

INVESTIGATING AND TRYING A HOMICIDE CASE

Andrea D. Lyon¹

Introduction

There is something about getting a new case, any case, that we have all felt. Interest, dread, hope that it is a “good one” (whatever that might mean), fear that it is a big loser and of course the fear that something we will do (or fail to do) may cost the client his freedom or even his life. In no case do these fears play a larger role than in a homicide case. The stakes are high for the client, they are high for us, and the odds are this is a case we will *try*.

This article will address some of these concerns; its intent is to help you to prepare a homicide case for trial. I have always found the hard work in preparing a case for trial to be the best palliative for fear, and my best ally in the courtroom.

This article will not address the special concerns of trying a death penalty case—it is beyond the scope of this article to speak to those complex legal and emotional concerns. There are many wonderful sources on that subject,² and I recommend that the reader consult them. Instead, this article

¹ Assistant Clinical Professor of Law, University of Michigan Law School. B.A. Rutgers University; J.D. Antioch School of Law. I gained extensive experience trying homicide cases during the 13 and one half years in which I served as an assistant public defender in the Cook County Public Defender’s Office in Chicago, particularly as a member of Homicide Task Force, and as the Director of the Capital Resource Center (now the Capital Litigation Division of the State Appellate Defender’s office). This article draws from my own successes and failures. The author would like to thank Rebecca Kline, a senior law student at the University of Michigan School of Law, for her substantial assistance in the research and writing of this article. The author also wishes to thank senior law student Nancy L. Woodruff for her assistance with this article.

² The following list, while not exhaustive, contains references to jurisdiction-specific manuals as well as general materials. *State Cases*: CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, CALIFORNIA DEATH PENALTY

will focus on the factual, expert, and legal investigation necessary to prepare to try a homicide case.

The first difference between a homicide case and other cases is clear; the victim of the crime isn't there at trial. This may seem to be too obvious a thing to bother to say, but many lawyers prepare a homicide case for trial ignoring this looming ever-present fact of the loss of life by violent means. It is very difficult to win an acquittal in a homicide case if only because the jury feels the need to make reparations to the family of the deceased. Indeed there are more instances of wrongful homicide convictions than nearly any other kind of crime with the possible exception of rape.³

Part of your job in a homicide case is to recognize and prepare for the emotional reactions of the jury, judge, and prosecutors to the case. You cannot ignore emotions; they will not go away. Part of your time must be spent in developing a relationship with your client, his or her family, and, if possible, with the family of the victim. You will be surprised how receptive a victim's family members may be if you approach them, either through an intermediary such as a clergyman or by yourself, with respect and some sensibility of their loss.

I cannot emphasize enough the importance of your relationship with your client. If he or she does not trust you, you will operate in ignorance of facts (good and bad) that you need in order to do well. Many lawyers feel that this is undue "hand-holding" of the client and "that is not their job." This is

MANUAL (1993); EQUAL JUSTICE INITIATIVE, DEFENDING A CAPITAL CASE IN ALABAMA (1997); KENTUCKY DEP'T OF PUBLIC ADVOCACY, DEATH PENALTY MANUAL (1989); TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, TOOLS FOR THE ULTIMATE TRIAL: THE TACDL DEATH PENALTY MANUAL (1992). *Federal Cases*: ANDREA D. LYON, FEDERAL DEATH PENALTY DEFENSE MANUAL (1997).

³ Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996). MICHAEL L. RADELET & HUGO ADAM BEDAU ET AL., IN SPITE OF INNOCENCE (1992).

literally true—you are neither their family member, priest or therapist. But in a very real sense you are some part of all three. You are the person to whom your client looks for meaning and understanding of the “system,” for guidance on his or her behavior in court, for your expert assessment of his case, and for the strategy you both should take. It is not possible to win if your client doesn’t want to win, it is not possible to convince a jury of the rightness of your cause if you both don’t believe in it (even if it might be a bit of a stretch), and you certainly cannot do your job in ignorance of the information only the client may have. Establishing a relationship with your client is not some gratuitous form of hand-holding or pseudo-therapy—it is a necessity. In other words, it is not only the moral or right thing to do, it is the practical thing to do.

Homicides also differ from other cases because of the media interest that often accompanies them.⁴ It is beyond the scope of this article to discuss the ethics of interaction with the media,⁵ but one thing is for certain—if the press is interested you must have a strategy for dealing with them. “No comment” is fine. Too often lawyers are seduced by the prospect of being on the news and speak about their client’s case without thinking about it. Certainly none of us would consider speaking to the jury before we were ready, before we investigated the facts, brain stormed the case with people we

⁴ Indeed, homicide cases are solved more frequently than other criminal cases. At eighty percent, they have clearance rate than larcenies, which have only a seventeen percent clearance rate. This discrepancy is due to, in part, public pressure to solve serious crimes, such as murder, which then causes police departments to expend substantial resources on investigation. JAMES N. GILBERT, CRIMINAL INVESTIGATION 54 (1980). Note that the third edition of this book is now available, JAMES N. GILBERT, CRIMINAL INVESTIGATION (3rd ed. 1993), although it is not referenced in this article..

⁵ See Elisabeth Semel and Charles M. Sevilla, *Talk to the Media About Your Client? Think Again*, CHAMPION, Nov. 1997, at 10. (providing an in-depth discussion about the ethical and strategic problems associated with defense lawyers’ communications with the media); see also NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS CASES (1992).

trust and developed a theory of the case. Speaking to the press without having done that kind of preparation can be a real disservice to the client, in fact it almost certainly will be. Remember that your job is to protect the client, not to promote yourself— if it is best to present your case or motions on a late Friday afternoon when the criminal courts building is nearly empty and no one is watching other than the parties involved, then that’s what you should do.

All that being said by way of introduction, what should you *do* to get ready for this trial? This article will discuss witness interviews, crime scene investigation, organization of both the investigation and the trial file, and other basic “how to” preparation for trying a homicide case. This is not a trial techniques article, nor a theoretical discussion of the merits of one theory of the case over another, or a discussion of courtroom tactics. My intent is to assist you in preparing your case, knowing what you need to know so that you can make intelligent decisions ahead of the trial, and getting that ninety percent of the case that you can prepare in advance done so that you can handle the unexpected ten percent during trial.

In order to better illustrate my points, let me introduce the first of two paradigm cases to you, which I will use to illustrate the steps needed to prepare your case. The first case involves a challenge to prosecution’s evidence—a reasonable doubt, mistaken identification case.

Overview of the Frias Case

On the night of November 8th, eighteen year old Alfredo Torres was brutally murdered by two armed men in front of the home where he lived with his mother and siblings. Many people were out on the street that night, watching helplessly as two men discharged their handguns into Torres’ body. He was an honest, hardworking kid—not a member of any of the numerous gangs in the area—and it

seemed a senseless crime. Within a few days, four witnesses identified the second gunman as Ruben Frias—each one separately selecting Frias’ picture from a series of photographs. Frias was then charged with the murder of Alfredo Torres, although there was no physical evidence connecting him to the crime scene. He was tried and convicted in July of 1980, not of murder but of armed violence in the course of murder. His conviction was subsequently reversed by the Illinois Court of Appeals.⁶

My partner on the case was Michael Morrissey.⁷ We began by analyzing the strengths and weaknesses of the prosecution’s case, as it appeared in the police reports. We found a lot of things we liked in the police reports (which in Illinois are a part of discovery,⁸ as they are in most states,⁹ although not in federal prosecutions¹⁰), and a lot of things we didn’t like.

Reviewing the Police Reports

First and foremost, there was no confession. While this article will not deal in depth with the topic of police interrogation, there are a few items worth noting.¹¹ First, more than any other case, a

⁶ People v. Frias, 109 Ill. App. 3d 888 (1st Dist. 1982), *aff’d*, 99 Ill.2d 193, 457 N.E.2d 1233 (1983).

⁷ Mr. Morrissey is now Chief of the Felony Trial Division of the Cook County Public Defender’s Office in Chicago.

⁸ ILL. SUP. CT. R. 412.

⁹ Many states require the prosecution to furnish the police reports to defense counsel upon request. *See, e.g.*, IDAHO R. CRIM. P. 16 (b)(7); ME. R. CRIM. P. 16(B)(2)(d). In several other states, however, police reports are not discoverable, *see, e.g.*, OHIO R. CRIM. P. 16(B)(2). TENN. R. CRIM. P. 16(a)(2), although it is likely that any exculpatory information contained in the police reports would be discoverable nonetheless. *See, e.g.*, CONN. R. CRIM. P. § 746(1). Be sure to consult your local state rules of criminal procedure and relevant case law to determine whether or not you can have access to the police reports.

¹⁰ FED. R. CRIM. P. 16

¹¹ *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3rd ed. 1986) (detailing a course of instruction to law enforcement personnel on interrogation tactics); Andrea D. Lyon & Michael J. Morrissey, *In Case of Confession*, CHAMPION, May 1990, at 8.

homicide has enormous pressure to “get” a confession. Frias had spent three days in the tender loving care of the Area Three Violent Crimes detectives and had named an alibi consistently. In fact, the alibi had been given in court reported form, which is unusual. While it is the regular practice of the Chicago Police Department to bring in a court reporter along with an Assistant State’s Attorney to record a confession,¹² it was very odd that they had made a true record of his alibi. Perhaps the original intent was to “break” the alibi and have the negative inference gained from that, but as it turned out, the alibi checked out. There was just one problem with it—Frias’ best friend who could corroborate each piece of it had the nickname “Wacko” which he had conveniently tattooed onto his knuckles in case he (or anyone else) should forget. Mike and I were (needless to say) less than enthusiastic about this alibi, although relieved to find it verified by all the people Frias referred to in it.

A second thing we noticed right away was the *length* of the police reports. There were over sixty pages of them, a sure sign that this case didn’t “break” easily and that there were likely problems in the case, at least from the prosecution perspective. The bad part was the number of witnesses against Mr. Frias, and the gang overtones to the case. Four witnesses had identified Frias as being the second man shooting. It was clear that they believed him to be a member of the “enemy gang”—the rival of the neighborhood gang. So, this turned out to be a pivotal part of our inquiry—was Frias a gang member? If so what gang (was it the “enemy” gang?), and if not, why did the witnesses think that he was?

The total breadth of these reports was surprising, because the writing of a police report reflects a sifting process. A textbook on criminal investigation suggests that note takers exercise caution so as

¹² That is, if the defendant has already *given* a confession to the police in oral form and they like it and he is sufficiently repentant or malleable to give it again in front of a larger audience.

not to identify certain witnesses or informants in their notes because they are likely to be produced to the defense during discovery.¹³ When you question a homicide investigator about his report, he will admit (because he has to) that some element of judgement goes into what is included in the police report. This can hurt you when you are impeaching by omission, especially if it appears that impeachment is a “technicality”, but if there are gaps in the investigation, and evidence that you have found, knowing this may help a jury to discount the prosecution theory, or any inference that this “late-appearing” witness was somehow manufactured by you.

Interviewing Eyewitnesses: Organization and Strategy

It is virtually impossible to interview every witness who might have information about a case, so choices have to be made. The easiest and most logical place to start is to make an index of every person you would like to interview, and then prioritize that list. There are lots of ways to organize, but I prefer to list the evidence in the order from the best for the prosecution to the worst for the prosecution. If I cannot investigate everything I’d like to, I skip the stuff in the middle and investigate both ends of the continuum.

In Frias’s case, there were four obvious witnesses to interview—the identifying ones. The alibi had to be checked out since even if we weren’t going to use it, we needed to know if it was provably a lie. There was a fellow who had been interviewed by two youth officers who had responded to the call of man shot, someone known to those youth officers, who had identified two entirely different men (Lopez and Lozano) as the shooters that night. The police had picked the two up, who denied the

¹³See GILBERT, *supra* note 4, at 67.

various	-----	from neighborhood canvass		
Dr. Stein	-----	pathologist		
Lopez & Lozano	-----	other suspects		
Mrs. Herreria	-----	eyewitness, victim's mother couldn't id anyone		
"Wacko"	-----	D's alibi?		
"Wacko"'s girlfriend	-----	corroborated part of alibi?		
Sam _____	-----	identified Lopez & Lozano that night		

Of course, this is a simplified list for the purposes of this article, and many of the names have been left out or changed. You may notice the columns for dates of contact and with whom are all blank, as are the columns for "comments." If you use an index like this (or something like it of your own devising) you have to be sure to write down when you either saw the witness, or tried to, and who was with you. This may become important later when you need to call a prover (the person you brought with you to hear what the witness had to say -- just in case) if a witness changes their story, or if you are accused of "intimidating" witnesses by showing up to interview them.¹⁴ The comments section is

¹⁴ There are prosecutors who believe that the witnesses belong to them, and then are quite angry at those witnesses for giving interviews. This anger can lead to such accusations. Of course, I want to be clear that at no time should you *ever* intimidate a witness, or push someone to talk to you if they are clear they don't wish to, but you must try to interview them. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standards 4-4.1 to 4-4.3 (James G. Exum et al. eds., 3d ed. 1994); NATIONAL LEGAL AID AND DEFENDER ORGANIZATION,

there on the assumption that you probably have a lot of cases, and you simply cannot remember everything about them, let alone what the witnesses were like. This is particularly true if you go to interview a witness who then refuses to speak to you which she has an absolute right to refuse to do. Nonetheless, you have seen her, maybe even formed an impression of her, but before she asked you to leave she said nothing substantive, thus not necessitating any investigation memo to the file. Don't you want to hold on to that impression? If she greets you in a purple slovenly dress, if she looks high, and like she's been high for some time, don't you want to remember that later when this case is ready for trial? That's what the comments section is for—your impressions jotted down can be useful in devising your cross-examination.

Results of the Interviews: What We Found

I will not bore the reader with a recitation of each interview we did, but allow me to illustrate how important these interviews are to preparation, trial and motions strategy. One of the eyewitnesses who identified Frias was Noel Castro. We found him early in the investigation, and he was certain of his identification. He described himself as several houses away from the shooting, was willing to admit it was dark out at the time, and even that he took cover as the shooting unfolded, but he wouldn't admit to the slightest possibility that he could have been mistaken.

As Mike and his prover were about to leave (I wasn't along on this interview), Castro said something that caught Mike's attention, something to the effect that he was certain of his identification because of something the police had done. Castro then described his interview with the police. He said

PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 4.1 (William J. Genego ed., 1995).

that the two detectives on the case picked up him and three other witnesses, all of whom later identified Frias, and they were driven around together in the police car. Castro said that, while they were all in the car, all four of the witnesses discussed what they had seen, and the detectives passed around some photographs between them. Castro said there were about twelve pictures, and that six of them were of Frias. When someone asked the detectives why there were so many photos of Frias, one of the detectives replied that “they had their reasons for doing this,” or something to that effect. This photo-identification procedure occurred while Frias was in custody, and he had been in custody for over a day -- there was absolutely no need to do a photo spread when a line-up could be held. Since a line-up is the preferred procedure, and deemed most fair, the fact they had failed to hold one, and had used this flawed process instead was quite telling. If we could show suggestive police procedures that led to Frias’s identification, the State would be asked to provide a separate and untainted basis for reliance on the identification.¹⁵ So this information was an incredible stroke of luck for us.

We put on a motion to suppress identification and all of the witnesses admitted to some of what Castro had said, except for (surprise!) the police. It also told us something else important—the police “had it in” for Frias, and there had to be a reason why. The reason turned out to be that both of Frias’s older brothers were in the “enemy” gang, but they had airtight alibis for the night in question (at least one was in jail, I believe). The officers just transferred their membership to Ruben. Frias was not actually a member (although he was headed that way), but his brothers’ reputations became his

¹⁵ To determine the likelihood of misidentification, courts will consider: the opportunity for the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of any prior descriptions, the level of certainty expressed by the witness, and the time lapse between crime and identification. *See* Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967).

problem.

The motion was denied, although the Court ordered the State to prove up an “independent basis” for the identifications (which the judge, unsurprisingly, found), the motion also had the effect of making the prosecution very nervous about their case. In fact, at trial, only two of the four witnesses, Jose Morales and James Malugin, testified identifying Ruben Frias. One of the four witnesses had been indicted for murder between the time of the motion and trial, and since Castro had been way too forthcoming about the improper behavior of the police in getting the identification of Frias at that same motion, the prosecution was unwilling to call either one.

Because we knew about the photographic line-up procedure, we were able to effectively cross-examine both the eyewitnesses and the police about the power of suggestion and reassurance,¹⁶ and the fact that they had Frias himself available for a real lineup. This didn’t look too fair, and coupled with the identification that night of two totally different suspects, doubt was created.¹⁷

Organizing Information About Witness Testimony

In addition to requiring thorough interviews and investigation, cases which will involve testimony from many witnesses also create a need for careful organization. First, I recommend creating a witness index. This forces you to truly know the file and makes it very accessible during trial. The following is an excerpt of one for the Frias case, just to give you the idea:

¹⁶ See generally ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (2d ed. Michie, 1992) (1987) (challenging the accuracy and reliability of eyewitness testimony through psychological research studies and advising lawyers on the use of such testimony).

¹⁷ The jury returned a “split” verdict—not guilty of murder, guilty of armed violence based on the offense of murder. Ultimately it was reversed outright by the Illinois Supreme Court.

WITNESS INDEX
PEOPLE V. RUBEN FRIAS

Names of Witness Type of Witness Page Nos. In

Police Reports Transcripts Other Locations

Castro, Noel	eyewitness/ids D	7-13	mot. suppress id, pp. 14-48	D witness interview, prover: XXXX
Herreria, Mrs. M	eyewitness/ does not identify D	4, 9		D witness interview, prover: XXXX
Malugin, James	eyewitness/ids D	9-17	mot. suppress id, pp. 49-72	D witness interview, prover: XXXX
Morales, Jose	eyewitness/ids D	9-18	mot. suppress id, pp. 72-91	
Palacios, Jose	eyewitness/ids D	10-19	mot. suppress id, pp. 93-103	D witness interview, prover: XXXX
Stein, Dr.	pathologist		Grand jury pp. 3-8	autopsy and toxicology report, D witness interview, prover: XXXX
Nolan, Sgt.	Main investigator	1-59	Grand jury pp. 8-14	

In order to make the most effective use of this index, you should alphabetize it by last name of the witness. The more complex the case, the more witnesses there are. In this case I believe the actual index had over thirty names, and the names of the authors of all reports must be indexed as well as those who were interviewed. The reason for this is obvious—you may need to prove up an impeaching

statement and you need to be able to figure out *fast* who can do that for you. The reason for alphabetizing (besides satisfying my need for order) is that when you do have a big case with hundreds of witnesses you cannot anticipate every single witness who could be called, especially if the prosecution is putting on fluff. For example, if you have prepared your cross-examination outline for the first officer on the scene, who you know to be “Roberts,” and then you hear the prosecution call “Smith” as the first officer (to, literally set the scene), you can go to your index and find out that Smith was the second officer on the scene. Probably Roberts is on furlough or something, so you can simply transfer your “scene” questions to Smith. If you don’t have the index, you will spend all of Smith’s direct examination madly paging through police reports to find out who he is, and what he has said before.

I recommend a similar chart for the purpose of keeping track of exhibits at trial:

**PEOPLE V. RUBEN FRIAS
TRIAL EXHIBITS**

Exhibit #	Description	Admitted?	Back to jury?	Comments
Peoples # 1	scene photo	yes	yes	none
Peoples # 2	autopsy photo	yes	yes	gory, objection made, instruction requested but denied

With this chart, obviously you would use a blank one that you fill out as you go, but you get the idea. You have to write it down as you go, or there is no chance you’ll remember it when you need to, especially if you lose the trial and need to file appropriate post-trial motions. I recommend making a similar chart for keeping track of trial error:

**PEOPLE V. RUBEN FRIAS
TRIAL ERROR**

Type of error	Objection made?	Ruling	Special instruction?	Comments
Officer testified to hearsay regarding gang membership of D	yes	overruled	no	judge says will revisit area at final instruction conference
Prosecutor asked defense witness opinion of prosecution witness's truthfulness	no	-----	-----	need to ask for instruction to jury, ask to recall witness for cross, indicate objection even though it's late

The reason this kind of a list is important is obvious once you see it—but it is really easy not to do it and to assume that you will remember. Particularly if this is a long trial you should not count on remembering that you need a special instruction at the end of trial.

An Overview of the Carter Case¹⁸

Let's look now at another type of homicide case which is often seen, the self defense case. Before I discuss the facts of the case, I want to say that the issues discussed in the Frias case apply to the Carter case as well—the decisions about whom to interview, the creation of the various organizing devices. I won't discuss those issues a second time, but will add to them.

Michael Carter and James Turk get into an argument inside a small “Mom and Pop” store on

¹⁸ Docket No. 84-13551 (Ill. Cir. Ct. Cook County). This case is abstracted from my notes of the actual trial. Since the case resulted in an acquittal, there is no transcript. Also, some of the facts have been slightly altered to allow me to discuss certain issues, and most of the names have been changed.

Chicago's west side. Carter works in the store as a clerk. The store is a long narrow one, with a limited number of items for sale. At the back of the store is a cooler with soft drinks, milk cheeses, other dairy products and beer. On the outside wall, the one with windows facing the street, are racks of food, mostly chips, bread and cookies. Opposite that wall is a bullet resistant hard plastic window behind which the clerk stands. Behind that "window" is the cash register and shelves of hard liquor, cigarettes and wine for purchase. The store is maybe twenty-five feet in length, less than half that in width.

Until you have been there it is hard to appreciate the devastation in that neighborhood. The west side of Chicago was hard hit during the riots in the late sixties and never really recovered. Businesses left, gangs moved in in force. There are still burned out buildings, two- and three-flat apartment buildings with boarded up windows, occupied by rats and homeless people. The store is right in the midst of one gang's territory, the Gangster Disciples.

The day of the killing was nothing out of the ordinary for Michael; he went to work around ten in the morning, and usually worked until six or so. He had just finished high school and was set to start a junior college in the fall. He and his girlfriend lived in a one bedroom apartment, which was really a small apartment in the attic of someone's house a few blocks from the store. She worked as a cashier at K-Mart. They had one child, a toddler, who was taken care of by his girlfriend's aunt. There was one very unusual thing about Michael though, he wasn't in the gang. He wasn't in any gang. Where Michael grew up, this was hard to do.

The argument with Turk began when Michael wanted identification from him before selling him liquor. Everyone knew Turk was under age, but they sold to him anyway, because of his rank with in the Gangster Disciples—enforcer. There were several witnesses in the store when the argument began,

but when Michael came out from behind the “window” and told Turk to leave the store, they left the store. A crowd gathered, and saw Carter and Turk wrestling, then some friends break them apart. There were a lot of witnesses around— maybe fifteen people— hanging out on the street and they all knew each other, including Carter and Turk. They started fighting again, and this time it escalated. Michael Carter had a gun, the one kept in the shop, but Michael had it on him. There was a scuffle, and shots were fired. Turk died from a gunshot wound to the chest, and there was a wound to his right arm which could have been from a bullet graze. Unlike the Frias case, there was no question as to the identity of the perpetrator. Carter did not flee the scene of the crime, and lots of people saw him holding a gun after Turk was shot. Carter signed a court-reported confession, which described what happened after the struggle began (“we was wrestling, I got the gun out, it just went off”) but never described why Michael pulled the gun in the first place, or even why the argument started or he stepped out from behind the “window.”¹⁹

When the police got to the scene (which took over twenty minutes), the paramedics had already taken Turk to the nearest hospital, where he was pronounced dead on arrival. The paramedics arrived about five minutes after they were called, and according to their report, they spent five minutes or so with Turk before removing him. When the police got there, Michael Carter was standing there, waiting. Now while you can see how all of these facts play into self-defense easily enough, do they establish the requisite state of mind necessary for an acquittal? In other words, was use of deadly force

¹⁹ Techniques for obtaining a confession, and for controlling its content are taught to police, and are a subject with which you need to be familiar. It is beyond the scope of this article to discuss these issues here. However, I recommend that you read. INBAU ET AL., *supra* note 11.

reasonable?²⁰ From an investigation standpoint, what do you need to do in this case? Besides the obvious—that is interview your client and the fifteen or so people who saw some of the struggle (we found only five who would admit being there, only three of whom had spoken with the police). But what is it that goes into “making a case” for self-defense? State of mind is the key. Was Michael afraid? Was his fear reasonable? Did he need to use deadly force?

Investigating the Crime Scene: General Introduction to the Issues

Careful crime scene investigation is a critical part of any affirmative defense strategy.²¹ A visit to the crime scene is important from a fact gathering sense as well as from an advocacy perspective. The information you get from a visit to the scene may help you strategize the investigation of your case, it may show you ways to challenge the admissibility of the results of certain scientific tests, and it may serve to assist you in preparing your cross-examinations. You cannot assume that all the facts relevant to your case will be provided for you in the police reports or the State’s files. It is imperative that you not only read what the prosecution has revealed, but visit the scene yourself as soon as possible, take your own photographs,²² and have your own experts look at any physical evidence which might be

²⁰ 720 ILL. COMP. STAT. ANN. 5/7-1 (West 1996 & Supp. 1997); ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL 24-25.06 (3d ed. 1993) (“Use of Force in Defense of a Person”).

²¹ See CRIMINAL AND CIVIL INVESTIGATION HANDBOOK (Joseph J. Grau ed., 1981); Jules Epstein, *Defense of Homicide Cases*, in CRIMINAL DEFENSE TECHNIQUES 50-1 (Liliana Perillo & Juliet Turner eds., 1997).

²² Careful investigation and photographic evidence of the crime scene also played an important role in our success on the Frias case. Our physical evidence in this case included our own photos of the crime scene, taken one year later and at the same time of night. The pictures showed the poor lighting in the area, in addition to some large old trees, whose branches overhung the street and further interfered with visibility.

helpful to you.²³ Often facts are omitted from reports, whether deliberately or negligently they can be of enormous help to you.²⁴

Another important part of your job as an investigator is to understand and evaluate the work that has already been done by the police. There are certain specific issues of which you should be aware; for example, the potential for contamination of trace evidence. Your goal should be to understand the care needed to extract evidence; this will allow you to compare what was done with what ought to have been done.

With that in mind, what should the police do when investigating a crime scene? The best way to find out is to read what the police *say* they should do.²⁵ I am about to discuss some of the high points for the criminal defense lawyer, but believe me, this isn't even close to exhaustive—there's plenty more

²³ You have a right to an independent investigation of the physical or forensic facts in the case, even if you are appointed and do not have the funds to hire your own expert. *Ake v. Oklahoma*, 470 U.S. 68 (1985). You should make a motion for funds *ex parte* in order to do your own investigation.

²⁴ For example, in one case, an eyewitness said that the deceased came at my client with a cane. My client, who had finished off whatever Canadian Mist the deceased hadn't, had failed to mention any cane in his confession. The crime scene photographs were not particularly good, but there appeared to be something wedged behind a chair in one of the photos. It was also clear that the furniture in the room in which the stabbing occurred had been moved so the paramedics could treat the deceased. When we got the photos, and looked at them with a magnifying glass—there it was, a black metal cane. The case just got better.

²⁵In this section, I rely primarily on the following materials: LESTER ADELSON, *THE PATHOLOGY OF HOMICIDE* (1974); DOMINICK J. DI MAIO & VINCENT I.M. DI MAIO, *FORENSIC PATHOLOGY*—note that there is no separate chapter on gunshot wounds, which frankly is puzzling; FEDERAL BUREAU OF INVESTIGATION, *HANDBOOK OF FORENSIC SCIENCE* (1981) [hereinafter 1981 FBI HANDBOOK]; FEDERAL BUREAU OF INVESTIGATION, *HANDBOOK OF FORENSIC SCIENCE* (1994) [hereinafter 1994 FBI HANDBOOK]; BARRY A.J. FISHER ET AL., *TECHNIQUES OF CRIME SCENE INVESTIGATION* (4th ed. 1987); PAUL C. GIANELLI & EDWARD J. IMWINKELREID, *SCIENTIFIC EVIDENCE* (2d ed. 1993); GILBERT, *supra* note 4; *CRIMINAL AND CIVIL INVESTIGATION HANDBOOK*, *supra* note 21; INBAU ET AL., *supra* note 11; *MEDICOLEGAL INVESTIGATION OF DEATH* (Werner U. Spitz & Russell S. Fisher eds., 2d ed. 1980).

to know.

There is a method to investigation of the crime scene, that is a discernable pattern. There are three primary methods of searching crime scenes: the strip method; the spiral method; and the sector method.²⁶ The different methods have different strengths and weaknesses, therefore a knowledge of which pattern was used will be important to your evaluation of how thorough the search for evidence was. The police choose a search method based upon the type of crime scene (i.e. indoor, outdoor).²⁷ In the strip method, the investigator walks over the entire scene, starting at one corner and ending at the opposite corner, in orderly rows.²⁸ The goal is complete coverage, and it is a method that can be used for small or large scenes with the help of other investigators.²⁹ The spiral method is what is sounds like—the investigator starts in the center of the crime scene, and walks through the entire area in an outward spiral pattern.³⁰ This method is best for small spaces. The sector method, in contrast, is designed for large and outdoor spaces.³¹ In this method, different investigators will be responsible for a particular “zone” of the crime scene.”³² Sometimes photographers will follow the pattern, but most often they take photos from the point of entry to the scene in a counter-clockwise pattern. This is helpful to know if you think that some “editing” has gone on in the photos.³³

²⁶ See, e.g., GILBERT, *supra* note 4, at 86; 1981 FBI HANDBOOK, *supra* note 25, at 9.

²⁷ GILBERT, *supra* note 4, at 86.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 85-86.

³² *Id.* at 86.

³³ For example, in a battered woman self-defense case, my client told the police that to the left of the bed on the dresser there was both a sharp pair of scissors and a letter opener. As she was trying to resist his sexual advances, while he had her pinned down on the bed, she saw him reach in that

In addition to understanding the method by which a crime scene is searched, you should know what else ought to have been done by the police in their initial investigation. The FBI has a checklist of what should be done at a crime scene:³⁴

- 1) Secure and protect the scene
- 2) Survey the scene and develop a strategy for the investigation
 - a) What type of crime is this?
 - b) What evidence should be there?
 - c) Is any evidence lost, moved inadvertently, or contrived?
- 3) Prepare a written description of the scene
- 4) Photograph scene
 - a) Distances: overall, medium, close-up
 - b) Take at eye-level
 - c) Use scale device
- 5) Diagram and sketch the scene
 - a) Include: specific location; date; time; case identifier; preparer/assistants; weather conditions; lighting conditions; scale; compass orientation; evidence; measurements; and a key.
 - b) Sequential steps in creating basic sketch: draw basic perimeter; draw fixed objects, such as furniture; diagram the evidence; record measurements..
- 6) Conduct a detailed search
 - a) Use specialized search patterns: strip, spiral, zone.
 - b) Collect evidence after diagram and photograph
 - c) Obtain known standards for comparison (such as fiber samples from carpet or furniture).

Five things to remember when collecting physical evidence:³⁵

- 1) Must have legal authority

direction and because she thought he was going to stab her, she reached under the bed where she kept a knife and began to stab him. The photographs of the crime scene travel counter-clockwise from the door to the bedroom. They show the empty plate of food at the foot of the bed, the walls, the door, the bed, the light switch, but miraculously, there are no photos of anything to the left of the bed where she said the dresser with the weapons was. Now, the fact there are no photos does not prove anything, but it is suspicious when you add in the knowledge of the way in which a room is searched and photographed.

³⁴ 1994 FBI HANDBOOK, *supra* note 21, at 16-19.

³⁵ 1981 FBI HANDBOOK, *supra* note 25, at 100.

- 2) Written description
- 3) Proper identification
- 4) Proper packaging
- 5) Chain of custody

Comments on the Police Investigation of the Crime Scene in the Carter Case

The investigation of the crime scene done by the police was cursory. Only a half a dozen or so photographs were taken of the scene and none of the outside area at all, with the exception of the outside door leading to the store.³⁶ The evidence inventory indicated that the gun had been recovered from Michael, and that was all. Everyone I talked to said that Turk always “carried” a gun, but none was found on him or at the scene. This isn’t surprising even if he had one, since it took that twenty minutes for the police to get there, and a gun is valuable. Given that there was a large crowd around and that Turk was known to carry a gun, it is possible that someone took his gun before the police got there—anyone could have taken it.

Our Independent Investigation of the Crime Scene in the Carter Case

We took more photos of the scene and surrounding environs. We also measured the store and drew a to-scale diagram. This was important because there is not a lot of room to move in the “corridor” area of the store —Turk and Michael would necessarily be at close quarters even if they had not been struggling. In fact, there was barely enough room for two adults to pass each other if one

³⁶This failure to adequately collect evidence is also fodder for cross-examination. Remember that the FBI says to photograph the scene including: a) Distances: overall, medium, close-up b) Taken at eye-level c) Using a scale device. *See supra* note 34 and accompanying text. They also say to diagram and sketch the scene, which should include: the specific location; date; time; case identifier; preparer/assistants; weather conditions; lighting conditions; scale; compass orientation; evidence; measurements; and a diagram key. *Id.* The manual also suggests identifying the sequential steps in creating basic sketch: draw basic perimeter; draw fixed objects, such as furniture; diagram the evidence; record measurements; and conduct a detailed search. *Id.*

person was walking from the back of the store to the front while the other was doing the opposite.

The Carter Forensic Investigation: Bullet Wounds

This is where the forensic part of the investigation comes in. First, start with the autopsy. Even where there is no question about time of death, means of death, or manner of death, there is something to be learned by looking carefully at the autopsy report, reading your source books to make sure you understand it, and interviewing the pathologist. I recommend always interviewing the pathologist, even if you think there is absolutely nothing to learn from him or her. Most pathologists will speak with you (although some insist on having the prosecutor present) because they either are fair or want to appear fair. You would be surprised what they can tell you about what happened to the deceased, and it may help you develop your theory of the case, or avoid pitfalls.

In this case, the pathology and toxicological reports revealed that Turk was 6' 4", 220 pounds, and "well-developed" when I asked the doctor what he meant by that he told me that there was significant muscle development, and responded affirmatively when I asked if in a layperson's terms that meant he was very strong. In describing the bullet wound to the chest, he told me the track of the wound was straight, front to back, with the bullet lodged just under the skin in the back. This fit what my client said in his confession. He also told me there was some stippling present on the body, although not much, and there were powder burns on the deceased's clothing.

Stippling (or powder residue) is burning of either clothing or skin by the gunpowder which fires out of the gun along with the bullet.³⁷ It often looks like soot, and is caused the gunshot is either a

³⁷ ADELSON, *supra* note 25, at 230; *see also generally* MEDICOLEGAL INVESTIGATION OF DEATH, *supra* note 25, at ch. X; GIANELLI, *supra* note 25, at chs. 14-2, 19.

contact or near bullet wound. Contact is what it sounds like—the muzzle of the gun is actually touching the person when the gun is fired. A contact wound may also show burning of the skin surrounding entrance.³⁸ A close wound is within inches of the person who has been shot, a near wound is less than 18 inches.³⁹

The amount of stippling indicated that this was a close or near wound, which again fit with our theory, that the gun went off during a struggle. I also asked the pathologist if a gunshot residue test had been done on the deceased's hands. If you fire a gun, or touch it as it is fired, the chemicals barium, lead and antimony (which are in gunpowder) will be left on your hand.⁴⁰ There are a number of tests which can be used to test for the presence of gunshot residue, and recovering the material is fairly simple—it just requires swabbing the hand. While it is true that a live person can wash their hands and do other activity which might spoil such a test,⁴¹ a cadaver cannot, so the test is potentially very useful. However, the test had not been done, which left me with the ability to ask about this “thing not done” on cross-examination, but without the definitive answer to the question.

The toxicology report indicated the presence of alcohol in blood, bile and urine. The level was 0.21%. This was very important for our case as well. At 0.05% to 0.14%, the level of intoxication is called “subclinical”⁴² and manifests itself as loquaciousness, deterioration of judgement and control;⁴³ from 0.15% to 0.24% is the stimulation or excitement phase in which increase emotional liability with

³⁸ ADELSON, *supra* note 25, at 216.

³⁹ *Id.* at 232-42.

⁴⁰ GIANELLI, *supra* note 25, at 394-402.

⁴¹ *Id.* at 395.

⁴² ADELSON, *supra* note 25, at 902.

⁴³ *Id.* at 903.

boasting and loud laughter which may alternate with anger and violence;⁴⁴ ranges between 0.24% and 0.34% is the “confusion” level;⁴⁵ between 0.35% and 0.40% is stupor; and beyond that is comatose.⁴⁶ The level of Turk’s intoxication was such that it increased the likelihood of his behaving aggressively and being violent.

Non-Crime Scene Investigation: the Victim’s Background

Also a big part of the investigation was discovering the background of the deceased. In a self-defense case, the deceased’s violent criminal history may be admissible⁴⁷ and is certainly of interest for trial preparation as well as potential negotiation—if a prosecutor knows that you are alleging self-defense, and that the deceased has a criminal record for violence, he or she may become more reasonable. You should not rely on the prosecutor to obtain these records for you, you should subpoena them yourself or use your Freedom of Information Act to get them. While most prosecutors are honest, not all are forthcoming, or consider it their duty to discover this information for you. Once you have the “rap” sheet, you should get the reports relating to the arrests. What is listed as a disorderly conduct may in fact be a crime of violence which “everyone” in the neighborhood had heard about and told you about, which your client knew about, but simply got reduced to that misdemeanor when the complaining witness refused to testify out of fear of reprisals. In other words, dig deeper than the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 904.

⁴⁷ In most states, it is admissible only if the defendant knew about it and it was therefore a part of his state of mind. However, in Illinois, under *People v. Lynch*, 104 Ill.2d 194 (1984), it is admissible even if the defendant did not know about it since it is relevant to answering the question of who was the aggressor.

surface—while it is possible you will find nothing useful, *not* digging will guarantee you will find nothing. Period.

In this case we found that while Turk had only been convicted of two assault and battery misdemeanors, he had been arrested on much more serious violent crimes, but no one would testify against him. We spoke with several complaining witnesses and learned his reputation in the community was one of extreme violence; one witness told us he had a “hair-trigger temper”.

Forensic Evidence in Other Cases: Determining Cause and Time of Death

As there is increasing reliance on “science in the courtroom,” you need to know more about it. Some you can learn from reading books or attending seminars, but I highly recommend hiring your own expert whenever the forensic part of the case is central. Even if you do not plan to challenge the results of testing, an expert in the field can help you prepare your cross-examination, and help you understand the import of the testimony. You need to figure out if the testimony hurts or helps your case and how it does that. It is not my intent to discuss the huge subject of forensic evidence in this article, but I will discuss two short examples of the place forensics can play in a homicide case. While most homicide cases are “who done its” or “why he did its” rather than what happened or how did death occur, sometimes those are the issues.

In a baby killing case, the child who was less than six months old, died of a subdural hematoma. What that means is there was bleeding on the brain below the dura, which is one of the three membranes which cover the brain. My client had told the police that he was holding the baby while standing, that their cat jumped up on the stove and as he moved to brush the cat down, he dropped his son. My question for the pathologist was, then, is this possible? The big question was, were there coup

and contrecoup contusions? Coup contusions occur at the site of the injury to the head and are due to the inbending of the bone with compression of the brain.⁴⁸ These are associated with blows to the head. Contrecoup contusions occur usually in the frontal and temporal lobes of the brain and are contusions on the opposite side of the brain from the point of impact and are commonly associated with falls.⁴⁹ If there was only a contrecoup injury, or if there were both, then the injury could be, was even likely to have been, from a fall. If there was only a coup contusion, then it would most certainly have been from a blow. When we interviewed the pathologist, he answered that he could not rule out a blow and *then* a fall, but there were definitely contrecoup contusions.

Time of death can also be of importance in a case. While it is not possible to tell from forensic evidence alone the exact time of death,⁵⁰ certain things can be determined from the body. In one case, looking at the autopsy photos.⁵¹ I noticed that the deceased had blue-green skin discoloration on some but not all of her body. When I looked that up in the Adelson book I saw that this meant the deceased had been dead for at least twenty-four and possibly as long as thirty- six hours.⁵² This was important because my client had confessed to the killing her on the day the body was discovered (he had been in a confessing mood, and the police had cleared two murders and five rapes that night). He *had* to have killed her that day, if he killed her, because he had been in jail for the previous week and only released that morning.

⁴⁸ DI MAIO, *supra* note 25, at 148.

⁴⁹ *Id.*

⁵⁰ *Id.* at 21; ADELSON, *supra* note 25, at 34.

⁵¹ You should always get your own copies of all autopsy photographs, indeed of all photographs in your case so you and possibly your expert can examine them.

⁵² ADELSON, *supra* note 25, at 171.

Conclusion

These are some ideas to help you prepare to try a homicide case. Remember—ninety percent of your chance to win your case is a combination of preparation and will. If you investigate your case, organize your case, and believe in your cause, you *can* win.