

The New Strangulation Statute and Domestic Violence Cases

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On November 11, 2010 a new law went into effect that created three new crimes pertaining to the act of strangulation: P.L. § 121.11-Criminal Obstruction of Breathing or Blood Circulation (A Misdemeanor); P.L. § 121.12 Strangulation in the Second Degree (D Violent Felony); and P.L. § 121.13 Strangulation in the First Degree (C Violent Felony). Prior to this legislation, in New York State, a person could have been strangled almost to the point of death and yet criminal charges may not have been applicable if there were no physical injuries. Below is an explanation of the new law including a discussion of the act of strangulation with suggestions for the investigation and prosecution of strangulation cases.

WHAT IS STRANGULATION?

While you may often hear victims and the public refer to strangulation cases as “choking” cases, these two acts are not the same. Strangulation is a form of asphyxia (lack of oxygen) which occurs when the carotid arteries or jugular veins are blocked by pressure being applied to the neck or throat or when the airway of the mouth or nose is blocked. In contrast, choking occurs when a foreign object blocks someone’s windpipe. While it is important to recognize the distinction and for those in law enforcement to use the accurate terms, if a victim indicates they have been “choked,” law enforcement should treat the case as a strangulation case.

HOW MIGHT A STRANGULATION VICTIM PRESENT TO LAW ENFORCEMENT?

A victim that was strangled will frequently have either minimal or no visible signs of injury. A San Diego study of 300 strangulation incidents involving victims of domestic violence found no evidence of visible injury in 50 percent of the incidents, and only minor levels of injuries in another 35 percent of the incidents.¹ This result can be explained by the fact that it only requires eleven pounds of pressure applied for ten seconds to cause someone to lose consciousness, and ten seconds for that individual to regain consciousness when pressure is released, at times without any sign of injuries.² While there may be no or minimal visible signs of the physical injuries sustained by a strangulation victim, there may be other indicia of strangulation present such as those outlined below.

¹ A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim, Journal of Emergency Medicine, Vol. 21, No.3 pp311-315 (2001).

² Correlation of Circumstances with Pathological Findings in Asphyxial Deaths by Hanging : A Prospective Study of 61 Cases from Seattle WA, Journal of Forensic Sciences, JFSCA, 30:4, Oct. 1985, 1140-47.

Signs and Symptoms of Strangulation

<i>Non-Visible Injuries</i>	<i>Minor Visible Injuries</i>
<ul style="list-style-type: none"> • Difficulty swallowing • Hoarseness/loss of voice • Sore throat • Difficulty breathing • Vision Changes (e.g. blurred vision) • Altered mental state (strangulation victims may appear combative due to the loss of oxygen to the brain³) • Light headed or head rush • Loss of bodily functions-defecation or urination • Fainting or unconsciousness • Shaking • Loss of memory 	<ul style="list-style-type: none"> • Minor finger nail marks (look for both defensive and offensive wounds) • Scratches • Redness • Neck swelling • Bruising behind the ears • Petechiae⁴ (This may be visible in the eyes, scalp or face) • Tongue swelling

HOW COMMON IS STRANGULATION IN DOMESTIC VIOLENCE CASES?

Strangulation, unfortunately, is a very common form of power and control that an abuser may exercise over a victim. In the San Diego study, referenced above, 89 percent of the strangulation cases had a prior domestic violence history⁵. In New York as well, unfortunately, a large percentage of New York State domestic incident or arrest reports indicate that the victim was “choked”. Other national studies have found that between 30 to 68% of women in abusive relationships are strangled during the course of the relationship⁶. Therefore, it is critical that in every domestic violence case, law enforcement inquire as to whether the victim was strangled.

³ A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim, Journal of Emergency Medicine, Vol. 21, No.3 pp313 (2001).

⁴ Petechiae are pinpoint hemorrhages of the skin which are sometimes visible in the conjunctiva of the eye. A Review of 300 Attempted Strangulation Cases Part III: Injuries in Fatal Cases, Journal of Emergency Medicine, Vol. 21, No.3 p318 (2001).

⁵ A Review of 300 Attempted Strangulation Cases Part I: Criminal legal Issues, Journal of Emergency Medicine, Vol. 21, No.3 p306(2001).

⁶ Archana Nath, Survival or Suffocation: Can Minnesota’s New Strangulation Law Overcome Implicit Biases in the Justice System?, 25 L. & INEQUALITY 253, 268 (2007).

HOW SERIOUS ARE STRANGULATION CASES?

All too often, law enforcement, and victims themselves, tend to minimize the severity of this action. THESE CASES MUST BE TAKEN SERIOUSLY. A victim who may have no visible injuries at the time of the incident could die, up to days or weeks after the incident, due to the progressive and irreversible effects of the strangulation.⁷ In addition, strangulation is an increased risk factor for homicide, with some studies indicating that the odds of homicide are almost ten times more likely if there was a prior attempt to strangle⁸.

HOW DID NEW YORK'S PENAL LAW HANDLE THESE CASES PRIOR TO THE RECENT LEGISLATIVE CHANGE?

Prior to this legislation's passage, there was no specific delineated crime that captured the criminality of this behavior. Prosecutors and law enforcement were forced to try to charge the A Misdemeanor charge of Assault in the Third Degree, P.L. § 120.00 (1) which requires proof that the defendant caused physical injury to the victim. Physical injury is defined under P.L. §10.00 (9) as: "impairment of physical condition or substantial pain." The case law places a very high burden on establishing physical injury. Some courts dismissed charges or reduced charges involving strangulation cases stating that the physical injury requirement had not been met even when victims experienced involuntary urination as a result of the strangulation, or where there was evidence of redness on the victim's neck.⁹ However, other courts held that the physical injury element had been met when the victim lost consciousness and experienced a sore and achy throat.¹⁰ The high physical injury requirement combined with the inconsistent court decisions made it very difficult for law enforcement to bring assault charges, and frequently left prosecutors and law enforcement only able to charge violation-level harassment charges, clearly not representative of the severity of the crime.

⁷ A Review of 300 Attempted Strangulation Cases Part III: Injuries in Fatal Cases, Journal of Emergency Medicine, Vol. 21, No.3 pp317-322 (2001).

⁸ Klein, A. R. (2009), Practical Implications of Domestic Violence Research: For Law Enforcement, Prosecutors and Judges, NCJ22572. US Department of Justice, National Institute of Justice.

⁹ People v. Melcherts, 160 Misc. 2d 470 (New York County 7-27-93)(court held no physical injury in case where victim was "choked" while being raped and robbed experiencing involuntary urination, bruising, and scratches); People v. Lewis, 294 AD2d 847 (4th Department 2002)(court held no physical injury where victims had redness on her neck as a result of the strangulation).

¹⁰ See Williams v. Walsh, 2004 WL 2754859 (S.D.N.Y.) (citing, People v. Bogan, 70 N.Y.2d 860, 862-63 (1987) (sufficient evidence for the jury to have found element of "physical injury" where defendant grabbed and choked victim and caused victim to lose consciousness, be taken to hospital and suffer pain and difficulty swallowing in days thereafter); People v. Delph, 704 N.Y.S.2d 209, 210 (1st Dep't 2000) (sufficient where two minute choke and compression of windpipe rendered victim nearly unable to hear or see); People v. Brown, 662 N.Y.S.2d 934, 935 (3d Dep't 1997) (jury could reasonably conclude victim suffered "physical injury" where defendant slammed her into couch, choked her to the point of almost passing out, left marks on neck and caused soreness and difficulty in swallowing); see also People v. Azadian, 600 N.Y.S.2d 278, 279 (2d Dep't 1993) (sufficient evidence for jury to find physical injury where choking victim momentarily lost consciousness, suffered aches and bruises, and was treated by doctor); People v. Daniels, 553 N.Y.S.2d 30, 30-31 (2d Dep't 1990) (sufficient evidence for jury to find element of "physical injury" where defendant choked victim until he felt dizzy, scratched his neck and face and caused him to be treated at the emergency room and suffer soreness and difficulty swallowing).

WHAT IS THE NEW LAW?

For years, many in the law enforcement and advocacy community have called for an amendment to the law to more accurately represent the severity of this crime. The legislation that went into effect on November 11, 2010 does just that. The new law, as outlined below, makes significant changes that will enhance law enforcement's ability to charge this crime and hold offenders appropriately accountable.

- **Change of the intent requirement:** Under the new law, the only intent required is that the defendant intended to *impede* someone's ability to breathe.
- **Removal of physical injury requirement:** Under the new law, a defendant can be guilty of an A misdemeanor charge even if there is no visible physical injury.
- **Delineates that loss of consciousness for *any period of time* constitutes physical injury** for purposes of Strangulation in the Second Degree.
- **Delineates that stupor constitutes physical injury** for purposes of Strangulation in the Second Degree.
- **Treats these crimes as violent felonies.**
- **Designates the three new crimes as family offenses.**

New Penal Law Crimes

Criminal Obstruction of Breathing or Blood Circulation, P.L. § 121.11:

This provision makes it an A Misdemeanor to intend to *impede* someone's ability to breathe by:

- applying pressure on the throat or neck; or
- blocking the nose or mouth of another.

There is no physical injury requirement for this offense.

Strangulation in the Second Degree, P.L. § 121.12

This provision makes it a class D Violent Felony to commit Criminal Obstruction of Breathing or Blood Circulation and cause either:

- Stupor, or
- Loss of consciousness *for any period of time*; or
- Any other physical injury or impairment.

Strangulation in the First Degree, P.L. § 121.13

This makes it a Class C Violent Felony to commit the crime of Criminal Obstruction of Breathing or Blood Circulation and cause serious physical injury.

Family Offense Designation

The new legislation also adds these crimes to the list of enumerated family offenses. Therefore, if the crime is committed by a member of the same family or household, the following must occur:

- **Mandatory Arrest:** A police officer shall arrest a person where they have reasonable cause to believe the defendant committed any one of these new strangulation crimes pursuant to C.P.L. § 140.10 (4)(c).
- **Completion of DIR:** A domestic incident report, pursuant to C.P.L. § 140.10 (5), must be completed.
- **Entry into Order of Protection Registry:** If an order of protection is issued, it must be entered into the Order of Protection Registry per Executive Law § 221-a(1).
- **Concurrent Jurisdiction with Family Court:** A victim can, if *they* choose, also go to family court to obtain an order of protection pursuant to Family Court Act § 812 (1).

In addition, the strangulation offenses are added to various sections of existing law for other considerations, such as DNA collection, hate crime prosecution, etc.. Multiple other areas of the law are also amended with this legislation. The entire text of the legislation can be found at: http://assembly.state.ny.us/leg/?default_fld=&bn=A10161%09%09&Summary=Y&Text=Y

HOW TO HANDLE STRANGULATION INVESTIGATIONS

A thorough investigation of strangulation cases is crucial. Below is an abbreviated list of steps that should occur in every strangulation case.

- Ask in every domestic violence case if the victim was strangled or “choked”.
- If yes, make sure that the victim is seen by a medical professional—remember, victims can die up to days after an incident, even where there are no visible signs of physical injury.
- Conduct a thorough interview and investigation at the scene.

✓ Ask the victim questions to identify signs and symptoms.

How is your breathing?

Do you have a sore throat?

Were you light headed?

Are you having trouble swallowing?

Did your voice change? (Record the victim's voice)

How long did it last?/How did it stop?

Did your vision change in any way?

Did you lose consciousness?

- ✓ Inquire about the victim's thoughts while being strangled.

What did you think was going to happen?

- ✓ Ask specifics about the method and manner of the strangulation

What was the suspect saying during the incident?

What did the suspect use: hands, arms, other body part, a ligature, a bag, a pillow?

Get details about the defendant's actions: Did the suspect shake you? Throw you against a wall?

- ✓ Get detailed information about history of abuse or other strangulations

- ✓ Gather evidence

Get 911 tapes—the victim's voice change might be evident on the tape.

Photograph victim and suspect.

Photograph and collect items used during strangulation.

- ✓ Make sure to ask questions to identify the dominant aggressor
Height/weight, etc.

A thorough investigation could mean the difference between an abuser facing D Violent Felony charges or an A Misdemeanor.

HOW TO HANDLE STRANGULATION PROSECUTIONS

The basis of all good prosecutions is a strong initial investigation. However, there are some unique aspects of handling a strangulation case after the initial investigation that should be taken into account.

Introduce Evidence of Every Sign or Symptom of Strangulation

Make sure that during the course of presenting your case that the evidence of every sign or symptom of the strangulation is established. Remember that the new enhanced D Violent Felony charge of Strangulation in the Second Degree requires proof of stupor, loss of consciousness or

other physical injury or impairment which, to some extent, will be guided by the previous case law.¹¹ This could be the difference between an A Misdemeanor and a D Violent Felony.

Bring Attempted Murder Charges Where Appropriate

While these three crimes will greatly enhance law enforcement's ability to hold offenders accountable for the act of strangulation, they should not replace the B Violent Felony charge of Attempted Murder in the Second Degree under Penal Law §§ 110/125.25 if the evidence would also support those charges. For example, if there is evidence of use of a ligature, statements threatening death or any other evidence that would meet the burden of proving that the defendant's intent was to kill the victim, law enforcement and prosecutors should err on the side of bringing Attempted Murder charges.

Charge All Appropriate Offenses

It is important to remember to charge the abuser with all pertinent charges. As was discussed above, strangulation is very common in domestic violence cases and may often occur within the context of other acts of violence or abuse. Law enforcement should remember to charge the offender with all appropriate offenses. For example, a victim may have been punched by the abuser during the course of the strangulation — do not forget to charge Assault in the Third Degree, P.L. § 120.00(1), as well.

Utilize an Expert

While an expert witness is not needed to meet the elements of the three new charges, an expert could be useful in educating a judge or jury about the dynamics of strangulation. For example, judges and jurors may not understand that strangulation can cause unconsciousness within seconds and death within minutes, or that it is common for victims in strangulation cases to sustain no or minimal visible injuries.¹²

For a detailed discussion of handling strangulation investigations and prosecutions see Gael Strack's article: "*How to Improve Your Investigation and Prosecution of Strangulation Cases*" which can be found at: http://ncdsv.org/images/strangulation_article.pdf.

¹¹ See case law discussed in footnote 10.

¹² "How to Improve Your Investigation and Prosecution of Strangulation Cases," Gael B. Strack, J.D., National College of District Attorney's (2007).

CONCLUSION

New York's adoption of the three new penal law provisions is a critical step toward addressing the severity of this crime. However, adoption of legislation alone will not fix the problem: there needs to be strong training and implementation efforts in order for the legislation to be effective. A study on the impact of Minnesota's adoption of a strangulation statute showed that the effectiveness of the statute was weakened due to inadequate law enforcement training.¹³ If we in New York learn from the experiences of Minnesota and provide enhanced training on the subject, as many agencies have already done, we will make huge strides in enhancing New York's response to domestic violence.

¹³ Heather Wolfram, *The Impact of Minnesota's Felony Strangulation Law* (WATCH Report, Minneapolis, M.N.), Jan, 2007. At 11.