



APRI

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Prosecution of Elder Abuse, Neglect, & Exploitation

*Criminal Liability,
Due Process,
and Hearsay*



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Due Process,
and Hearsay**

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INTRODUCTION

Elder abuse, neglect, and exploitation are burgeoning crimes in the United States. It is estimated that one to two million Americans, ages 65 or older, who are dependent on others for care are victims of abuse, neglect, or exploitation.¹ Given that census data project that the 65 and older age group will nearly triple to more than 70 million by 2030,² it is likely that the number of crime victims in this age group will increase accordingly. However, as a National Academies report recently noted, the greatest tragedy may be that society's grasp of the problem is so loose that a more exact estimate cannot be made, and the most definitive estimate was made seven years ago.³

Prosecution of elder abuse, neglect, and exploitation cases is similarly difficult to quantify. At present, there are no statistics on the number of cases prosecuted involving older victims. This does not mean, however, that these crimes go uncharged. Depending on the jurisdiction, elder abuse, neglect, and exploitation can be prosecuted under a multitude of statutes and/or specific elder protection laws.⁴ Anecdotal evidence suggests that prosecution of crimes that victimize older Americans is becoming more frequent, and that more state and local prosecutors' offices are forming elder abuse units or designating a staff member(s) with specific responsibility for these types of cases.

Prosecution of elder abuse, neglect, and exploitation cases has given rise to a growing body of case law. Many of the legal issues are germane to any criminal case, such as *Miranda* requirements, search and seizure, or admissibility of co-conspirator statements. However, a review of the case

¹ Eds. Bonnie, Richard and Wallace, Robert, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, National Academies Press, 2003, Executive Summary.

² Federal Interagency Focus on Aging Related Statistics. *Older Americans 2000: Key Indicators of Well-Being*.

³ Bonnie, R., *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, Executive Summary.

⁴ A summary of state criminal laws on elder abuse, neglect, and exploitation is contained in another APRI *Special Topics* publication, *Fifty-one Experiments in Combating Elder Abuse: A Digest of State Laws on Elder Abuse, Neglect, and Exploitation*.

law finds three main issues that are unique to elder abuse, neglect, and exploitation cases.

The first issue relates to criminal liability. Defendants have argued that the state has not proven the perpetrator's knowledge of the age of the victim. Generally, the courts have followed the old saw, "ignorance of the law is no excuse," in disposing of these arguments. Also, unlike most criminal cases, defendants in elder neglect cases are held liable for what they omitted or failed to do, rather than for an affirmative act. The criminal liability is premised upon a care-provider relationship between the perpetrator and the victim, which the perpetrator failed to fulfill.

Closely related is the issue of due process. Defendants often argue that they did not have "adequate notice" of the relevant statute. This argument has been couched in several different ways including whether the perpetrator has adequate notice of: the perpetrator's status as a caregiver to the victim; the victim's membership in the population protected by the statute; or the prohibition of the conduct or neglect.

The final issue, admissibility of elder victims' hearsay statements, is of special sensitivity to the prosecutor at the trial level. Elder abuse, neglect, and exploitation cases sometimes place the prosecutor in the predicament of proceeding despite the victim's inability to testify due to incapacity or death. Still, a prosecutor may prevail if he or she has a victim's hearsay statement and has evaluated the admissibility of the statement under potentially applicable exceptions to the hearsay rule.

These cases have some of the most horrific fact patterns with victims suffering from decubitus ulcers, maggots devouring human flesh, and sexual assault. It is important for the criminal justice system and our nation to hold accountable the perpetrators of elder abuse, neglect, and exploitation. Protection of those unable to protect themselves is the *sine qua non* of a civilized society.

CRIMINAL LIABILITY FOR ELDER ABUSE AND NEGLECT

An increasing number of states have enacted laws that specifically criminalize elder abuse and neglect. Legislatures also are strengthening penalties and mandating reports and investigation of elder abuse to signal their intent that elder abuse and neglect be treated as a serious crime. Even where there is no specific statute or provision authorizing criminal prosecution for elder abuse and neglect, a jurisdiction's basic criminal laws (e.g., battery, assault, theft, fraud, rape, manslaughter, or murder) can be used to prosecute these crimes and often provide for enhanced penalties, when elders are victimized.

Criminal liability for elder abuse and neglect has engendered two issues unique to these areas. One issue is the requisite *mens rea* for criminal liability. Must the state demonstrate beyond a reasonable doubt that the defendant had knowledge of the victim's "protected status" under the statute? In other words, does the state have to prove that the defendant had knowledge of the victim's age, typically 65 years or older, or infirmity, such as physical or mental impairments?

The other issue primarily arises in elder neglect cases. *Mens rea* as an issue for neglect cases has been treated differently depending on the setting where the neglect occurs. In the domestic care setting, the issue arises in terms of the defendant's knowledge of the duty of care owed to the victim and the victim's neglected condition.⁵ The issue generally turns on whether the defendant has assumed responsibility for the victim's care through words or deeds, and if the defendant knew or should have known of the victim's neglected condition. In the institutional setting, *mens rea* is an issue in terms of the level of knowledge of the victim's neglected condition necessary to impose criminal liability for corporations and their managers. Generally, courts have looked to whether management levels above the first-line "care-providers" have authority over the care-providers, and whether the victim's physical condition was such

⁵ The issue of whether the defendant has notice of the duty of care is a due process one and is addressed in the next section of this publication.

that someone within the organization knew or should have known of the victim's neglected state.

I. Mens Rea—Is it Elementary?

To avoid criminal liability for victimizing an elderly person, defendants frequently argue that the state did not demonstrate beyond a reasonable doubt that the defendant knew the victim's age. Prior to discussing how the courts have handled this issue, a review of *mens rea* generally would be instructive.

Traditional notions at common law dictated that for there to be criminal liability, there had to be an *actus reus* and a *mens rea*. An *actus reus* is a wrongful deed that renders the actor criminally liable if combined with *mens rea*. Black's Law Dictionary, 6th Ed. (1990). *Mens rea* is defined as an element of criminal responsibility: a guilty mind or a guilty or wrongful purpose. See *United States v. Greenbaum*, 138 F.2d 437, 438 (3d Cir. 1943).

The early *mens rea* or intent cases considered by the U.S. Supreme Court involved regulatory statutes attempting to control the introduction of goods into interstate commerce for protection of the public welfare. These cases centered on the issue of whether the statutes were *mala prohibita* or *mala in se*. *Mala prohibita* statutes are prohibited wrongs, which do not require that the state prove the defendant's intent, just the act itself. *Mala in se* offenses require the state to prove both the act (*actus reus*) and the defendant's intent to commit the act (*mens rea*).

One of the seminal cases in the evolution of *mens rea* is *United States v. Balint*, 258 U.S. 250 (1922). In *Balint*, the defendant argued that he was denied due process under the Fourteenth Amendment when he was held criminally liable for an act in violation of the law, although ignorant of the facts underlying the prohibition. The Court rejected this argument, noting that punishment for an illegal act committed by one in ignorance of the facts making it illegal is not contrary to due process, particularly where the harm to the public welfare is great. *Id.* at 252. Further, the Court held that the subject statute's lack of an expressly

stated *mens rea* element was not, in itself, a denial of due process.⁶

The Court, in *Balint*, also recognized an evolution in the Court's perception of public welfare laws in terms of the defendant's knowledge or *scienter* as part of the *mens rea* element needed to establish criminal liability, noting that:

While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court.

Id. at 251 (citation omitted).

The effect of the Court's interpretation made it easier to prosecute these types of crimes and carry out the legislature's intent. For violations of public welfare-type statutes prosecutors now had to prove only that a defendant did not act as a reasonable person similarly situated, rather than actual knowledge on the part of the defendant.

This actual knowledge v. reasonable person standard has had a great impact on the prosecution of crimes victimizing the elderly. First, for statutes criminalizing conduct committed against victims of a certain age, absent explicit statutory language the courts generally have not required the state to demonstrate that the defendant knew the victim's age, only

⁶ In *Balint*, the defendant was indicted for violation of the Narcotic Act of December 17, 1914, c. 2546, 34 Stat. 1246, for selling large amounts of opium and coca leaves to the victim who was an addict. The subject statute lacked an express *mens rea* element. The Court determined that the intent of the legislature was to prevent the introduction of voluminous amounts of narcotics into the stream of commerce, and that the public needed protection from itself. This interpretation meant that the defendant should have known he was introducing dangerous amounts of narcotics to an addict, and that a person in the regular practice of medicine, similarly situated, would have recognized this and not prescribed the drugs, since an addict would not normally be able to self-medicate and dispense correct dosages over an extended time interval. Thus, the Court did not require that the government prove that the defendant intentionally or knowingly be aware that the victim was an addict.

that the victim was, in fact, that age. In elder neglect cases, the courts have used the reasonable person standard to determine whether the defendant knew or should have known of the victim's neglected condition, i.e., would a person, similarly situated to the defendant, reasonably have known of the victim's neglected condition.

Keeping that background in mind, the remainder of the article discusses how the courts have considered *mens rea* in the context of elder abuse and neglect. Many elder abuse and neglect statutes incorporate a *mens rea* element that is expressly stated. If there is not a stated *mens rea* element in the statute, courts generally have inferred one by analyzing the legislature's intent behind the statute or by looking at comparable statutes that address child abuse.

II. Ignorance is Not Bliss

Generally, criminal elder abuse and neglect statutes define the population they protect either through age or infirmity. For example, Fla. Stat. § 784.08(1), aggravated assault or battery, protects only persons 65 years of age or older and subjects perpetrators to a higher punishment than an aggravated assault and battery committed against the general population. On the other hand, Alaska Sta. § 11.51.200, *et seq.*, protects "vulnerable adults" and requires that the victim have a physical or mental impairment that prevents the victim from providing for his or her own needs.

To avoid criminal liability for violation of these types of statutes, defendants have argued that the state did not prove that the defendant had knowledge of the victim's age or infirmity, which placed the victim in the population protected by the statute. Initially, it should be noted that several states have specifically precluded this argument through their statutory scheme. For example, Fla. Stat. § 825.104, entitled, "Knowledge of the Victim's Age," specifically provides that a defendant's lack of knowledge regarding the victim's age is not a defense.⁷ Similarly, N. D. Cent. Code §

⁷ One of the cases that drove the enactment of this legislation was *Smith v. State*, 650 So. 2d 689 (Fla. Dist. Ct. App. 3d Dist. 1995). In *Smith*, the defendant appealed his conviction for assault on a person 65 years of age or older pursuant to Fla. Stat. § 784.08(2)(c) (1991). The court overturned the conviction stating, "[t]he State failed to prove that [defendant] had knowledge that the victim was over age 65 as was required by then § 784.08(2)(c) (1991)."

12.1-31-07.1(3) provides that “[i]t is not a defense to a prosecution of a violation of this section that the accused did not know the age of the victim.” Utah follows suit with Utah Code § 76-5-111, which states “[i]t does not constitute a defense to a prosecution for any violation of this section that the accused did not know the age of the victim.” *See* Wis. Stat. § 939.647 (provides that criminal penalty applies “even if the person mistakenly believed that the victim had not attained the age of 62”).

The nation’s capital, however, has taken the opposite approach. D.C. Code § 22-3601, which provides for enhanced penalties for certain crimes victimizing persons over 60, states in relevant part that “[i]t is an affirmative defense that the accused knew or reasonably believed that the victim was not 60 years of age or older at the time of the offense.” Thus, in Washington, D.C., the prosecutor specifically must disprove a defense that the defendant did not know the victim’s age when committing the crime.

In the absence of specific statutory direction, the courts have split regarding whether the state must prove that the defendant had knowledge of the victim’s age or infirmity, which made the victim part of the protected population under the subject criminal elder abuse statute. For example, in *People v. Suazo*, 867 P.2d 161 (Colo. Ct. App. 1993), the defendant complained that Colo. Rev. Stat. § 18-3-209(1)-(3), the “assault on the elderly” statute, required the state to prove that the defendant acted with knowledge that the victim was over the age of 60.⁸ The *Suazo* court looked to the plain language of the statute, Colo. Rev. Stat. §§ 18-1-503(2) and 18-1-502, and determined that the absence of any defined *scienter* or *mens rea* element in the statute made it a strict liability offense in terms of the age of the victim. The court concluded that the legislature chose not to include the defense of “reasonable mistake of age” in the statute and, therefore, the trial court did not err when it refused to instruct the jury that a defendant must have known the victim was 60 years of age.⁹

⁸ In *Suazo*, the defendant was convicted of assaulting the elderly as the result of an altercation with a co-worker over the age of 60.

⁹ The *Suazo* court reversed, in part, defendant’s conviction for third degree assault on the elderly, a class 5 felony, which has less culpability and less harm than a second degree assault on the elderly with provocation, which was a class one misdemeanor. The court concluded that this legislative scheme, which provided for a harsher punishment for a lesser crime, constituted an irrational classification and violated the constitutional guarantee of equal protection.

Likewise, in *People v. Davis*, 935 P.2d 79 (Colo. Ct. App. 1996), the court, in considering Colorado’s statutory definition for “at-risk adult” at Colo. Rev. Stat. § 18-6.5-102, and the substantive criminal prohibitions protecting at-risk adults at Colo. Rev. Stat. § 18-6.5-103, found no indication that the Colorado legislature intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult.

Similarly, in *Carter v. State*, 647 P.2d 374 (Nev. 1982), where the defendant was convicted of sexual assault and robbery of a 73-year-old woman with the use of a knife, the court denied the defendant’s due process challenge to NRS 193.167, a penalty-enhancing statute for certain crimes committed against victims 65 years and older. The defendant argued that his right to equal protection was violated because the statute distinguishes between perpetrators of crimes against victims over 65 and those who are younger. The court disagreed and held that “[d]ue process is not violated merely because the statute does not require knowledge of the victim’s advanced age.”¹⁰

In *People v. Jordan*, 430 N.E.2d 389 (Ill. App. Ct. 1981), the defendant shoved and struck a 66-year-old woman and was convicted of aggravated battery under Ill. Rev. Stat. Ch. 38, para. 12-4(b)(10), which provides in part that “aggravated battery is committed if the victim is 60 years of age or older.” The defendant challenged the constitutionality of § 12-4(b)(10), asserting that the statute involved an irrational classification and failed to require knowledge by the defendant that the battery victim was 60 years of age or over. A review of the legislative history of the statute revealed that legislators debated whether § 12-4(b)(10), which was similar to § 11-4 (indecent liberties with a child) and § 11-5 (contributing to the sexual delinquency of a child) in not having a *scienter* element, should require the State to prove that the defendant was aware of his victim’s age. The legislators noted that to require this proof by the state “would

¹⁰ In *Carter*, the court cited *Sheriff v. Williams*, 604 P.2d 800 (Nev. 1980), holding that the legislature is entitled to establish more severe penalties for acts which it believes have greater social impact and graver consequences. The court found that harsher penalties for crimes committed under different circumstances from those that accompany the commission of other crimes do not violate equal protection guarantees so long as the classification is rationally based upon the variety of evil proscribed.

be so difficult that the purpose of the act would be nullified.” *Id.* at 1139. Consequently, the court upheld the conviction, stating “it is inescapable that the legislature did not intend § 12-4(b)(10) to require the State to prove as an element of the offense that the defendant had prior knowledge of the victim’s age.” *Id.*

A cautionary tale for prosecutors is contained in *People v. White*, 608 N.E.2d 1220 (Ill. App. Ct. 1993), where the defendant appealed convictions of home invasion, robbery and aggravated battery for rushing into a dwelling where the victim was house sitting, knocking him down and stealing his wallet. The defendant argued that the State failed to offer any evidence of the victim’s age and therefore, the defendant was not proven guilty beyond a reasonable doubt of the charges of Class I robbery and aggravated battery based on the victim’s age. The court found that the State did not meet its burden, as it did not introduce evidence of the victim’s age as required by the statute, which would enhance the offense of Class 2 robbery to the higher Class 1 robbery. The court also found that the State was required, and failed, to prove the age of the victim to sustain the charge of aggravated battery. Thus, the court upheld the defendant’s conviction for home invasion, but reduced his conviction of robbery from a Class 1 to a Class 2 offense since the state did not prove the age of the victim, which was an element of the greater crime.¹¹ Based upon *White*, a prosecutor should be cognizant to put into evidence the victim’s age at the time of the offense.

On the other hand, in *Hubbard v. State*, 725 S.W.2d 579 (Ark. Ct. App. 1987), where the defendant was convicted for violation of Ark. Stat. § 41-1602(1)(d)(iii), second degree battery of a person 60 years or older, the court reduced the sentence to third degree battery because the State did not prove the defendant had actual knowledge of the victim’s age prior to the battery. The defendant struck the 61-year-old victim several times while the two were in a hospital conference room discussing the defendant’s medication. The court found the statute required knowledge by the defendant of the victim’s age based on the specific statutory language, which provided in relevant part, “[b]attery in the second degree is

¹¹ In *White*, the court also vacated the defendant’s aggravated battery conviction due to the one act, one crime doctrine.

committed by a person if he knowingly or intentionally...causes physical injury to one he knows to be sixty years of age or older.” *Id.* at 148.

Another case, where the court found that the state had to prove the defendant’s knowledge of the victim’s age, was *People v. Smith*, 16 Cal. Rptr. 2d 820 (Cal. Ct. App. 1993). In *Smith*, the defendant was convicted of robbery and kidnapping after he pushed a 67-year-old woman into her car and drove away. The defendant challenged the language of Cal. Penal Code § 677.9, which enhanced his sentence because the victim was over 65 years of age. Specifically, the defendant challenged the language of the statute that he “knew or reasonably should have known” that the victim was over 65 years of age as being unconstitutionally vague. The court rejected this argument, holding that all elements of § 667.9 were “clear” and “understandable” to any person committing one of the designated crimes and to any trier of fact. *Id.* at 1190. The court also rejected defendant’s argument that there was insufficient evidence that defendant knew or reasonably should have known, finding that the victim’s elderly appearance and the defendant’s reference to her in committing the robbery as an “old woman” were sufficient evidence to support the convictions.

Based on these cases, the defense of “I didn’t know how old my victim was before I attacked him / her” will not hold water unless the statute requires that the defendant have specific knowledge of the victim’s age or infirmity as an element of the offense. For states requiring that the state prove such knowledge on the part of the defendant, generally a basic reasonable person standard is used, *i.e.*, should the defendant have reasonably known the age or condition of the victim.

III. You Are Your Mother’s Keeper

In a domestic setting, criminal liability for elder neglect has largely turned on the issue of whether the defendant has a sufficient relationship with the victim to qualify as a caretaker or care-provider for the victim. If the defendant has caretaker status, the defendant has a consequent reasonable person duty of care for the victim. The prosecutor must prove that the defendant breached that reasonable person duty of care for the

victim. Defendants frequently argue that they are not caretakers or providers for the victims.¹² In resolving this issue, the courts generally have considered the statutory definition of caretaker in the context of the specific case. When there is no statutory definition or the definition is unclear, the courts have used basic dictionary definitions to give the words their plain meaning. In terms of whether the defendant actually breached the duty of care, many of these cases arise from injuries to the victims that are simply horrific. Consequently, the courts generally have had little trouble in concluding that under a reasonable person standard, the defendant has the requisite knowledge or *mens rea* of the victim's neglected condition and, therefore, the duty of care has been breached.

To prove criminal liability for elder neglect, prosecutors must first show there is an express or implied duty of care owed by the defendant to the victim through a "special" or contractual relationship. In *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994), the court overturned defendant's conviction for willfully permitting her elderly father to suffer the infliction of unjustifiable pain and mental suffering. Defendant did not live in the victim's house but had visited the house for six consecutive weekends prior to his death. The court found that defendant's brothers, who resided in the house and also were convicted of elder abuse and neglect, had clear custody and control of their father's well being. Initially, the court held that defendant did not have custody of her father, so the duty of care could only be based on the relationship between defendant and her brothers rather than defendant and her father. After looking at the legislative intent behind Cal. Penal Code § 368(a), the court determined that both § 368(a) and § 273, the California felony child abuse statute, are identical in form except where the word "dependent adult" replaces the word "child," and were enacted to protect members of a vulnerable class from abusive situations in which serious injury or death is likely to occur. *Id.* However, the court noted that the legislative history of § 368 was silent as to who, in addition to caretakers and custodians, may be under a duty to prevent the infliction of elder abuse. *Id.* Consequently,

¹² Often, as a companion argument, defendants also claim that they have been denied due process because the statutory definition of a caretaker is void for vagueness and, consequently, they lack notice of the duty to care for the elder victims. This argument is discussed in the next section of the publication.

the court dismissed defendant's conviction "[b]ecause the People presented no evidence tending to show that defendant had a *legal duty* to control the conduct of either of her brothers." *Id.* at 1245.

In *State v. Johnson*, 528 N.W.2d 638 (Iowa 1995), where the defendant [wife] assaulted the victim [husband] and left him on the floor in the house for hours, the court undertook an analysis of the term "custody" to determine if the defendant, as sole caretaker of the victim, was the victim's legal guardian. Iowa Code § 726.3 (emphasis added) provides:

A person who is the father, mother, or some **other person having custody** of a child, or any other person who by reason of mental or physical disability is not able to care for the person's self, who knowingly or recklessly exposes such person to a hazard or danger against which such person cannot reasonably be expected to protect such person's self or who deserts or abandons such person, knowing or having reason to believe that the person will be exposed to such hazard or danger, commits a class "C" felony.

The defendant argued that the statute only applies to instances of wrongdoing on the part of an individual carrying the status of legal custodian and that the defendant did not carry this status. The State argued that the legislature intended the phrase "other person having custody" to carry its normal, non-technical meaning. Because the statute had no definition of "custody," the court looked to other statutes and Black's Law Dictionary to define the term. Black's Law Dictionary's definition of custody was "the care and control of a thing or person." The court also examined the legislative history for § 726.3 and found that it suggested that the intent was for § 726.3 to apply to all instances where circumstances charge a person with the care and control of an individual. In the present case, the court determined the defendant's actions of taking charge of all aspects of her husband's life as his health and mental acuity failed were sufficient to be considered having "care and control of a person," and, thus, "custody."

Another case, which discusses the issue of whether the evidence demonstrated that the defendant had a duty of care for the victim, is *Sieniarecki v.*

State, 756 So.2d 68 (Fla. 2000). In *Sieniarecki*, the victim [defendant's mother] died as a result of severe neglect two weeks after she moved in with her eldest daughter and boyfriend. The defendant-eldest daughter argued that she had not assumed responsibility for her mother's care within the context of Florida's elder neglect statute. Because the term "assumed responsibility" was not defined in the statute, the court gave the term its ordinary meaning and found that under the defendant's own testimony, she had done so. The defendant had testified she had no other employment, and bathed, changed, and fed her mother with the exception of a few occasions when the defendant's brothers brought some meals to her mother.

Likewise, in *People v. McKelvey*, 281 Cal. Rptr. 359 (Cal. Ct. App. 1991), the defendant was convicted of neglect of a dependent adult, his mother. The victim, paralyzed by multiple sclerosis and reliant on others for feeding and hygienic needs, lived at home with her daughter and son. The daughter left the home permanently, and four days later defendant called emergency services, which found the victim in her bed covered with excrement, maggots, ants and other insects. The victim was taken to a hospital where she died from her neglected condition four days later. The defendant challenged the conviction, asserting that his sister was the caretaker for the victim, and that his mother and he were embarrassed about his taking care of her hygiene, which is why he chose not to care for her.

The court found "overwhelming" evidence that defendant was responsible for his mother's care and allowed her to suffer and become injured. The court concluded that defendant's conduct was a gross or culpable departure from the ordinary standard of due care and was criminally negligent within the subject elder neglect statute, Cal. Pen. Code § 368(a).¹³ The issue of whether the defendant had "care or custody" of his mother was moot, as the trial court found that the defendant violated the

¹³ Cal. Penal Code § 368(a) provides:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three, or four years.

first and second clause of § 368(a) and fell within the ordinary understanding of the terms “any person.”

These cases demonstrate the different ways courts determine if the defendant has a caretaker relationship with the victim. Generally, if the defendant assumes a role in relation to the victim where a reasonable person would view that relationship as endowing the defendant with the care, custody, or control of the victim’s health and welfare, it is likely to be sufficient to establish a duty of care owed by the defendant to the victim.

IV. Ostrich-Like Behavior Is No Defense

Caretaker elder neglect in an institutional setting varies from the domestic setting in that the duty of care owed to the elder victim is contractually assumed once the elder is admitted to the facility. However, the issue now becomes a type of “principal/agent” issue, i.e., how far up the chain of command does criminal liability travel? This issue turns on how far up the chain the knowledge or *mens rea* of the victim’s neglected condition is imputed. The remainder of this section reviews several cases where corporate owners and nursing facility personnel, including attendants, supervisors, nurse managers, administrators, and others have been held criminally liable for breaching the duty of care owed to the elders in their charge. Concepts of agency law affect the distance each state court allows criminal liability to extend. However, upper management tiers in nursing home facilities should be warned—the courts have had little problem holding both the corporate owners and individual managers liable for the neglect of patients that occurs on their “watch”—regardless of actual knowledge.

A. Corporate Liability

Corporate criminal liability typically is determined by the actions of the corporation through its agents. This liability can be imputed to the corporation itself as well as those agents/employees acting on its behalf. This section reviews how readily the courts will find corporate liability because of, or in spite of, the actions of those agents/employees.

In *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83 (Ky. 1991), the defendant, a nursing home health care corporation, appealed its conviction for

elder abuse in violation of KRS § 209.990(2). The victim, under contract with the defendant corporation, suffered from “multiple, extensive” decubiti on her body while in their care. The corporate defendant argued that because the jury acquitted the individual defendant nurses, a guilty verdict as to the corporation was inconsistent. The court rejected this argument, finding that as to the corporate defendant, “the case at bar included not only the three named defendants, but the live-in aides as well.” *Id.* Therefore, the court concluded that the corporate defendant could be held liable for the conduct of all of its employees, not just those charged or named in the indictment. The court explained “that although not named in the indictment, the defendant surely expected that the Commonwealth intended to pursue neglect by the aides and attribute it to the company.” *Id.*

Similarly, in *State v. Boone Retirement Ctr.*, 26 S.W.3d 265 (Mo. Ct. App. 2000), the court affirmed conviction for elder neglect of a corporate defendant where two residents under its care had died from bed sores and resulting complications. The court found it was entirely appropriate for a corporation to be held criminally responsible if, in the context of this statute on elder abuse, the conduct constituting the offense was authorized or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment. The court noted that corporate criminal liability could be predicated on the combined knowledge and actions or inaction of several high managerial agents. The court found there was sufficient evidence in this case, based on the combined acts and knowledge of the high managerial agents involved, to establish criminal liability for the corporation.

In contrast, in *State v. Compassionate Home Care, Inc.*, 639 N.W.2d 393 (Minn. Ct. App. 2002), the home-care provider corporate defendant successfully appealed from a conviction of criminal neglect of a vulnerable adult in violation of Minn. Stat. § 609.233(1). This case arose from defendant’s employee housing the victim, a 52-year-old quadriplegic, in a tent for two weeks and in a small windowless room thereafter. The court found that the trial court improperly refused to instruct the jury regarding corporate liability as required under Minnesota precedent. The court also questioned whether there was sufficient evidence to demonstrate

actual knowledge of corporate management of the employee's actions. This was significant because under Minnesota law the corporation must "knowingly permit" the conduct.

Essentially, courts are starting to hold the once impervious corporate entity responsible for incidents of elder abuse and neglect. Courts are finding that if a corporation's "high managerial agents" are aware or should be aware of abuse in their facilities, then that will be sufficient to find the corporation guilty. Unless the specific jurisdiction has a statute like Minnesota's, where actual knowledge must be shown, more and more corporate care facilities will be held criminally liable for their agents' actions or inaction that result in neglect or abuse of elder victims.

B. Individual Manager Liability

Criminal liability for individual managers has been even easier for prosecutors to prove than corporate criminal liability. Of course, the corporate manager defendant puts a person before the jury, for it to hold accountable for the frequently horrific nature of elder neglect cases. However, in terms of the law, the courts have had little difficulty in imputing knowledge of the victim's condition based upon a "reasonable person" standard.

In *State v. Thomason*, 33 P.3d 930 (Okla. Crim. App. 2001), the court reversed the trial court's dismissal of an incident where the victim, a 91-year-old resident of Western Hills Health Care Center (WHHCC), died from neglect of a leg fracture one month later. The defendant, regional director of the managing entity of WHHCC, was charged with caretaker neglect under Okla. Stat. Tit. 21, § 843.1.¹⁴ The trial court dismissed the charge, stating "there is no way that a reasonable person could—I think in her position be on notice of what was expected of her under the law." *Id.* at 932. On the State's appeal of the dismissal, the defendant argued that as a management employee, she could not have known that she could be criminally responsible for abuse and neglect of nursing home residents, given the definition of caretaker and the management exemption from liability found in the rules and regulations governing nursing

¹⁴ Okla. Stat. Tit. 21, § 843.1 provides in pertinent part, "[n]o caretaker...shall willfully abuse, neglect, or financially exploit any person entrusted in his care, or shall cause, secure, or permit any of said acts to be done."

homes. The court rejected this argument, stating that the defendant could not claim ignorance of the law because it was not a valid defense, and that she had no excuse for ignorance of the definition of caretaker for criminal statute purposes under § 10-103(6)(b).¹⁵

In *State v. Brenner*, 486 So.2d 101 (La. 1986), the defendants sought to quash an indictment for cruelty to the infirm in violation of LSA-R.S. § 14:93.3.¹⁶ Defendants argued, *inter alia*, that the statute did not provide adequate notice to them as managers of the nursing home of a duty of care to the victim. The court denied this argument, finding:

All nursing homes and other licensed facilities caring for the infirm receive written notification of the state's laws, minimum standards, rules, regulations and orders with which they are expected to comply. Therefore, there is notice of the duties imposed in regard to the residents. Since the personnel are fully apprised of their affirmative duties toward the residents, there is no problem with the due process requirement of notice.

Id. at 105 (footnotes omitted).

In *State v. Springer*, 585 N.E.2d 27 (Ind. Ct. App. 1992), the defendant, administrator of a nursing home corporation, explicitly argued that as an administrator he could not be liable for neglect of the victim-resident since he provided no direct care for the victim.¹⁷ The court rejected this argument and found defendant could be held liable if a reasonable person of ordinary intelligence would have sought medical care for the victim.

In a companion case, *Kerlin v. State*, 573 N.E.2d 445 (Ind. Ct. App. 1991), the defendant, the medical director for the same corporation, made the innovative argument that criminal liability in this context was not in the

¹⁵ Okla. Stat. Tit. 43A, § 10-103(6)(b) defines a "caretaker" as a person who has "assumed the responsibility for the care of a vulnerable adult voluntarily, by contract, or as a result of the ties of friendship...."

¹⁶ LSA-R.S. § 14:93.3 provides, in relevant part, "[c]ruelty to the infirm is the intentional or criminally negligent mistreatment or neglect whereby unjustifiable pain or suffering is caused a person who is a resident of a nursing home...."

¹⁷ In *Springer*, the victim's conjunctivitis worsened due to lack of treatment so that his eyes were matted shut.

public interest because “application of the statute to health and medical care professionals would result in reluctance by the medical profession to provide care to nursing home residents.” *Id.* at 447. The court dismissed this argument, noting that it was “better addressed to the legislature...” *Id.*

In contrast, in *People v. DeKorte*, 593 N.W. 2d 203 (Mich. Ct. App.), *app. denied*, 598 N.W. 2d 337 (1999), the case manager for an adult foster care facility escaped criminal liability for ordering that a resident, who suffered a shattered pelvis and distorted hips and elbow after jumping from the roof of the facility, not be taken to the hospital.¹⁸ While all parties agreed that under Michigan law, the defendant had a duty of care to the victim as a “caretaker,” the court concluded defendant’s order not to contact emergency medical services did not cause “serious physical harm” to the victim as required by statute. Accordingly, the court dismissed defendant’s conviction.

These cases illustrate that individual managers of nursing homes and residential care facilities can be found criminally liable if their actions or inactions rise to the standard described in each jurisdiction’s relevant elder care statute. What should a prosecutor consider in terms of proof of criminal liability for neglect of a manager of adult care facility?

- The organizational relationship between the manager and the first-line care provider;
- The regulatory scheme, both statutory and administrative, which may explicitly place the manager on notice of his or her duty of care;
- The condition of the victim, and whether it would have placed a reasonable person in the manager’s chain of command on notice of the neglect.

V. Conclusion

Criminal liability for elder abuse and neglect has embraced civil concepts such as the “reasonable person” standard. Generally, where an elder abuse or neglect statute has lacked an express intent or *mens rea* element, the

¹⁸The victim received medical treatment some 17 hours after the injuries when defendant’s subordinate, in contradiction of defendant’s order, called for an ambulance. *Id.* at 208-9. Defendant’s order apparently arose from a concern about the cost of emergency medical treatment.

courts have implied one, after looking to the legislature's intent behind the elder neglect and abuse statutes or to similar child abuse statutes in determining the requisite *mens rea* element.

The courts have generally resolved the "he/she didn't look that old to me" defense to elder abuse crimes or punishment enhancements by looking to the specific statutory language. Some states have ensured that defendant's knowledge of the victim's age does not become an issue by enacting statutes specifically eliminating this defense. At least one jurisdiction, Washington, D.C., has taken the exact opposite approach, specifically providing for lack of personal knowledge as an affirmative defense. Where the statute is silent on the issue, the courts have been all over the road, finding that defendant's knowledge is an element (pre-enactment Florida and Arkansas), defendant's knowledge is not an element (Colorado and Illinois), or using a reasonable person standard, i.e., would a reasonable person have known (California). In any jurisdiction without a specific enactment or controlling case law eliminating this defense, the prosecutor would be well-advised to put as much evidence into the record as possible to demonstrate that defendant knew or reasonably should have known the victim's age or condition.

In determining criminal liability for elder neglect, the primary issue in a domestic setting is whether there is a duty of care between the victim and the defendant under the relevant statute. The degree of consanguinity is not necessarily dispositive as is demonstrated by *Heitzman*. Rather, the issue is whether the defendant, through words or deeds, has assumed the duty of care. Absent an assumption of the duty of care through specific words or deeds, the courts have demonstrated some reluctance to hold persons related to the victim liable. Thus, in an elder neglect case in a domestic setting, a prosecutor will want to look at evidence regarding the nature and extent of the defendant-victim relationship.

On the issue of establishing the duty of care owed by defendants in home caretaker settings, courts have used a totality of the circumstances approach and looked to the plain meaning of the challenged provisions and words of the statutes. They have not concerned themselves with the question of whether the corporate entity defendants or the individual

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manager defendants have actual knowledge of the victim's neglected condition or a direct relationship with the victim. Rather, the focus has been on the relationship between the defendant and the subordinate first-line care providers. The courts have had little trouble in affirming individual managers' or corporate entities' criminal liability for elder neglect, which they or their subordinates knew or reasonably should have known.

DUE PROCESS IN ELDER ABUSE PROSECUTIONS

Defendants in elder abuse and neglect cases have commonly challenged charges on constitutional grounds by claiming that they have been denied “due process” because the statute is so vague it does not provide adequate notice to the defendant. These challenges have focused upon whether the defendant has notice under the subject elder abuse or neglect statute that: (1) the defendant has a duty of care for the victim; (2) the defendant’s conduct was criminal in nature; and (3) the defendant’s intent to commit the conduct was clearly defined. Generally, the courts have rejected these arguments, finding that the statutes do provide sufficient notice generally or at least to the subject perpetrator based upon his or her conduct and specific relationship to the victim. However, the sufficiency of criminal elder abuse statutes in terms of due process is certainly a concern of every prosecutor to ensure perpetrators of elder abuse are brought to justice.

I. It’s Constitutional—The Void-for-Vagueness Doctrine

The Fourteenth Amendment’s Due Process clause provides, in relevant part, that “no person shall...be deprived of life, liberty, or property without due process of law....” Due process of law requires that “an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In *Kolender v. Lawson*, 461 U.S. 352, 357-8 (1983), the Court succinctly summarized that:

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine “is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Smith*, 415 U.S., at 574.

Thus, as the California Supreme Court recognized in *People v. Heitzman*, 886 P.2d 1229, 1235 (1994),

...to satisfy the dictates of due process two requirements must be met. First, the provisions must be definite enough to provide a standard of conduct for those whose activities are proscribed.... Second, the statute must provide definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement.

However, the void for vagueness doctrine cannot be used to “challenge...[a] statute on the ground it may conceivably be applied unconstitutionally to others in situations not before the Court.” *New York v. Ferber*, 458 U.S. 747, 767 (1982). Accordingly, “a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others.” *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982). Thus, for a criminal statute to be in compliance with the Fourteenth Amendment’s Due Process Clause, the U.S. Supreme Court has held that it must: 1) provide adequate notice to perpetrators, and 2) provide guidelines for the police to use in assessing whether the perpetrator’s actual, not hypothetical, conduct violates the statute.

II. You Are Not Duty Free

Criminal elder abuse and neglect statutes often limit their applicability to persons occupying a caretaker role for the victim, which they have assumed in fact, when the victim is in a residential setting, such as the victim’s or perpetrator’s home, or by contract, when the victim is in an institutional setting, such as a nursing home. By limiting the application of elder abuse and neglect statutes to those persons who have a “special” relationship with the victim, perpetrators of simple negligence, such as the mailman who notices that the victim is in poor health, or the courier for the overnight delivery service who unquestioningly accepts the \$5,000 cashier’s check to be delivered to a post office box in Canada, cannot be held liable. However, whether a specific elder abuse or neglect statute provides adequate notice to the perpetrator that he or she has an affirmative duty to care for the victim has been raised in numerous elder neglect cases.

In *Sieniarecki v. State*, 756 So. 2d. 68, 74 (Fla. 2000), the defendant argued that Florida's criminal elder neglect statute (Fla. Stat. § 825.101) was too vague to provide the defendant adequate notice that she was a "caregiver" to the victim, her mother, who died from septicemia resulting from decubitus ulcers, a bladder infection, and a vaginal infection. Defendant argued that because the terms "assumed responsibility" or "been entrusted with care" in the statutory definition of caregiver were undefined, she did not have notice of her status as a "caregiver" to her mother or that she had a consequent duty of care to her mother. Because the terms "assumed responsibility" and "entrusted with care" were not further defined by Florida's statutory scheme, the court "construed [these terms] in their plain and ordinary sense." *Sieniarecki*, at 74. Citing to Webster's Dictionary, the court noted that "'to assume' is 'to take to or upon oneself.'" *Id.* The court concluded the defendant had actually "assumed responsibility" under the facts of the case because the defendant physically changed, fed, and housed her mother for the final weeks of her mother's life. Therefore, the court concluded that defendant, along with her assumption of the duty of care, also had actual knowledge of her duty to care. The court dismissed the defendant's claim that the term, "assumed responsibility," might be vague as applied in another context because it clearly applied in this defendant's case.

In another horrific case involving an adult child's neglect of a parent, *People v. McKelvey*, 281 Cal. Rptr. 359 (Cal. Ct. App. 1991), the court denied an argument that California's criminal elder neglect statute (Cal. Penal Code § 368) was unconstitutionally vague regarding whether the defendant had a duty of care to the victim, his mother. Defendant's mother was found by emergency personnel lying in a bed full of excrement with maggots and other insects crawling on her in the house she shared with the defendant. She subsequently died from heart failure due to multiple sclerosis, malnutrition, infections and neglect. Cal. Penal Code § 368(a) provides, in relevant part:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suf-

fering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health is endangered....

Defendant argued that the first clause of Section 368 covering “any person” was unconstitutionally vague. The court conceded there was some merit in the defendant’s argument but concluded it was of no moment since defendant had “the care and custody” of his mother, which meant defendant fell within the scope of the second clause of Section 368.

In *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994), the court considered head-on whether the phrase “any person” as used in the first clause of Cal. Penal Code § 368 was unconstitutionally vague. In one of the few instances where a defendant has successfully argued that an elder abuse statute was unconstitutionally vague, the court affirmed the defendant’s argument that the first clause of Section 368 did not provide sufficient notice of defendant’s legal duty of care.

In *Heitzman*, the defendant was charged with neglect of her elderly father. The defendant, although not a resident of the victim’s home, had been an overnight visitor in the weeks preceding the victim’s death of septic shock caused by body sores resulting from malnutrition, dehydration, and neglect. Initially, the court rejected the state’s argument that “any person” literally meant “any person” and declined to apply the duty to act to all persons regardless of their relationship to the victim. Next, the court considered child abuse statutes that proscribed similar conduct and found those wanting, since cases involving those statutes had not considered the issue of whether the defendant had a duty to act. Finally, the court determined

section 368(a) or the felony child abuse statute on which it was modeled do not provide a clear definition of those under a duty to protect either elders or children, respectively. Under these circumstances, section 368(a) fails to provide adequate notice as to the class of persons who

may be under an affirmative duty to prevent the infliction of abuse. Of equal, if not greater, constitutional significance, police and prosecutors may lack sufficient standards under which to determine who is to be charged with permitting such abuse.

Heitzman, at 1239. The court further expounded on the failure of Section 368 to provide adequate guidance for law enforcement, commenting that

under the statute as broadly construed, officers and prosecutors might well be free to take their guidance not from any legislative mandate embodied in the statute, but rather, from their *own* notions of the proper legal obligation owed by a grown child to his or her aging parent. This lack of statutory guidance is at least potentially troublesome where, as here, regardless of any perceived *moral* obligation on defendant's part to protect her father from abuse, she cannot be held criminally liable for her failure to come to his aid in the absence of a corresponding legal duty.

Id. at 1240 (emphasis in original). Thus, the court's concern was not so much whether the defendant had sufficient notice of a legal duty to act, but rather, that law enforcement had inadequate guidance regarding who had a legal duty to care for the victim.

In *State v. Thomason*, 33 P.3d 930 (Okla. Ct. Crim. App. 2001), the court considered whether a nursing home director-defendant had a duty of care in an institutional setting as a "caretaker" as defined in 43 Okla. Stat. § 10-103(b). In *Thomason*, the defendant was charged with elder neglect of a 91-year-old nursing home patient whose leg cast was permitted to become soaked in urine, causing the victim's leg fracture to open and become filled with pus. The defendant argued that because the term, "caretaker," was defined differently between 43 Okla. Stat. § 10-103(b) and the administrative regulations governing nursing homes, it was void for vagueness. The court denied this argument and held that the term "caretaker" was not vague on that basis and held that the statutory defini-

tion controlled for purposes of determining adequate notice. The court concluded that “caretaker” was adequately defined and that whether defendant was a caretaker was a factual issue for the jury.

A court again confronted the issue of whether a criminal elder neglect statute was void for vagueness in the context of an allegation of institutional neglect in *State v. Brenner*, 486 So. 2d 101 (La. 1986). In *Brenner*, a director and some employees of a nursing home were prosecuted for “cruelty to the infirm” for neglect of an elderly patient. The defendants complained that they did not have a duty of care under the relevant statute, LSA-R.S. 14:93.3, which provided in relevant part:

Cruelty to the infirm is the intentional or criminally negligent mistreatment or neglect whereby unjustifiable pain or suffering is caused a person who is a resident of a nursing home, mental retardation facility, mental health facility, hospital or other residential facility required to be licensed or operated under the laws of this state or established by the laws of this state.

Interestingly, the court looked to Louisiana’s statutes and regulations governing the nursing home industry to reject the argument that defendants had inadequate notice of their duty to care. The court found that because these statutes required notice by a nursing home to its employees of minimum standards of care, the defendants had adequate notice of a duty to care for the victim. In addition, the court held that the public policy favoring protection of the “injured and defenseless from abuse” also necessitated denial of the defendant’s argument. The court concluded that any nursing home employee was subject to the statute because all were “in some way responsible for...[the patient’s] well-being...” *Brenner*, at 105.

An interesting corollary to the void-for-vagueness and “duty of care” issue is whether the criminal elder abuse statutes have defined adequately the class of persons who are protected by such statutes. In *People v. Simpson*, 643 N.E. 2d 1262 (Ill. App. Ct. 1994), the defendant argued that the Illinois statute prohibiting financial exploitation of disabled persons was unconstitutionally vague because “disabled person” was insufficiently

defined. The defendant, an insurance agent, was charged with selling fake investments to the victim, who was disabled due to post-polio sclerosis. In short order, the court rejected this argument, finding that ILCS 5/16-1.3(b)(2) adequately defined a “disabled person” as one,

“who suffers from a permanent physical or mental impairment” that results from “disease, injury, functional disorder or congenital condition” and, as a result, the person’s permanent impairment “renders such person incapable of avoiding or preventing the commission of the offense.”

Simpson, at 1268. The court then looked to Roget’s Thesaurus for the definition of the term “incapable” and found it to be synonymous with “unable.” Accordingly, the court concluded that:

a “disabled person” under the statute is one who (1) suffers from a permanent physical or mental impairment, and (2) because of the impairment is unable to avoid or prevent being financially exploited by a person who stands in a position of trust and confidence.

Id.

Similarly, in *State v. Young*, 11 P. 3d 55 (Kan. Ct. App. 1999), the court denied a defendant’s argument that the statutory definition of “dependent adult” at K.S.A. § 21-3437 was void for vagueness in a case involving a home-care provider’s neglect of an elderly patient. Section 21-3437 defined a “dependent adult” as a person “18 years of age or older who is unable to protect their own interest.” The court held that the phrase “unable to protect their own interest” was “readily understandable by persons of common intelligence” and, accordingly, not unconstitutionally vague. *Young*, at 57.

Prosecutors also should be aware that the information or indictment may need to allege the relationship between the defendant and the victim and state how that relationship gives rise to the defendant’s duty of care under the subject elder abuse or neglect statute. In *Billingslea v. State*, 780 S.W. 2d 271 (Tex. Crim. App. 1989), the court invalidated a conviction for elder neglect because the indictment, the formal charging

document, did not recite how the relationship between the defendant and his mother, the victim, placed upon the defendant a duty to act under the Texas elder neglect statute. Consequently, the defendant's conviction and sentence of 99 years for elder neglect was overturned, despite the fact that the defendant had permitted the victim to develop decubitus ulcers and sores that went to the bone on several different parts of her body, which were caused by the victim lying in her own waste for long periods of time. Accordingly, a prosecutor would be well advised to detail in the formal charging document, the relationship between the defendant and victim and how that relationship places upon the defendant the duty to act or liability for failure to act within the context of the subject statute.

In dealing with void-for-vagueness arguments regarding "duty of care" status in criminal elder abuse and neglect cases, a prosecutor should remain cognizant of several points. First, the courts have readily looked to the dictionary to define words and phrases not considered to be legal "terms of art." The courts also have accorded these words and phrases their ordinary, everyday meanings. Second, in determining whether the defendant had adequate notice of his or her duty of care or liability for failure to care, the issue is whether the defendant had adequate notice based on his or her actual conduct—not a hypothetical situation. (See the initial section of this publication for a discussion of cases involving specific circumstances that demonstrate criminal liability for breach of duty to care.) Finally, a prosecutor should consider that the subject elder abuse or neglect statute must provide not only adequate notice to the defendant but also sufficient guidelines for law enforcement's discretion.

III. When is Neglect, Neglect and Abuse, Abuse?

Defendants also have challenged criminal elder abuse and neglect statutes as unconstitutionally vague by arguing that the proscribed criminal conduct is not clearly defined. Generally, the courts have denied these arguments by responding that regardless of the clarity of the definition of abuse or neglect in the statute, the courts (and thereby the defendants) know abuse and neglect when they see it.

Three Indiana cases exemplify the court's consideration of the void-for-vagueness argument in the context of whether the statutory definitions of abuse or neglect provide adequate notice of what conduct is prohibited. In *Klagiss v. State*, 585 N.E. 2d 674 (Ind. Ct. App. 1992), the defendant was charged with elder neglect for failing to obtain medical care for his elderly mother's broken neck. The defendant argued Indiana's elder neglect statute (I. C. § 35-46-1-4(a)), which made a person having care of the victim criminally liable for placing "the dependent in a situation that may endanger his life or health," was unconstitutionally vague. The court derisively dismissed this argument, stating:

The section is clear that one charged with the care of a dependent may not knowingly place that dependent in a situation which might endanger the life or health of the dependent. A person blessed with any measure of common understanding would recognize that endangering a dependent by abusing her in a manner which caused her to die of a broken neck would violate the statute. The statute is thus not void for vagueness.

Klagiss, at 682.

Similarly, in *State v. Kerlin*, 573 N.E. 2d 445, 447 (Ind. Ct. App. 1992), the court commented that "[a]n itemized list presenting each item of prohibited conduct in the statute is unnecessary." The court also stated that "[n]o reasonable person of ordinary intelligence would have difficulty determining that failure to give necessary or proper medical care is proscribed by the statute." *Id.* at 448. The court had no difficulty in concluding that the defendant, the medical director of a nursing home, had adequate notice that failure to give medical care to residents could result in criminal liability where the victims suffered from gangrene, eye infections and maggots in open sores. Likewise, in *State v. Springer*, 585 N.E. 2d 27, 31 (Ind. Ct. App. 1992), the court held that the Indiana neglect statute was not unconstitutionally void for vagueness and that the defendant had adequate notice that the statute "encompasses the failure to obtain necessary medical attention..." *Springer* involved the same nursing home and victims as *Kerlin*, with the defendant, in *Springer*, being the nursing home director.

A case previously discussed also considered whether defendants had adequate notice of the proscribed conduct. In *Brenner*, 486 So. 2d 101, the defendant complained that the term “neglect” was unconstitutionally vague. The court found that because the Louisiana elder neglect statute used the terms “neglect” and “criminal negligence” interchangeably, the general criminal statute’s definition of criminal negligence provided adequate notice. The court rejected a challenge that the phrase “unjustifiable pain and suffering” in the Louisiana elder abuse statute was unconstitutionally vague. The court stated that “unjustifiable” has a “definite and ascertainable meaning...intended to distinguish that pain and suffering which is an inevitable consequence of care and treatment from that which is not justified by medical needs.” *Id.* at 104.

In *Caretakers, Inc. v. Commonwealth*, 821 S.W. 2d 83 (Ky. 1991), the court considered whether the term “abuse” or “neglect” was unconstitutionally vague as applied to elder abuse in an institutional setting. Similarly to the court in *Kerlin*, 573 N.E. 2d 445, the Kentucky Supreme Court held “[t]o describe every possible situation in which the infliction of pain or injury could occur would be pointless and would make the statute unwieldy.” *Caretakers, Inc.*, at 88. The court concluded that Kentucky’s statutory definition of abuse or neglect “as, ‘the infliction of physical pain or mental injury, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult,’ [provided] adequate warning of the prohibited conduct.” *Id.*

In summary, the courts have evidenced a decided disinclination to accept defendants’ vagueness challenges in the context of adequate notice of prohibited conduct, probably due to the egregiousness of the neglect or abuse the defendants are charged with committing. Because the physical injuries to the victims were so clearly evidenced in all of these cases, the attitude of the courts has been more along the lines of “how could you, defendant, not know” of the victim’s neglected condition. Even where elder abuse and neglect statutes have been found to lack clarity in theoretical terms, the courts have held that the statutes certainly provided adequate notice when applied to the defendant’s actual conduct at issue.

IV. The Law of Unintended Consequences

The third primary issue defendants have argued regarding criminal elder abuse and neglect statutes and void-for-vagueness is that these statutes do not adequately define the intent element of the crime. In *Sieniarecki*, 756 So. 2d 68, the defendant unsuccessfully raised this very issue. The court rejected the defendant's argument that the Florida elder neglect statute was unconstitutionally vague for lack of an intent element. The court denied this argument because the Florida elder neglect statute prohibited "culpable" negligence. The court found "culpable" provided the requisite intent element because "culpable" indicated a more severe disregard than "simple negligence," which would not be criminal. In a similar case, in *People v. Coe*, 501 N.Y.S. 2d 997 (Sup. Ct. 1986), *aff'd*, 510 N.Y.S. 2d 470 (App. Div. 1987), *aff'd*, 522 N.E. 2d 1039 (1988), the court held that a statute that criminalized willful public health law violations, including physical abuse of an elder care patient, provided the requisite intent element. *See also State v. Boone Retirement Center, Inc.*, 26 S.W. 3d 265 (Mo. Ct. App. 2000) ("knowing abuse and neglect" was not unconstitutionally vague).

Criminal elder abuse statutes that use the terms "illegal and improper" in describing prohibited conduct have been similarly challenged. In *Cuda v. State*, 639 So. 2d 22 (Fla. 1994), a financial exploitation case, the court invalidated the Florida financial exploitation statute which criminalized any "illegal act" in using or managing an elder person's funds. The court found the reference to "any illegal act," without any further definition in Florida's statutory or regulatory scheme, was unconstitutionally vague because of lack of notice, and unconstitutionally permitted juries to determine the appropriate standard of guilt for the defendant.

In contrast, in *State v. Sailer*, 684 A. 2d 1247 (Del. Sup. Ct. 1995), the Delaware Superior Court specifically declined to follow the reasoning in *Cuda* in denying a similar challenge to Delaware's financial exploitation statute. The Delaware court found that the Delaware legislature's intent, which was codified in the Delaware statutory scheme, clarified "illegal" and "improper." In addition, because "illegal" and "improper" previously had survived constitutional challenges made to other Delaware criminal

statutes, the court was reluctant to find the language unconstitutionally vague in this instance.

Ultimately, a prosecutor facing a void-for-vagueness challenge to an elder abuse or neglect statute that contains only the phrase “illegal and improper” as a description for the prohibited conduct, should look for a more specific definition within the statutory scheme or case law. In addition, a prosecutor should focus on whether the defendant’s neglect was so great that an ordinary person would consider it to be illegal and improper. The issue generally becomes whether the statute connotes a specific intent through the inclusion of “willful” or a similar phrase. The statute also must raise the degree of neglect to be more than “simple” or “ordinary” neglect. If it complies with those guidelines, a criminal elder abuse or neglect statute is probably immune to a void for vagueness challenge based on an alleged lack of intent argument.

V. Invalidation Unlikely

In the final analysis, defendants generally have been unsuccessful in arguing the void-for vagueness doctrine to invalidate elder abuse and neglect statutes. For a statute to be unconstitutional based upon void for vagueness requires that the subject statute either provide inadequate notice to the defendant based on the facts and circumstances of that case, or provide insufficient guidance to law enforcement to determine whether the defendant’s alleged conduct is in violation of the statute. In the first instance, regarding inadequate notice, the issue quickly goes from inadequate notice to the defendant to how could the defendant not notice the injuries to the victim. In the second instance, the two decisions where elder protection statutes have been found void for vagueness, *Heitzman*, 886 P.2d 1229, and *Cuda*, 639 So. 2d 22, the issue has been the lack of definite standards (the reference to “any persons” in the California elder neglect statute and “illegal and improper” in the Florida financial exploitation statute). In essence, because elder abuse and neglect statutes are predicated upon a duty of care between the defendant and the victim, the duty and the persons who owe the duty to the victim must have some definition in the statute or, at least, incorporate a definition by reference. This duty of care issue also necessitates that prosecutors carefully

draft the information or indictment to specifically detail the defendant's relationship with the victim and how that relationship invokes a duty of care to the victim under the subject statute.

ADMISSIBILITY OF ELDER VICTIMS' HEARSAY STATEMENTS —SPEAKING FOR SILENCED VOICES

It's Monday and you have been handed the case files to prepare for the following week's probable cause hearings. Among the files is a particularly heart-wrenching case of physical and financial abuse of an 85-year-old woman by her in-home care provider. The victim gave a statement to the investigator, where she identified her abuser and the manner of abuse, and denied that the care-provider had fiscal authority. There's only one problem: the victim died a week after giving the statement.

A major issue confronting prosecutors in elder abuse, neglect, and exploitation cases is what to do when the victim is unavailable to testify because of intervening death, disability, memory loss, or illness. Five states (California, Florida, Illinois, Delaware, and Oregon) have amended their evidentiary codes to add hearsay exceptions to permit the introduction of elder victims' out-of-court statements. However, the Florida Supreme Court already has struck down that state's elder abuse hearsay exception as an unconstitutional violation of the Sixth Amendment's Confrontation Clause. The California, Illinois and Delaware courts have not yet ruled on the constitutionality of their elder victim hearsay exceptions, and Oregon has only considered (and upheld) those portions of the Oregon exception that deal with child abuse. In light of the Florida Supreme Court's decision and the U.S. Supreme Court's dicta when discussing the balance between other types of hearsay exceptions and the Confrontation Clause, the constitutionality of elder victim hearsay exceptions certainly is an issue.

This section considers the legal and practical implications of hearsay exceptions potentially applicable for introduction of hearsay statements made by elderly victims. In addition to the statutory elder hearsay exceptions in these five states, other exceptions may be available including present sense impression, excited utterance, statement for medical diagno-

sis, declarant's state of mind, business records, past recollection recorded, and if all else fails, the residual or "catch-all" exception.

Ultimately, a prosecutor's lodestar in offering elder victims' hearsay statements under any of the exceptions is to demonstrate that: (1) the offered statement is inherently reliable because of a lack of opportunity and motive for the victim to fabricate the statement; and (2) therefore, cross-examination is unnecessary. However, in demonstrating the inherent reliability of the proffered statement the emphasis should be on the facts and circumstances surrounding the making of the statement and, where required by the state exception, corroboration of the proffered statement through independent evidence. Finally, because admission of a hearsay statement implicates the Sixth Amendment's Confrontation Clause, a prosecutor should be mindful to make a record that satisfies the constitutional and statutory requirements for admission.

I. Confronting the Confrontation Clause

The Sixth Amendment states, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him....

The U.S. Supreme Court has stressed the importance of strict observance of this constitutional right in a long line of cases stretching back to the nineteenth century. However, for purposes of admission of elder victims' hearsay statements, there are two opinions of primary concern: *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Idaho v. Wright*, 497 U.S. 805 (1990). In these decisions, the Court makes clear that the Confrontation Clause prohibits admission of a victim's hearsay statement into evidence in a criminal case unless the state demonstrates that the subject statement has "particularized guarantees of trustworthiness" or falls within one of the well-established exceptions to the hearsay rule.

In *Roberts*, 448 U.S. 56, the Court considered the effect of the Confrontation Clause on the state's attempt to introduce the preliminary hearing testimony of an unavailable witness. Initially, the Court admitted that strict construction of the Confrontation Clause "would abrogate vir-

tually every hearsay exception, a result long rejected as unintended and too extreme.” *Id.* at 63. However, the Court noted “that the Clause was intended to exclude some hearsay.” *Id.* Why? Because of the Confrontation Clause’s “preference for face-to-face confrontation at trial and that ‘a primary interest secured by [the provision] is the right of cross-examination.’” *Id.* quoting, *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). Thus, the Court concluded that when a witness’s out-of-court statements are not subjected to cross-examination, for admission into evidence they must “bear adequate ‘indicia of reliability’...which can be inferred without more in a case where the evidence falls within a firmly rooted exception.” *Roberts*, 448 U.S. at 66. Otherwise, the hearsay statement “must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” *Id.*

In *Wright*, 497 U.S. 805, decided ten years after *Roberts*, 448 U.S. 56, the Court, in its consideration of the admissibility of a child victim’s hearsay statements in a sexual abuse case, provided some illumination of what it considered to be “particularized guarantees of trustworthiness.” The Court declared that the particularized guarantees “must be shown from the totality of the circumstances that surround the making of the statement, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” *Wright*, 497 U.S. at 819. The Court specifically rejected the argument that the “guarantees of trustworthiness” could be demonstrated through corroboration of the truthfulness of the statement with independent evidence. *Id.* The Court concluded that “[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.” *Id.* at 818. A hearsay statement not fitting within one of the historical exceptions is only admissible if “an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial...” *Id.* at 821.

The net effect of *Roberts*, 448 U.S. 56, and *Wright*, 497 U.S. 805, was to “grandfather in” all hearsay exceptions codified in Fed. R. Evid. 803.

However, for admission of hearsay statements that did not fall within any historically recognized hearsay exception, the state had to demonstrate that the proffered statement had: (1) particularized guarantees of trustworthiness, (2) based upon the totality of the circumstances, (3) with the only relevant circumstances being those surrounding the making of the statement.

II. Florida's Short-lived Elder Hearsay Exception

In 1995, Florida enacted Florida Stat. § 90803(24), entitled “Hearsay Exception; Statement of Elderly Person or Disabled Adult,” which provided, in relevant part:

- (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult...describing any act of abuse or neglect...is admissible in evidence...if
 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and
 2. The elderly person or disabled adult either:
 - a. Testifies; or
 - b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense.

The statute is remarkable in that it demonstrates a complete disregard of the U.S. Supreme Court’s decision in *Wright*, 497 U.S. 805, by: (1) failing to recite any of its key phrases such as “guarantees of trustworthiness” or “totality of the circumstances;” (2) making such statements presumptively admissible rather than requiring that the party proffering the statement demonstrate the “particularized guarantees of trustworthi-

ness;” and (3) conditioning the admissibility of the statement on “corroborative evidence” rather than the circumstances surrounding the making of the statement.

In *Conner v. State*, 748 So. 2nd 950 (Fla. 1999), *cert. denied*, 530 U.S. 1262 (2000), the Florida Supreme Court emphatically ruled that the elder victim hearsay exception was unconstitutional and violated the Confrontation Clause. First, the court ruled that the elder abuse hearsay exception was not firmly rooted “because the Legislature enacted the exception [only] in 1995.” *Conner*, 748 So. 2d at 957. Next, the court rejected the state’s attempt to analogize the elder hearsay exception to the child victim hearsay exception. The court held that the elder hearsay exception was unnecessarily overbroad because it could apply to any statement from a person over 60 regardless of physical or mental capacity in any criminal case. This was in contrast to Florida’s child hearsay exception, which limited its application to children with a physical, mental, emotional or developmental age of 11 or less in criminal cases of abuse or neglect. The court also found that the factors enumerated by the statute for consideration in determining the reliability of the proffered statement were inappropriate and would, in fact, tend to demonstrate why the statement should not be admitted. Finally, the court completed its demolition of the elder hearsay exception by ruling that the public interest supporting the child abuse hearsay exception (protection of the child from the trauma of testifying) was not present in the elder abuse context.

III. Pass the Constitutional Muster?

What *Roberts*, 448 U.S. 56, *Wright*, 497 U.S. 805, and *Conner*, 748 So. 2nd 950, made clear is that the latter-day elder hearsay exception is not an historically “firmly rooted” exception. Therefore, to avoid the guillotine effect of the Confrontation Clause, an elder hearsay exception will have to survive the stringent “totality of the circumstances” test set forth in *Wright*. Moreover, the circumstances considered in determining whether the subject statement demonstrates adequate “particularized guarantees of trustworthiness” for admission must be those relating to the making of the statement itself – not circumstances that merely corroborate the validity of the assertions made in the statement.

Unfortunately, the *Conner* decision, particularly in light of the U.S. Supreme Court’s denial of certiorari, raises constitutional concerns for the Illinois elder hearsay exception, 725 ILCS § 115-10.3, because it closely tracks the language of the Florida hearsay exception, including the requirement that there be “corroborative evidence” of the act which is the subject of the statement. Similarly to the Florida hearsay exception, this “corroborative evidence” requirement disregards the *Wright* logic that admission be predicated on the circumstances of the making of the statement—not on the circumstances demonstrating the substantive truthfulness of the statement.

On the other hand, the Oregon and Delaware elder hearsay exceptions, ORS § 40.460 (18a) and 11 Del. C. § 3516, do appear to have the *Wright* stuff. While the Oregon and Delaware elder hearsay exceptions recite, respectively, the phrases “corroborative evidence of the act of abuse” and “extrinsic evidence...to show the defendant’s opportunity to commit the act” as admission criteria, the primary bases for admission are the circumstances surrounding the subject statement. Specifically, ORS 40.460 (18a)(b)(2)(a) lists the following factors that the court may consider in determining whether a statement possesses adequate indicia of reliability:

- (A) The personal knowledge of the declarant of the event;
- (B) The age and maturity of the declarant or extent of disability if the declarant is a person with developmental disabilities;
- (C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;
- (D) Any apparent motive the declarant may have to falsify or distort the event, including bias, corruption or coercion;
- (E) The timing of the statement of the declarant;
- (F) Whether more than one person heard the statement;
- (G) Whether the declarant was suffering pain or distress when making the statement;
- (H) Whether the declarant’s young age or disability makes it unlikely that the declarant fabricated a statement that represents a graphic, detailed account beyond the knowledge and experience of the declarant;

- (I) Whether the statement has internal consistency or coherence and uses terminology appropriate to the declarant's age or to the extent of the declarant's disability if the declarant is a person with developmental disabilities;
- (J) Whether the statement is spontaneous or directly responsive to questions; and
- (K) Whether the statement was elicited by leading questions.

The Delaware elder hearsay exception lists the same criteria, with only minor changes, for the trial court's consideration in determining whether the statement has sufficient "particularized guarantees of trustworthiness." Thus, the Oregon and Delaware statutes' emphasis on the declarant's physical and mental condition, the external circumstances of the statement, and the internal circumstances of the statement itself should meet the Court's guidelines set forth in *Wright*, 497 U.S. 805, for a "totality of the circumstances" test based upon the circumstances surrounding the making of the statement. Both the Oregon and Delaware elder hearsay exceptions also place the burden on the statement's proponent to demonstrate that the statement has adequate "indicia of reliability" or sufficient "particularized guarantees of trustworthiness." In addition, both states require prior notice of intent to offer the statement to the opposing party. This prior notice allows the trial court to determine whether there are adequate "indicia of reliability" for the statement's admission. Indeed, the Oregon and Delaware statutes go beyond the *Wright* requirements and place upon the proponent the additional burden of demonstrating the substantive truthfulness of the statements, in addition to adequate indicia of reliability.

The California elder hearsay exception, located at Cal. Evid. Code § 1380, also requires that the statement's proponent demonstrate that the statement has "particularized guarantees of trustworthiness." However, unlike the Delaware and Oregon exceptions, the California statute does not recite a laundry list of factors for the court to consider in determining admissibility; rather, the California statute focuses on the "cleanliness of the hands" of the proponent, documentation of the statement, and the condition of the elderly person at the time of the incident and the time the statement is offered. Specifically, Section 1380(a) requires for admis-

sion of an elder victim’s hearsay statement, in relevant part, that:

- (2) There is no evidence that the unavailability of the declarant was caused by... [the proponent].
- (3) The entire statement has been memorialized in a videotape recording made by a law enforcement official, prior to the death or disabling of the declarant.
- (4) The statement was made by the victim of the alleged violation.
- (5) The statement is supported by corroborative evidence.
- (6) The victim meets both of the following requirements:
 - (A) Was 65 years of age or older or was a dependent adult when the alleged violation or attempted violation occurred.
 - (B) At the time of any criminal proceeding...regarding the alleged violation or attempted violation, is either deceased or suffers from the infirmities of aging...to the extent that the ability of the person to provide adequately for the person’s own care or protection is impaired.

Section 1380’s reference to “particularized guarantees of trustworthiness” along with the other admission criteria should comply sufficiently with the *Wright* guidelines to defeat a constitutional challenge made pursuant to the Confrontation Clause. In fact, with the additional requirement of demonstrating that the statement “is supported by corroborative evidence,” California, like Delaware and Oregon, has exceeded the requirements of *Wright*. However, for admission of a statement under Section 1380, the statement will have to meet the other specific criteria governing the recording of the statement and the victim’s condition.

Ultimately, until there is case law on the constitutionality of the Illinois elder hearsay exception, prosecutors in that state may want to proffer statements under the elder hearsay exception only if no other exceptions are applicable. If a prosecutor is relying upon the Illinois elder hearsay exception, it is advisable to make a trial record regarding the circumstances surrounding the actual making of the statement as well as the corroborative evidence demonstrating the substantive truthfulness of the statement. The Oregon and Delaware elder hearsay exceptions probably can be safely relied upon to survive federal constitutional challenge. However, compliance with the notice provisions, and making a trial

record of the circumstances surrounding the making and demonstrating the truthfulness of the statement are key requirements for admission. California prosecutors have been advising their elder abuse investigators to keep a videotape camera ready and to record the victim's entire statement. Until other states enact elder hearsay exceptions, prosecutors in jurisdictions other than Illinois, Oregon, Delaware or California will have to look to one of the "firmly rooted" hearsay exceptions for admission of an unavailable elder victim's hearsay statement.

IV. Other Hearsay Exceptions

Several "firmly rooted" hearsay exceptions are potentially available to introduce an unavailable elder victim's hearsay statement: (1) "present sense impression," (2) "excited utterance," (3) "medical diagnosis," (4) "state of mind," (5) "records of regularly conducted activity," i.e., business records, (6) "past recollection recorded," and (7) the "residual" exception. The remainder of this section will examine each of these exceptions in the context of the introductory scenario and some of the relevant case law that has arisen in the elder abuse context. However, a factor in the applicability of any of these exceptions is each state's hearsay rule and relevant case law. It should be noted that each of these exceptions is applicable regardless of the availability of the declarant. Accordingly, even if the elder victim testifies, a prosecutor may want to introduce hearsay statements under these exceptions to corroborate the victim's credibility.

A. Present Sense Impression

Fed. R. Evid. 803(1) defines "present sense impression" as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter."

Under the given scenario, suppose that a third party had been present and called 911 to report the abuse while observing it. That is nearly the exact situation presented in *Commonwealth v. Cunningham*, 805 A.2d 566 (Pa. Super. 2002), *app denied*, 2003 Pa. LEXIS 440 (Mar. 26, 2003), where the court affirmed the admission, pursuant to the present sense impression exception, of a 911 tape that contained statements made by two eyewitnesses while they actually were observing the burglary and rob-

bery of two elderly victims.¹⁹ The court identified the two conditions necessary for application of the present sense impression exception as: (1) the occurrence of a non-exciting event, and (2) the statements describing the event were “made at the time of the event or shortly thereafter...” *Id.* at 14. Thus, if a prosecutor is fortuitous enough to have a victim or eyewitness who made a statement at or shortly after the event, the statement should be admissible. However, in the more likely event that the victim’s statement is given to the investigator more than “shortly” or “immediately” after the event (seconds and minutes, not hours), a review of the hearsay statute may be warranted to locate another potentially applicable exception.

B. Excited Utterance

The excited utterance exception may be the most liberally interpreted of all the hearsay exceptions. Fed. R. Evid. 803(3) defines “excited utterance” as “[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.” In *State v. Mickelson*, 848 P.2d 677 (Utah Ct. App. 1992), the court, in a horrific sexual assault case involving a 72-year-old victim suffering from dementia, *inter alia*, admitted as an “excited utterance” the victim’s identification of the perpetrator and complaint of physical discomfort made **two to three hours** after the assault. The court identified three criteria that must be demonstrated for admission of an out-of-court statement as an excited utterance:

1. A startling event or condition occurred;
2. The statement was made while the declarant was under the stress of excitement caused by the event or condition; and
3. The statement relates to the startling event or condition.

Id. at 683.

Obviously, the only criterion at serious issue in *Mickelson*, 848 P.2d 677, was whether the victim was under the stress or excitement of the event. Or was it? As discussed in *Mickelson*, the trial court initially had to make a threshold determination that the startling event actually occurred. A

¹⁹ Interestingly, the court did not consider whether the statements also were admissible under the “excited utterance” exception.

prosecutor's recognition of the necessity for this threshold determination is extremely important at the trial level. Prosecutors who plan to offer an elder victim's hearsay statement as an excited utterance may need to organize their order of proof so as to provide the trial court with sufficient evidence to find that this startling event occurred prior to offering the statement itself.²⁰ Otherwise, the court may deny or limit admission of the subject statement, or require recalling the witness later in the case.

Demonstrating whether the victim is still under stress is not a matter of time (in contrast to present sense impression, where time is very much the focus). Rather, as the court stated in *Mickelson*, 848 P.2d at 685:

In certain situations, the stress of an event may affect the declarant's mind long after the event itself has transpired. In recognition of this fact, courts have generally been willing to characterize statements as products of exciting occurrences despite a significant lapse in time between the event and the statement, so long as adequate evidence suggests the declarant was still under the stress of the event at the time the statement was made.

Another example is *People v. Noble*, 178 N.W. 2d 118, 119 (Mich. Ct. App. 1970), is a sexual assault case where a 70-year-old woman was victimized and identified her assailant in a statement made **some 12 hours** after the assault. The court affirmed the admission of the victim's statement as an excited utterance because the record clearly established that the victim was "highly excited and upset when she made the declaration."²¹

²⁰ As discussed in *Mickelson*, 848 P.2d at 685 n.7, the majority rule is that the proffered hearsay statement itself may satisfy this initial prong. However, for jurisdiction not following the majority rule, order of proof is a concern.

²¹ See *State v. McFadden*, 458 S.E. 2d 61 (S.C. Ct. App. 1995)(elderly woman's statement to third person, which identified defendant as perpetrator in sexual assault case while victim was visibly upset and excited, admitted despite that victim was declared incompetent to testify); *Commonwealth v. Carter*, 767 N.E. 2d 100 (Mass. Ct. App.), *rev. denied*, 774 N.E. 2d 1098 (2002)(mother's identification of her son as perpetrator of assault on her made to police officer was admissible as a "spontaneous utterance"); *Cooks v. State*, 1995 Tex. App. LEXIS 3664 (Ct. App. April 7, 1995)(77-year-old victim's hearsay statement to reporting officer at emergency room describing her assault admitted as excited utterance); *cf. People v. Seymour*, 588 N.Y.S. 2d 551 (Sup. Ct.), *app. denied*, 610 N.E. 2d 402 (1992)(77-year-old victim's initial statement to police admitted as an excited utterance; however, second statement made 20 minutes after conclusion of first statement found not to be an excited utterance).

Returning to the introductory scenario, a prosecutor's initial focus when offering the victim's hearsay statement as an excited utterance should be on proving that the abuse occurred through independent evidence. Next, the focus should be on demonstrating the excited or stressed condition of the victim at the time the statement was made and the lack of opportunity to fabricate the statement. Finally, the prosecutor should demonstrate how the statement itself relates to the subject matter of the case.

C. Statement for Medical Diagnosis

Another "firmly rooted" hearsay exception is the medical diagnosis exception at Fed. R. Evid. 803(4), which provides for admission of hearsay "[s]tatements made for purposes of diagnosis or treatment and describing medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Because this exception only applies to that part of the statement relevant to medical diagnosis and treatment, its utility is very dependent on a proper foundation. For example, in *Conley v. State*, 620 So. 2d 180 (Fla. 1993), the Florida Supreme Court found that a rape victim's description to her rape examiner of the rifle used to threaten her was not admissible as a statement made for purposes of medical diagnosis. The court made this determination because the victim was not actually injured by the rifle and, accordingly, the victim's description of the weapon was irrelevant to her treatment.

Another case where the court considered the admissibility of a victim's hearsay statement pursuant to the medical diagnosis exception is *People v. Zemarian*, 2002 Cal. App. Unpub. LEXIS 5250 (Ct. App. June 12, 2002).²² In *Zemarian*, the court affirmed the trial court's admission of a 75-year-old victim's hearsay statements to the examining physician and medical technician about his sexual assault by a worker at the nursing home where the victim resided. The court found that the victim's statements were admissible to demonstrate why the victim was examined for sexual

²² Though an unpublished opinion, *Zemarian* provides an excellent overview of possible exceptions for admission of an elder abuse victim's hearsay statements. In *Zemarian*, the state was able to introduce the victim's hearsay statement to the defendant's co-worker as an excited utterance, another statement to a police officer under the state of mind exception, and yet a third statement to the examining doctors under the medical diagnosis exception.

assault and also to support the examining physician's expert opinion as to the victim's communication skills.

Therefore, in considering the introductory scenario, it would be advisable to locate and contact the victim's attending physician or any other medical professional (e.g. nurse, emergency medical technician, hospital worker, adult protective services worker), who may have observed the victim's injuries and discussed them with the victim. When offering the statement the prosecutor should be mindful of laying an adequate foundation for how the proffered statement relates to the medical diagnosis and treatment. For example, in the introductory scenario, if the victim complained to her physician of anxiety due to her relationship with the defendant and was treated, this may be a sufficient foundation for admissibility. However, admission of the victim's statements for medical diagnosis will be limited to that part of the statement relevant for purposes of the subject medical professional's course of conduct in examining, diagnosing, and treating the victim.

D. State of Mind

Commonly referred to as the "state of mind" exception, Fed. R. Evid. 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition..." is admissible. The important thing to remember when attempting to offer a statement under the state of mind exception is that the subject statement is admitted only for the limited purpose of demonstrating the declarant's state of mind, and not for the substantive truth of the matter asserted.

Forrest v. State, 721 A. 2d 1271 (Del. 1999), contains an excellent explanation of the state of mind exception in the context of a financial exploitation of the elderly case. To be admissible under this exception, the court held that the statement(s) must:

1. Be relevant and material;
2. Relate to an existing state of mind when made;
3. Be made in a natural manner;
4. Be made under circumstances dispelling suspicion; and
5. Contain no suggestion of sinister motives.

Id. at 1276. The court concluded that the victim’s statement in that case met those criteria notwithstanding that the victim suffered from Alzheimer’s disease. Accordingly, the court admitted the victim’s statement with an instruction to the jury that the statement could be considered only as to the victim’s state of mind, not as evidence of the truth of the statement itself. The victim’s statement was made to his son in an attempt to convince him to approve payment on a check the victim had made payable to the defendant. The court concluded that the trial court properly admitted the victim’s statement since the defendant’s sole challenge to the admissibility of the statement was that the victim suffered from Alzheimer’s disease. Therefore, absent any evidence that the victim’s statement to his son was suspicious or suggestive of sinister motives, the statement was admitted.²³

In the scenario described at the beginning of this article, the state of mind exception would have limited applicability. Primarily, it could be used to demonstrate a victim’s lack of consent to the improper conduct. However, since this statement would be admitted for that limited purpose only, independent evidence of the crime and the defendant as the perpetrator would still be necessary.

E. Records of Regularly Conducted Activity or Business Records

The “records of regularly conducted activity” exception located at Fed. R. Evid. 803 (6), commonly referred to as the “business records” exception, provides for admission of any

memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation....

²³ *Cf. Davis v. State*, 718 So. 2d 874 (Fla. Ct. App. 1998) (videotaped law enforcement interview of elderly victim suffering from dementia in financial exploitation case was inadmissible under state of mind hearsay exception because of the leading nature of the questions and the lack of relationship between the charged crimes and the subject matter of the statement).

In the context of elder abuse, the business records exception most commonly arises as an issue when attempting to introduce forgery affidavits in financial exploitation cases.²⁴ The general rule appears to be that a forgery affidavit is not a “business record” within the hearsay exception because the victim, who is not an employee of the financial institution, completes the affidavit.²⁵ Thus, while a forgery affidavit meets the requirement that it is a record kept by the business, it does not meet the other criterion of preparation by an employee of the business.

For example, in *Johnson v. State*, 633 So. 2d 484 (Fla. Ct. App. 1994), the court concluded that admission of a forgery affidavit, as a business record, was improper in a financial exploitation case because the affidavit contained information from the victim that was inadmissible hearsay. Similarly, in *Featherston v. State*, 2001 Ala. LEXIS 233 (Ct. App. Sept. 28, 2001), *rev'd on other grounds*, 2002 Ala. LEXIS 136 (May 10, 2002), the court reviewed a number of cases that held a forgery affidavit was not a business record within the meaning of the business records hearsay exception. The basis for those courts' decisions was that the information contained in the affidavits came from persons not employed by the financial institution maintaining custody of the affidavits. The court concluded that a forgery affidavit essentially was hearsay containing hearsay. Therefore, a separate hearsay exception, apart from the business records exception, was necessary for admission of the victim's statement that the check was forged. *See* Fed. R. Evid. 805.

In the introductory scenario, a prosecutor cannot demonstrate that the perpetrator committed unauthorized use of financial instruments simply by offering a forgery affidavit that was executed by the victim. A prosecutor in this scenario may want to find out who initially contacted the victim about the financial exploitation and the victim's reaction to this discovery. The victim's response (depending upon the circumstances) may be admissible as an excited utterance or as a statement of the victim's state of mind.

²⁴ Forgery affidavits are written notarized declarations that the affiant did not sign or authorize the signing of the checks listed therein.

²⁵ Forgery affidavits also may be objectionable as records prepared in anticipation of litigation.

F. Past Recollection Recorded

“Past recollection recorded” is another hearsay exception with potential application to the admission of elder victims’ statements. Fed. R. Evid. 803 (5) provides that for admission of

a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.

The statement may only be read to the jury, not admitted as an exhibit, except when offered against the declarant.²⁶

Returning to the introductory scenario, if the victim has capacity at the time of the interview, it is advisable to have the victim complete a statement describing the events of abuse and exploitation. Such a statement should be written or recorded as close in time to the acts of abuse or exploitation as possible, and witnessed to satisfy the foundational criteria of making the statement when “fresh in the victim’s memory” and “made or adopted” by the subject witness. The better practice would be for the victim to review and sign the statement at the time it is made and have the statement written rather than recorded using other media.

Thus, in our scenario, if the investigator obtained and witnessed a written statement from the victim, and the statement demonstrated that it contained sufficient details of the abuse and exploitation to show that the acts were fresh in the victim’s memory, then the statement could be read into the record so long as the victim was still alive. However, this exception only applies if the victim’s unavailability is due to memory loss, rather than as posited in our scenario, the victim’s death.

G. Residual Hearsay—Last Resort

The “catch-all” or residual hearsay exception is a final possible means of

²⁶ See *Godfrey v. State*, 989 S.W. 2d 482 (Tex. Ct. App. 1999) (trial court committed harmless error in admitting eyewitness’s written statement rather than having the statement read into the record in elder assault case).

admission of an elder victim's hearsay statement.²⁷ Fed. R. Evid. 807 provides that if a statement is not admissible under any other exception, it may be admitted if the

1. Statement is offered as evidence of a material fact;
2. Statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
3. General purposes of these rules and the interests of justice will best be served by admission of this statement into evidence.

Two cases involving elderly victims vividly illustrate the issues in admissibility under the residual hearsay exception. In *People v. Lee*, 622 N.W. 2d 71 (Mich. Ct. App. 2000), *app. denied*, 630 N.W. 2d 334 (2001), the court affirmed the admission of an 81-year-old victim's hearsay statement identifying the defendant as a perpetrator of an armed robbery, when the victim died prior to trial. The court affirmed admission of the statement notwithstanding that the statement was made shortly after the victim had suffered a closed head injury when defendant hit the victim in the head with a lead pipe.

The court discussed *Roberts*, 448 U.S. 56, and *Wright*, 497 U.S. 805, in detail and found that "the federal cases require (1) a showing of unavailability and (2) that the statements sought to be admitted bear an adequate indicia of reliability ... [which are determined based upon] the totality of the circumstances surrounding the making of the statement." *Lee*, 622 N.W. 2d at 78. In assessing whether the statement had adequate indicia of reliability, the court listed factors to be considered as:

- (1) the spontaneity of the statements;
- (2) the consistency of the statements;
- (3) lack of motive to fabricate or lack of bias;
- (4) the reason the declarant cannot testify;
- (5) the voluntariness of the statements...;
- (6) personal knowledge of the declarant about the matter on which he spoke;

²⁷ It should be noted that a minority of jurisdictions do not recognize the "catch-all" or residual hearsay exception including: Alabama, Florida, Indiana, Kentucky, Maine, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, and Louisiana (in criminal cases only). Birdsong, Leonard, *THE 2001 SURVEY OF FLORIDA LAW: Evidence Law*, 26 Nova L. Rev. 59, 65 (Fall 2001).

- (7) to whom the statements were made...; and
- (8) the time frame within which the statements were made.

Id. at 80 (citations omitted). The court held that the victim’s statement, which identified the robber, demonstrated adequate “indicia of reliability” based upon the consistency of the victim’s statements in identifying defendant as the perpetrator, the “lucidity” and coherence of the victim, the lack of evidence of memory loss by the victim, and the victim’s demonstrated awareness of his environment and the crime at all times.

In contrast, in *Government v. Tranberg*, 28 V.I. 52 (Terr. Ct. 1993), the court found the trial court’s admission of an elderly victim’s hearsay statement was improper because the statement did not have the “particularized guarantees of trustworthiness” in part due to the victim’s “physical and mental condition...” In fact, the court described the victim’s condition as “frail and vulnerable, both physically and emotionally...partially paralyzed and confined to bed or to a geriatric chair...[and] unable to care for himself.” *Id.* at 54.

Based on *Lee* and *Tranberg*, reliance on the residual exception for the elder abuse prosecutor may be limited. The emphasis on the mental and physical condition of the victim at the time of making the statements makes reliance on the residual hearsay exception possible only if the victim’s mental and physical condition was good at the time, or at the very least was not so impaired as to affect the victim’s ability to be cognizant of his or her environment and the acts perpetrated upon the victim. Unfortunately, in many elder abuse and exploitation cases, victims become victims precisely because they lack cognizance of their environment and/or are in poor physical and mental condition. Therefore, a court may determine that the residual exception is not applicable for admission of a victim’s hearsay statements just when the prosecutor needs it the most.²⁸

²⁸ See also *State v. Shubert*, 402 S.E. 2d 642 (N.C. Ct. App. 1991) (81-year-old victim’s hearsay statements made to neighbor and responding officer regarding home invasion deemed “most probative evidence” and admissible under the residual exception).

V. Competency and the Admissibility of Hearsay

Let's assume the prosecutor in our introductory scenario has identified the applicable exceptions to the hearsay rule for admission of the victim's statements. The defendant then objects on the basis that the victim was not competent at the time the statement was made. Whether this is a problem depends on the jurisdiction. Some states require that the declarant be competent at the time of the making of the hearsay statement for it to be admitted. Other states provide competency is not an issue in terms of hearsay because the foundational criteria for admission provide adequate indicia of reliability.²⁹

The issue of the declarant's competency for admission of a hearsay statement is one that child abuse prosecutors have faced for years—with one major difference. The difference is that an elderly person's hearsay statement is presumptively admissible; unlike the situation where a child's hearsay statement is sought to be admitted because the child is found incompetent. Thus, the party objecting to the statement has the burden to produce evidence of the declarant's lack of competency at the time the statement was made.

In *State v. Doheny*, 1999 Wash. App. LEXIS 1860 (Wash. Ct. App. Oct. 26, 1999), the court found that the trial court properly admitted the 84-year-old victim's hearsay statements for purposes of medical diagnosis notwithstanding that the victim suffered from Alzheimer's disease.³⁰ Washington law requires that a declarant be competent at the time of making the hearsay statement for its admission. The court held, however, that there was no requirement "that the State had to affirmatively prove ... [the victim's] competence" and that "since the victim...[was] an adult, absent a finding to the contrary, her [the victim's] competency is presumed." *Id.* at 10-11.

²⁹ A summary of the states that have ruled on the issue of whether a declarant must be competent at the time of the making of the hearsay statement in the context of the excited utterance exception is contained at *Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify At Trial*, 15 A.L.R. 4th 1043.

³⁰ *Doheny* arose from the defendant's assault of the victim while defendant was a care-provider for the victim in the defendant's home.

Several cases previously discussed demonstrate the rule that competency of the declarant is not an admissibility issue. *Forrest*, 721 A. 2d 1271, *McFadden*, 458 S.E. 2d 61, and *Mickelson*, 848 P.2d 677, all considered and rejected admissibility arguments based upon the declarant-victim's mental condition at the time of making the statements.

In those jurisdictions where a declarant's competency is not a prerequisite for admission, a prosecutor should be mindful that the declarant's mental health or disability may be a credibility issue. For example, in *Bender v. State*, 1998 Miss. App. LEXIS 798 (Ct. App. Sept. 29, 1998), the court permitted the state to impeach the victim's hearsay statement identifying someone other than the defendant as his assailant. See Fed R. Evid. 806 (“[w]hen a hearsay statement...has been admitted in evidence, the credibility of the declarant may be attacked...”).

Thus, a prosecutor facing a potential competency objection to an elderly victim's hearsay statement initially will want to examine the controlling jurisdiction's law on this issue. It is likely that this issue will have been ruled upon in the context of child abuse prosecutions. However, the elder abuse prosecutor should keep in mind that unlike the situation involving hearsay statements of an incompetent child, an elderly victim is an adult, which generally will require the party objecting to the statement to produce evidence of the victim's incompetency.

VI. The End and the Beginning

Published case law on the issue of admission of an elderly victim's hearsay statements is still somewhat sparse. In Illinois, Delaware, Oregon, and California, prosecutors have a statute to rely on for admission of victims' hearsay statements. However, because the Illinois statute emphasizes corroboration of the substantive truthfulness of the victim's statement rather than the facts and circumstances surrounding the making of the statement, prosecutors relying on the Illinois hearsay exception may want to offer the hearsay statement under both the statutory exception and any other applicable exception.

Prosecutors in other jurisdictions will need to offer the statement under the present sense impression, excited utterance, medical diagnosis, state of mind, business records, recorded recollection, or residual hearsay exceptions. In assessing the applicability of each of these exceptions, a prosecutor will need to carefully consider the circumstances surrounding the making of the statement that the prosecutor is seeking to admit.

For the present sense impression exception to apply, the statement likely will need to have been made either concurrently with or very close in time following the event described in the statement. Regarding the excited utterance exception, the emphasis is on demeanor of the victim to demonstrate that the victim at the time of making the statement is still excited by the event. With the medical diagnosis exception, a prosecutor's emphasis will be on laying a foundation in the medical professional's statement as to why the victim's statement was significant in terms of the treatment of the victim. For the state of mind exception, the prosecutor must lay a foundation as to why the victim's state of mind is relevant. For the business records or records of regularly conducted activity exception, the major hurdle usually is that the victim is not employed by the business which provides or keeps the affidavit. Thus, the business record that contains a victim's statement is inadmissible as hearsay within hearsay, unless there is a separate exception applicable to that part of the record that contains the victim's statement. The past recollection recorded exception can be useful so long as the statement meets the foundational criteria of unavailability of the witness due to loss of memory, making of the statement while the event is still fresh in the mind of the declarant, and adoption of the statement contemporaneously to its making. The residual exception is the exception of "last resort" for prosecutors. However, admission under this exception will normally require notice and an *in camera* hearing, where the court will examine all the circumstances surrounding the statement to determine if the subject statement is inherently reliable and whether this evidence is available from any other source.

Even if other jurisdictions legislate elder hearsay exceptions, because such exceptions are not "firmly rooted," a prosecutor will have to demonstrate that the statement has "particularized guarantees of trustworthiness"

based on the “totality of the circumstances” surrounding “the making of the statement.” This means that elder hearsay exceptions enacted in the future will put prosecutors in the same position they would occupy if they rely on the residual exception. However, for those jurisdictions without a residual exception, an elder hearsay exception certainly would be of great utility. Even for those jurisdictions with a residual exception, as a practical matter, an elder hearsay exception may make trial courts more comfortable with the admission of elder victims’ hearsay statements. Prosecutors also should be cognizant of the need to make “clean” records regarding the “particularized guarantees of trustworthiness” of the statement since admission of hearsay in a criminal case is a Confrontation Clause (and, therefore, a constitutional) issue.

Another avenue for prosecutors to keep in mind is preservation of the victim’s testimony through a pre-trial deposition. For example, in *State v. Peeler*, 614 P.2d 335 (Ariz. Ct. App. 1980), the state was able to preserve a 79-year-old victim’s testimony in a sexual assault case and avoid Sixth Amendment issues by conducting a pre-trial deposition.

The last hurdle to admission for prosecutors to consider is whether the controlling jurisdiction requires that the declarant be competent at the time of making the statement. If this is a prerequisite, a prosecutor will have to be prepared to meet the objector’s evidence of incompetence. In the event of admission of the statement, evidence of the mental disability or condition of the victim still may be admissible to attack the credibility of the statement.

In sum, a prosecutor has many avenues to explore in obtaining admission of an elder victim’s hearsay statements. A thorough consideration of the statement and the circumstances surrounding the statement should yield dividends to the prosecutor in identifying a basis for admission. The elder abuse prosecutor’s primary concern is having a solid foundation for the admission at the trial court level to withstand appellate scrutiny pursuant to the Confrontation Clause. Strict attention to these points is important because, unfortunately, an elder abuse prosecutor will almost certainly face instances where the victim is unavailable and his or her hearsay statements are the most probative remaining evidence of the abuse.

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