an adult did this to another adult, would we call it sudden heat? Would we try to find a way to make the behavior less horrible?
 - ▶ Need to get jurors to acknowledge that no one wants to believe that a parent would intentionally hurt a child BUT they have to review the evidence
 - They don't get to speculate about a parent's motives
- ▶ Get commitments on issues like "sudden heat"



Reducing the Law: Medical Experts

▶ THE DECISION

- ▶ I would like each of you to think of a major decision you have made in the last 2 years
 - ▶ What factors did you take into account in making the decision?
 - ▶ Did you consult others in making the decision?
 - How did you choose who you would consult?
 - ▶ Did you make a final decision?
 - ▶ How do you feel about the decision that you made?
 - ▶ Do you feel good about how you made the decision, even if, in retrospect, you might make a different decision?



Brief Word on Special Child Abuse Cases

- ▶ Sometimes a "special" type of case will arise that may require review of a technical legal concept with a jury
 - ▶ Accomplice Liability
 - ▶ Neglect Cases



Special Child Abuse Cases

▶ **Accomplice Liability:**

- ▶ Want a commitment from the jury that people who aid and abet abuse are no different than a lookout man in a bank robbery
- ▶ They make it easier for the crime to happen



Special Child Abuse Cases

▶ **Accomplice Liability:**

- ▶ May need to address testimony in exchange for favorable consideration
- ▶ What if your fellow juror said "hasn't he been punished enough? He lost his child and now his wife is in prison. What could we possibly do that he hasn't already done to himself?"
- ▶ Eliminate jurors who think that holding the abuser accountable is enough – everything else can be dealt with through child protection.
- ▶ Drunk driving: why don't we just let Motor Vehicles take away the license?



Special Child Abuse Cases

▶ **Child Neglect / Endangerment**

- ▶ Review of the law may be needed
- ▶ Commitment that there are criminal remedies in addition to protective remedies
- ▶ Get jurors to articulate the distinction between being a bad parent and being a criminal


