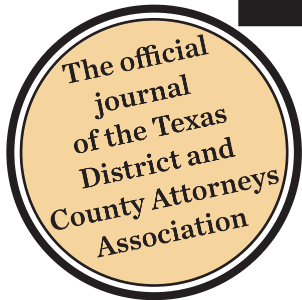
The Texas Prosecutor



November–December 2024 • Volume 54, Number 6

"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Protect your righteous conviction

There is nothing more upsetting than telling a victim or next of kin who thought they had closure with a defendant's guilty plea or conviction, "I'm sorry, but the Court of Criminal Appeals granted habeas relief and he received a new trial."

By Rehana Vohra
Assistant District Attorney in Harris County

And sometimes, "a new trial" actually ends up in a dismissal of the case because the evidence or witnesses are no longer available.

With the hope that this article can protect a righteous conviction from that fate, I'm here to offer a few practical tips I have learned along the way. I am a post-conviction writ prosecutor in Harris County handling ineffective assistance of counsel, prosecutorial misconduct, actual innocence, and "new science" claims since 2016. Before that, I was your typical line prosecutor handling felony cases in a district court. Here, I hope to share some practical lessons I wish I had learned before I started trying cases myself.

Document, document, document

This is an obvious but important first tip: document your file. It's best not to rely solely on your personal recollection when it comes to what happened with a case you handled, especially if that case resulted in a lengthy prison sentence. You may have forgotten the details of that case, but the defendant sure hasn't stopped thinking about them.

Document any disclosures to the defense. Document plea offers and the defendant's rejections of those offers. Document any counteroffers by the defense that the State rejected. If a plea is not on the record, document any judicial admonishments or agreements of the parties that were not reduced to writing and filed. Document what the defense shared with you about the client's mindset about the case (e.g., he wants some type of community supervision, he won't take anything above a five-year sentence, or he's not taking anything and insists on his right to a jury trial, etc.) We hope that the defense attorney is also documenting his or her file accordingly and that the file is still available, but sometimes that doesn't happen for any number of reasons.

Continued on page 13

A new role for Rob Kepple

Rob Kepple is no stranger to Texas prosecutors.

By Ken Magidson
TDCAF Board President

A former prosecutor himself, since 2002 he has served with distinction and honor as the Executive Director of the Texas District and County Attorneys Association (TDCAA), focusing its management and direction by increasing the quantity and quality of the Association's training programs and related services.

In addition to his leadership within the organization, Rob also represented the Association's interests before the state legislature, consulting with the legislative staff and committees on changes to criminal laws, codes, and procedures.

Because of the close connection between the Association and the Texas District and County Attorneys Foundation (TDCAF), in 2006 Rob took on the role as the part-time Executive Director of the Foundation. This action ensured the coordinated efforts of the two separate entities.

At the end of 2023, Rob announced his plans to retire from TDCAA; however, we on the Foundation Board wanted to guarantee that his leadership and advocacy would not be lost. At the September 17, 2024, TDCAF Board meeting, I proposed that Rob be hired as the first full-time Executive Director of the Foundation. The Board unanimously approved, Rob agreed to take the role, and he will begin serving in this capacity on January 1, 2025.

As our Executive Director, Rob will work closely with the Board to engage in long-term planning and execution of the Foundation's mission to support and enhance the work of TDCAA. With Rob's experience and now full-time oversight, the Foundation will be better able to meet the Association's specific financial and programming needs. He will provide direct and immediate communication between TDCAA's staff and the Foundation's Board.

The future is bright with the continued leadership and advocacy of Rob Kepple. His help and support for our organizations provide us with security and confidence for the future of Texas's prosecutors. If you would like to honor Rob's outstanding leadership, commitment, and service, please consider making a donation to TDCAF in his name. ❇

Recent gifts to the Foundation*

Alva Alvarez
Gordon Armstrong
Kathy Braddock *in honor of Mike Criswell on his retirement as County & District Attorney of Swisher County*
Katrina Daniels
Erin Faseler
David Finney
Jack Frels *in memory of Skip Cornelius*
Dan Hagood
Rob Kepple *in memory of Bob Scheske*
Audrey Louis
Rebecca Lundberg
Barry Macha *in honor of Rob Kepple*
Natalie McKinnon
Clint Morgan
Laura Nodolf
John Schorre *in memory of Gail Ferguson and Jim Vollers*
Kerry Spears
Jeff Swain
Beth Toben *in honor of Rob Kepple*
Xochitl Vandiver-Gaskin
Hardy Wilkerson

* gifts received August 3–October 4, 2024

Texas District and County Attorneys Foundation
505 W. 12th St., Ste. 100
Austin, TX 78701
www.tdcaf.org

Board of Trustees
Joe Bailey, II
Bobby Bland
Kathleen A. Braddock
Thomas L. Bridges
Joe Brown
Kenda Culpepper
David A. Escamilla
Tony Fidelie
Knox Fitzpatrick
H.E.Bert Graham
Rusty Hardin, Jr.
Helen Jackson
Tom Krampitz
Barry L. Macha
Ken Magidson
Mindy Montford
Kebharu Smith
Johnny Keane Sutton
Greg Willis
Mark Yarbrough

Advisory Committee
James L. Chapman
Ashton Cumberbatch, Jr.
Norma Davenport
Dean Robert S. Fertitta
Gerald R. Flatten
Jack C. Frels
Michael J. Guarino
W.C. "Bud" Kirkendall
James E. "Pete" Laney
John T. Montford
Kimbra Kathryn Ogg
Joe Shannon, Jr.

Texas District and County Attorneys Association

505 W. 12th St., Ste. 100
Austin, TX 78701 • www.tdcaa.com

Board of Directors

Executive Committee

President	Erleigh Wiley, Kaufman
Chairperson	Bill Helwig, Plains
President-Elect	Kriste Burnett, Palo Pinto
Secretary–Treasurer	David Holmes, Hillsboro

Regional Directors

Region 1:	Landon Lambert, Clarendon
Region 2:	Laura Nodolf, Midland
Region 3:	Shane Deel, Baird
Region 4:	Carlos Omar Garcia, Alice
Region 5:	Will Durham, Huntsville
Region 6:	Jacob Putman, Tyler
Region 7:	Jeff Swain, Weatherford
Region 8:	Dusty Boyd, Gatesville

Board Representatives

District Attorney	Brian Middleton
Criminal District Attorney	Joe Gonzales
County Attorney	Natalie Koehler
Assistant Prosecutor	Jessica Frazier
Training Committee Chair	Glen Fitzmartin
Civil Committee Chair	Carlos Madrid
TAC Representative	Natalie Koehler
Investigator Board Chair	Bob Bianchi
Key Personnel & Victim Services Board Chair	Sara Bill

Staff

Robert Kepple, Executive Director • W. Clay Abbott, DWI Resource Prosecutor • Diane Beckham, Senior Staff Counsel • Kaylene Braden, Membership Director & Assistant Database Manager • Kristin Burns, Domestic Violence Resource Prosecutor • William Calem, Director of Operations & Chief Financial Officer • Shannon Edmonds, Director of Governmental Relations • Sarah Halverson, Communications Director • Joe Hooker, Assistant Training Director • Jordan Kazmann, Facilities & Sales Manager • Brian Klas, Training Director • Bobbi Nocis, Reimbursement Clerk • Andie Peters, Assistant Meeting Planner • Francis Perez, Receptionist & IT • Jalayne Robinson, LMSW, Victim Services Director • Dayatra Rogers, Database Manager & Registrar • LaToya Scott, Meeting Planner • Andrew Smith, Financial Officer • Hector M. Valle, Director of Governmental Relations

About *The Texas Prosecutor*

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, staff, and TDCAA members.

Articles not otherwise copyrighted may be reprinted with attribution as follows: "Reprinted from *The Texas Prosecutor* journal with permission of the Texas District and County Attorneys Association." Views expressed are solely those of the authors. We retain the right to edit material.

Table of Contents

COVER STORY: Protect your righteous conviction
By Rehana Vohra, Assistant District Attorney in Harris County

2 **TDCAF News**
By Ken Magidson, TDCAF Board President

2 **Recent gifts to the Foundation**

4 **Executive Director's Report**
By Rob Kepple, TDCAA Executive Director in Austin

7 **The President's Column**
By Erleigh Wiley, TDCAA Board President & Criminal District Attorney in Kaufman County

8 **As The Judges Saw It**
By Britt Houston Lindsey, Chief Appellate Prosecutor in Taylor County

12 **Photos from our Annual Conference**

16 **The Cameron Moon saga ends (at least for now)**
By Jessica Caird, Assistant District Attorney in Harris County

22 **Detecting radioactive materials**
By Charlie Johnson, Program Manager, & Ian Feldman, Assistant Program Manager, Securing the Cities

28 **Street racing claims three lives**
By Jeanne M. Truglio & Owen C. Dewitt, Assistant Criminal District Attorneys in Tarrant County

32 **Unraveling juvenile detention hearings**
By Kathleen Takamine, Assistant Criminal District Attorney in Bexar County

38 **Beloved longtime TDCAA executive director retires**

Thanks to the TDCAA staff

I will finish my career at TDCAA in my 35th year. I have been blessed and privileged to work with an amazing team here at TDCAA World Headquarters, people who are dedicated to getting what you need.

By Rob Kepple
TDCAA Executive Director in Austin

I have so many great memories it would be impossible to share them all. But I do want to give a very special shout-out to my right-hand woman and resident Queen of Fun, **Diane Beckham**. Diane came to TDCAA not long after I did, and she has been a tremendous force in Texas prosecution with her publications, as well as a great leader here at the office. I couldn't have done it without you, Queen! Thanks to all my TDCAA champions. You are the best.

Annual award winners

We had the honor of recognizing some outstanding prosecutors at this year's Annual Conference in Galveston. The State Bar Criminal Justice Section Prosecutor of the Year is **Fredericka Sargent**, ACDA in Tarrant County. Fredericka was the appellate prosecutor who spearheaded her office's amicus efforts at the U.S. Supreme Court in *U.S. v Rahimi*, in which the court upheld the government's right to limit access to firearms with domestic violence protective orders. (See the article on that case on page 8.)

We are honored that so many talented prosecutors contribute to TDCAA conferences for the betterment of the profession. We recognize these folks with the **C. Chris Marshall** Award. This year was a tie: **Allenna Bangs** and **Ronny Dale Smith**, both ACDAs in Tarrant County. (Dale, Fredericka, and Allenna are in the photo below left [in the center holding their awards] along with people from their office, including CDA Phil Sorrells [second from right].)

Finally, we had three worthy Lone Star Prosecutor of the Year award recipients. First, **Eric Erlandson**, an ADA in Cooke County, was recognized for his work in a serious child abuse case that could only be characterized as torture. **Chris Gatewood** and **Richard Vance**, ACDAs in Smith County, were recognized for their work in a complicated and highly contested intoxication manslaughter case. (Chris, Richard, and Eric are pictured below [holding their awards] along with their elected CDAs, **Jacob Putman**, left, and **John Warren**, right.) Thanks for all you have done for Texas!

Laying behind the log, version 2.0

I am a big fan of the concept of "the loyal opposition." The term was coined in the British parliament in the 1800s and was meant to confer respect for a worthy opponent even if there was disagreement on the merits of the issue. It works for the Texas criminal bar, too: Prosecutors and defense attorneys understand and appreciate our different roles, and we act within those roles to strive to achieve a just result. Mostly.

The concept had a rough go in the late 1980s. I recall an article in the Texas Criminal Defense Lawyers Association (TCDLA) journal, *Voice for the Defense*, which advocated that defense attorneys not object to a defect in a pleading but instead "lay behind the log—just make sure it is a big enough log." I can't fault the defense bar for teaching such dilatory tactics—the fault really fell on the law, which back then allowed for such gamesmanship that had nothing to do with the discovery of the truth. To the credit of the Court of Criminal Appeals and the legislature, the law changed to mostly eliminate procedural gamesmanship in favor of truth-finding.

Until recently.

When the Michael Morton Act was passed in 2013, it did so with quite a bit of support from prosecutors who viewed robust discovery as a lynchpin to a fair criminal proceeding. Fast forward 10 years and we are unfortunately once again back to gamesmanship. On the heels of *State v. Heath*, 696 S.W.3d 677 (Tex. Crim. App. 2024), the defense bar is teaching its members to lay behind the log. We learned in *Heath* that a trial court can choose to exclude inculpatory evidence that was not timely turned over to the defense through no fault of the prosecutor and without any showing of harm to the defendant. As a result, TCDLA was quick to teach its members in the June 2024 edition of its journal (a copy is on our website) that even if you are fully aware of evidence that should be turned over but hasn't been, it is ethical to lay behind the log—then scream bloody murder (at the right tactical moment) about the State's failure to produce.

I would hope that in the future, courts are reticent to exclude evidence without a showing of harm. It might be wise to keep a copy of the TDCLA article handy if you face a defense effort to exclude inculpatory evidence of which it was aware during the discovery process.

New Director of Governmental Relations

Welcome to TDCAA, **Hector Valle**! Hector will be TDCAA's new Director of Governmental Relations when he steps into the role being vacated by **Shannon Edmonds**, who is taking over as Executive Director in the new year. Hector worked as both a state and federal prosecutor in Dallas for more than a decade before moving to Austin to oversee the government relations and communications efforts of the General Land Office for eight years, followed by a recent stint as a partner in a multinational strategic consulting firm. Hector is already on board getting up to speed in preparation for the next regular session in January. Welcome, Hector!

Hector Valle, TDCAA's new Director of Governmental Relations

New Domestic Violence Resource Prosecutor

And another warm welcome to **Kristin Burns**! Kristin, a seasoned prosecutor most recently with the Brazos County DA's Office, will be TDCAA's first Domestic Violence Resource Prosecutor. The Association's leadership recognizes the need to focus on one of the most difficult and challenging crimes to prosecute, domestic violence. With a generous grant from the Court of Criminal Appeals and support from the Foundation, TDCAA will develop training and support akin to our Traffic Safety Resource Prosecutor program (so ably run by our resident Road Warrior, **W. Clay Abbott**). Welcome, Kristin!

Kristin Burns, TDCAA's new Domestic Violence Resource Prosecutor

Thanks to outgoing Board members

We had a terrific year here at TDCAA, and it really began with an outstanding leadership crew. A few of our Board members are rotating off at the end of the year, and I want to say thanks for their hard work: **Bill Helwig**, CDA in Yoakum County; **Kriste Burnett**, DA in Palo Pinto County; **Joe Gonzales**, CDA in Bexar County; **Natalie Cobb Koehler**, CA in Bosque County; **Landon Lambert**, CA in Clarendon County; **Laura Nodolf**, DA in Midland County; **Carlos Garcia**, 79th Judicial District Attorney; and **Jeff Swain**, DA in Parker County. Y'all did us proud.

Thanks, Jenn

If you have called TDCAA in the last year, you have talked with **Jenn Piatak**, our receptionist. Jenn has done a great job for us, but she is off to more northern parts as her husband got a new job in Iowa. Jenn, we will miss you!

The next time you call our offices, you'll hear a different voice—that of **Joseph Studer**. He is our new receptionist; he'll handle phones, visitors, and our online job bank (email him job postings at joseph.studer@tdcaa.com). Welcome, Joseph!

When the time comes to seek justice in the courtroom on behalf of victims and our communities, the prosecutor must be ready. And that is where TDCAA comes in.

"I'm not Daniel, but you are surely lions"

Shortly after **Michael Morton** was released from prison after serving 27 years of a life sentence for a murder he didn't commit, we decided that our profession needed to hear directly from him. Some folks were nervous about how that might go, but nonetheless I made the offer for Mr. Morton to give the keynote address at our Annual Conference. He gladly accepted.

It was perhaps the most powerful speech I have ever heard. Make no mistake, he told a rapt crowd: He was no Daniel, but we were surely lions. It was a reference to the biblical account where Daniel refused to worship King Darius and was thrown into a lions' den as punishment. During the night, the angel of the Lord shut the mouths of the lions, and Daniel was spared. Mr. Morton's words were not of derision but of encouragement. He explained that he wanted prosecutors to be good at their jobs because he knew the dangerous people we faced in court every day. After all, he explained, we saw them in court—but he had showered with them for 27 years. He just wanted to make sure we were prosecuting the right people. It was a message the assembled crowd took to heart, as evidenced by the prolonged standing ovation.

Michael Morton's speech has stuck with me as I end my career here at TDCAA. It has been a reminder of why I have loved this profession. First, a prosecutor's job is to seek the truth in the search for justice. How great is that? But second, when the time comes to seek justice in the courtroom on behalf of victims and our communities, the prosecutor must be ready. And that is where TDCAA comes in. It has been my great honor to work with you for 35 years to constantly improve our profession and, as a result, the quality of justice in Texas. It has been my life's work. So as I end my career at TDCAA, permit me to feel a little tinge of pride every time a Texas prosecutor announces: "The State is ready." ❇

Reflecting on a very full 2024

By Erleigh Wiley

TDCAA Board President & Criminal District Attorney in Kaufman County

As I look back on my year as Board President of the Texas District & County Attorneys Association (TDCAA), I am filled with a profound sense of gratitude and pride.

When I started this position at the beginning of 2024, I didn't know what the journey would entail. For me, the presidency has been transformative. I had the opportunity to better understand and appreciate why I wanted to be a prosecutor through the eyes of the amazing members of TDCAA. I also got an opportunity to see a well-run and healthy organization up close as we navigated the different opportunities throughout this year of my presidency. From Board meetings, trainings, and conferences, I have worked with the staff and trainers and met so many members—I am honored and humbled to serve alongside such a caliber of professionals.

This year the profession of prosecution faced challenges but succeeded in guiding our membership through them. To name a few, we worked through the implementation of HB 17, enacted by the 88th Legislature, which added grounds for removal; the State Bar of Texas (SBOT) advocating for additional ethical responsibilities only for prosecutors through Rule 3.09; and the Office of the Attorney General (OAG) promulgating additional administrative responsibilities to prosecutor offices in counties of certain sizes within our state.

Though these entities (the legislature, SBOT, and OAG) may be well-meaning in bringing about better prosecution in Texas, I have found, as an elected prosecutor, an increase in the politicization of prosecution in the last several years and have felt it more acutely in my role as the President of TDCAA. I have seen firsthand how others are affected in the profession. This includes the electeds, assistants, investigators, and support staff, and it does concern me for the future of prosecution. Most county and district attorney's offices throughout the state and nation have had problems recruiting and retaining prosecutors. There are many reasons for that, but I cannot help but believe that this changing environment for prosecutors is one of the factors.

So as we move forward into this new world, I would like for old and new prosecutors in our profession to understand that there may seem to be attacks from others, but we must remember that our goal is to see justice done and serve the citizens of Texas. We will face the new challenges head-on, celebrate the victories in our counties, and foster prosecutor offices that will be celebrated in our counties and communities. Your passion and dedication will propel the profession of prosecution to new heights, and I can't wait to see what you all achieve next.

As I step down as President, I carry with me countless memories and special friendships forged through our shared experiences from this year. I am excited for the road ahead for this organization and can report that the future of TDCAA is strong. I am confident that our association will continue to build on the strong foundation established by outgoing executive director Rob Kepple that will be handed over to incoming leader Shannon Edmonds. Thank you for allowing me to be a part of this incredible journey. ❇

A little post-*Bruen* clarity in *U.S. v. Rahimi*

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

In this column in the March–April 2023 issue ("Get ready for the fallout from *U.S. v. Rahimi* and *Bruen*"[1]),

I discussed the sea change to Second Amendment jurisprudence in *New York State Rifle & Pistol Association Inc. v. Bruen*[2] and the U.S. Fifth Circuit's subsequent declaration in *United States v. Rahimi*[3] that the federal ban on the possession of firearms by those under a domestic violence protective order was unconstitutional. At that time there were several dozen post-Bruen opinions analyzing federal gun regulations and many more pending in litigation; several of those opinions expressed concern over the lack of guidance in the lower courts as to the correct application of *Bruen*. On June 21, 2024, the U.S. Supreme Court issued its opinion reversing the Fifth Circuit in *Rahimi*, giving the courts (and us) a little more much-needed guidance.

Background

Zackey Rahimi was involved in five shootings in and around Arlington between December 2020 and January 2021, including shooting into the residence of person to whom he had sold narcotics, shooting at another driver after a collision, and then fleeing (then returning in a different vehicle and shooting again at the other driver's car), shooting at a constable's car, and shooting into the air after his friend's credit card was declined at Whataburger (later charmingly described by Chief Justice Roberts as a "roadside burger restaurant"). Arlington police identified Rahimi as a suspect in the shootings and executed a warrant on his home, where they found a rifle, a pistol, and a copy of a Texas state court civil protective order for an allegation of assault family violence, the terms of which expressly prohibited him from the possession of a firearm, which was[4] a federal crime.

Federal prosecutors then indicted Rahimi for possession of a firearm while under a domestic violence restraining order in violation of 18 U.S.C. §922(g)(8). Rahimi moved to dismiss the federal indictment on the ground that §922(g)(8) is unconstitutional, while acknowledging that then-existing caselaw in the Fifth Circuit had expressly held otherwise.[5] The federal district court denied his motion to dismiss, and a Fifth

[1] www.tdcaa.com/journal/get-ready-for-the-fallout-from-u-s-v-rahimi-and-bruen.

[2] 142 S.Ct. 2111 (2022).

[3] 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S.Ct. 1889 (2024).

[4] That is to say it was a federal crime, then it wasn't a federal crime, and now it is again.

[5] *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020).

Circuit panel upheld that denial based on that court's precedent.[6]

Only 15 days after the Fifth Circuit issued its first opinion in Rahimi's case, the U.S. Supreme Court handed down its opinion in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*. Justice Thomas, writing for the majority, held that requiring a showing of special need for a firearm is unconstitutional and that the government's regulation must be "consistent with this Nation's historical tradition of firearm regulation," meaning at the time of the Second Amendment's adoption in 1791 and the Fourteenth Amendment's adoption in 1868. The Fifth Circuit granted rehearing to reconsider Rahimi's case in light of *Bruen* and found that there was no historical analogue for §922(g)(8), concluding that it was an "outlier that our ancestors would never have accepted." The statute was declared unconstitutional, and Rahimi's conviction was vacated. The Department of Justice petitioned for writ of certiorari to the U.S. Supreme Court.

As the judges saw it

The U.S. Supreme Court reversed in an 8–1 ruling. Writing for the majority, Chief Justice Roberts held that the lower court had misapplied precedent involving facial constitutionality challenges and that §922(g)(8) had historical analogues in English and 18th-Century American law. These included surety laws, such as requiring a bond to carry a weapon whenever there was a "probable ground to suspect of future misbehavior," and State statutes codifying the ancient common law offense of "going armed to terrify the King's subjects," which Roberts noted "disrupted the public order and led almost necessarily to actual violence. … The law punished these acts with forfeiture of the arms and imprisonment." The Fifth Circuit had rejected these laws as insufficiently similar to the regulation at hand, but the Supreme Court held that that view was too rigid, saying *Bruen* required only a historical analogue, not a historical twin. As Chief Justice Roberts put it, Second Amendment jurisprudence is not "trapped in amber." Historical surety laws and going-armed laws did not broadly restrict the public generally but applied only once a court had found that an individual "represents a credible threat to the physical safety" of another, which is explicitly what §922(g)(8)(C)(i) says in the statutory text. Roberts reasoned that if violating surety and going-armed laws could result in imprisonment, then the lesser restriction of temporary disarmament under §922(g)(8) is historically permissible as well.

Chief Justice Roberts concluded that the majority had "no trouble" concluding that §922(g)(8) survives Rahimi's facial challenge and that "our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." The holding was largely limited to the facts and the statute in question, and that was likely intentional on Chief Justice Roberts's part. Keeping the opinion tied tightly to the facts of the case rather than making a broad and expansive statement on Second Amendment jurisprudence allowed eight judges in the majority to sign onto something they all found palatable. Accordingly, there's perhaps more "meat on the bone" to be found in the concurrences and dissent.

Writing for the majority, Chief Justice Roberts held that the lower court had misapplied precedent involving facial constitutionality challenges and that §922(g)(8) had historical analogues in English and 18th-Century American law.

Concurrences

Justice Sotomayor concurred, joined by Justice Kagan. Although she disagreed with the holding of *Bruen*, she agreed with the majority that *Bruen* required a finding that the challenged law must comport with the principles underlying the Second Amendment rather than a precise historical match. Although §922(g)(8) is by no means identical to surety and going-armed laws, it restricts firearm use to mitigate demonstrated threats of physical violence just as those laws did, and that shared principle is sufficient. She criticized the dissent's rigid view of what is required under *Bruen*, saying that the majority view was preferable as it "permits a historical inquiry calibrated to reveal something useful and transferable to the present day."

Justice Gorsuch also concurred. While he agreed that the challenged law need not be a "dead ringer" for some historical analogue, he also expressed some agreement with Justice Thomas's dissenting opinion regarding how comparable the analogue needed to be. Nevertheless, in his opinion the outcome here was exactly what *Bruen* mandated. Gorsuch places much of his reasoning on the fact that Rahimi raised a facial

[6] *United States v. Rahimi*, No. 21-11001, 2022 WL 2070392 (5th Cir. June 8, 2022) (opinion withdrawn).

challenge to the law which requires a showing that the law, violates the Second Amendment in all applications, which the Court has called the "most difficult challenge to mount successfully."[7]

Justice Barrett's concurrence is of particular interest to us in defending the constitutionality of firearm regulations. She cited Justice Scalia's opinion in *District of Columbia v. Heller*[8] in saying that the Second Amendment codified both a pre-existing right and pre-existing limits on that right. She noted the difficulty that lower courts have had in applying *Bruen* and stated that the problem was one of generality, i.e., whether courts must find a "founding era relative" ("if not a twin, a cousin") of the modern regulation, or whether they must determine whether founding-era gun regulations yield concrete principles that may be discerned. In her opinion many of the lower courts, including the Fifth Circuit, incorrectly used the narrower first approach, which both forces 21st-Century regulations to use an 18th-Century approach and assumes that the founders used their regulatory powers to the maximum in a "use it or lose it" mentality. In her view the latter was what *Bruen* required; analogical reasoning requires that historical regulations reveal a principle, not a mold.

Justice Barrett's concurrence is of particular interest to us in defending the constitutionality of firearm regulations. … She noted the difficulty that lower courts have had in applying Bruen and stated that the problem was one of generality, i.e., whether courts must find a "founding era relative" ("if not a twin, a cousin") of the modern regulation, or whether they must determine whether founding-era gun regulations yield concrete principles that may be discerned.

Justice Kavanaugh wrote a lengthy concurrence to address the proper roles of text, history, and precedent in constitutional analysis. In his opinion text controls, but when problems arise in interpreting vague constitutional texts, history rather than policy should guide the courts. Here he looked to not only the pre-ratification history of the regulation in question, but also to the post-ratification history, i.e., the "collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text." He defended the validity of looking to post-ratification history by citing caselaw from over two centuries engaging in and endorsing the practice.[9] Justice Kavanaugh's concurrence is a reminder of the continuing relevance of historical precedence and is worth remembering when citing to those older cases.

Justice Jackson concurred, saying that she disagreed with and would have dissented in *Bruen*, but that the Court's opinion was a correct application of that case and that she accordingly joined the majority. She wrote separately to address the difficulty that the lower courts have had in applying *Bruen* and that the Court should be aware of the difficulty faced by the judges on the ground in assessing workable legal standards. As she put it, "Make no mistake: Today's effort to clear up 'misunderst[andings],' is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them." To that end she cited over a dozen opinions from lower courts in which judges expressed their frustration and confusion over the correct application of *Bruen*.[10] Although she agreed with the Court's application of *Bruen* in this case, she reminded the Court that both legislatures and the public deserve workable standards and clarity.

The dissent

Justice Thomas, who wrote the majority opinion in *Bruen*, was the lone dissent. He stated that the directive in *Bruen* was clear: A firearm regulation that falls within the Second Amendment's plain text is unconstitutional unless it is consistent with the nation's historical tradition of firearm regulation, and none of the historical regulations proffered are sufficiently similar to §922(g)(8). He noted that states already have criminal pros-

---

[7] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[8] 554 U.S. 570 (2008). Justice Barrett refers here to Justice Scalia's observation that the historical understanding that the pre-existing right to keep and bear arms was limited to those weapons in common use by militias at the time. *Id*. at 624-627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)). Justice Scalia went on to say that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27.

[9] In so doing Justice Kavanaugh created perhaps the longest string cite in modern U.S. Supreme Court history, comprising 32 case citations. It is a thing of beauty.

[10] Among those opinions cited is Judge Higginson's concurrence in *United States v. Daniels*, 77 F.4th 337, 356-62 (5th Cir. 2023), which eloquently laid out the difficulties of the lower courts in applying *Bruen* and the "uncertainty and upheaval resulting from best efforts to apply *Bruen* [that] now extend far beyond our dockets."

ecution as a mechanism for disarming anyone who uses a firearm to threaten physical violence, but the question here is whether the government may disarm anyone subject to a protective order even if he had never been accused or convicted of a crime. Having found no historical analogue for revoking a citizen's Second Amendment right based on the possibility of violence against another person, he would find the law unconstitutional.

The takeaway

The Fifth Circuit gives us an example of how courts are moving forward in light of *Rahimi* in *United States v. Diaz*,[11] issued on September 18, 2024. Diaz was convicted in federal district court for felon in possession of a firearm under 18 U.S.C. §922(g)(1), and raised both facial and as-applied constitutional challenges to that law. Other circuits, such as the Eleventh Circuit Court of Appeals,[12] had simply held per curiam that the late Justice Scalia's "felons and the mentally ill" language in *Heller* settled the matter. The U.S. Attorney's Offices argued here that that language could begin and end the court's inquiry,[13] but the Fifth Circuit disagreed, holding that Scalia's language was mere dicta and that *Rahimi* required a full historical analysis. Echoing Roberts's language that a lesser restriction than the law allowed at the time of the Constitution's passage is historically permissible, the court noted that "those convicted of horse theft—likely the closest colonial-era analogue to vehicle theft—were often subject to the death penalty."[14] Because the theft crime Diaz was convicted of would have led to capital punishment or estate forfeiture, "Disarming Diaz fits within this tradition of serious and permanent punishment."[15]

The Court's decision in *Rahimi* addresses some of the concerns voiced in my earlier column from the March–April 2023 issue, the opinions of lower courts applying *Bruen*, and Justice Jackson's concurrence, but certainly not all. It is a step in the right direction, but only a step for now. For those constitutional challenges we see arising in the meantime, remember to look to how those arguments are playing out in the lower state and federal courts. ❇

The Court's decision in Rahimi is a step in the right direction, but only a step for now.

---

11 116 F.4th 458 (5th Cir. 2024).

12 See *Diaz*, 116 F.4th 458 n.2 (citing *United States v. Rambo*, No. 23-13772, 2024 U.S. App. LEXIS 18375, 2024 WL 3534730, at *2 (11th Cir. July 25, 2024) (per curiam); *United States v. Young*, No. 13-10464, 2024 U.S. App. LEXIS 17801, 2024 WL 3466607, at *9 (11th Cir. July 19, 2024) (per curiam); *United States v. Johnson*, No. 23-11885, 2024 U.S. App. LEXIS 16932, 2024 WL 3371414, at *3 (11th Cir. July 11, 2024) (per curiam).

13 One of the few Texas state court cases to thus far address a constitutional challenge post-*Rahimi*, *In re Ex Parte Strickland*, No. 12-24-00031-CR, 2024 Tex. App. LEXIS 7355 (Tex. App.–Tyler Oct. 9, 2024, no pet. h.) (mem. op.) (op. on re'hg), also relied on *Heller* and *Bruen* in finding that a felon was not a "law-abiding, responsible citizen," and went on to hold that surety and going-armed laws justified the disarming of felons.

14 Citing Crime and Reform in Post-Revolutionary Virginia, 1 Law & Hist. Rev. 53, 73 (1983)).

15 Because Diaz's as-applied challenge failed, his facial challenge failed as a matter of law.

Photos from our Annual Conference

Protect your righteous conviction (cont'd from the front cover)

A prosecutor's contemporaneous note-taking during a discussion with a defense attorney can shed light on an issue many years later. If your notes are handwritten, make sure they are readable and that they would make sense to a third party. It is also helpful to write the date of the conversation, any additional people present, and the context in which the conversation occurred.

Document events that happened during trial that you did not get a chance to put on the record or were prevented from putting on the record—especially if something weird happened. A silent record might be OK on direct appeal, but it is not helpful on a post-conviction writ of habeas corpus 10 years later when you cannot remember what happened and someone like me is now asking you questions. If there isn't any documentation to refute a post-conviction claim, a writ lawyer on the defense side can twist what was a non-issue into one of the worst acts of lawyering or misconduct you've ever heard. The lesson is that right after a trial or plea is over and before you close that file, document it while everything is still fresh.

I handled a post-conviction writ in which the habeas attorney claimed that the State failed to disclose exculpatory, material evidence under *Brady v. Maryland* and the defendant would not have pleaded guilty had he known about this information. It dealt with whether the State's experts were in agreement that the victim's injuries were consistent with sexual assault. After I spoke with the trial prosecutor, it was clear to me that the defense attorney knew the information, but the disclosure was not explicitly documented in the State's file or on the record. Providentially, the defense attorney had mentioned this controversy between the State's experts in one of his unsealed vouchers. I was able to rely upon this public document to demonstrate that the defense attorney knew about the *Brady* material, contrary to what habeas counsel represented.

While we are on the topic of documentation, remember that notes, emails, and memos might sometimes be produced, with or without redaction, to a writ lawyer through a public information request. Be mindful of the future readers of the file. Nothing compares to the shock of seeing a real live email you sent, no matter how innocuous or irrelevant it was, attached as an exhibit in a post-conviction writ application. While your office's in-house lawyers should claim any work-product privileges on your behalf, they will probably still err on the side of disclosure when it comes to information in the file or elsewhere, especially if it could be considered exculpatory or responsive to an outside request. Strive to be professional in your note-taking and communications.

Exercise a bit of restraint during trial

It's very exciting when the defense attorney opens the door to an avalanche of extraneous offenses that the State can now introduce to the jury, but think about the post-verdict impact of the admission of that evidence. It's difficult for a defendant to win an ineffective assistance of counsel (IAC) claim on direct appeal unless the deficient performance and prejudice is firmly rooted in the record.[1] IAC claims will generally lose on direct appeal because the defense attorney gets the legal equivalent of the benefit of the doubt.

However, in a post-conviction writ when IAC is alleged, the trial court gets to learn outside-the-record information about the defense attorney's strategy through an affidavit or live testimony, and that can become a problem for the conviction. If the defense attorney gives credible testimony that it was error on his part when he opened the door, that righteous conviction is now hanging in the balance if the defendant can also demonstrate that the error harmed him during trial.[2] Don't get me wrong, I will still argue how

---

[1] See, e.g., *Andrews v. State*, 159 S.W.3d 98, 102–03 (Tex. Crim. App. 2005).

[2] See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (to prove that trial counsel failed to render the effective assistance of counsel, the defendant must show by a preponderance of the evidence that the performance was deficient in that it was beyond the bounds of prevailing, objective professional standards, and then show the deficient performance was prejudicial).

strong the evidence was on its own (if it was) or how no amount of excellent lawyering by the defense would have helped (if that's true), but consider all of that first before walking the evidence through the open door.

Understand the limitations of the applicable scientific field

There have been an influx of post-conviction writ claims having to do with new scientific evidence or the evolving standards of forensic science. Article 11.073 of the Texas Code of Criminal Procedure went into effect on September 1, 2013, and it provided an avenue for relief involving new scientific evidence. Article 11.073 covers everything from new DNA evidence to a recanting scientist.[3] Given that this type of post-conviction relief has a lower standard of proof (a preponderance of the evidence) than an actual innocence claim (clear and convincing evidence), trial prosecutors should be aware. In fact, the Court of Criminal Appeals recently granted Art. 11.073 relief in a case[4] involving "shaken baby syndrome," which is now more commonly referred to as "abusive head trauma," as it is the more inclusive term.[5] While that decision contains a fact-specific analysis *and* the State joined in on relief, it is worth mentioning that the Court of Criminal Appeals has been generally more receptive to these "new science" claims filed under Article 11.073.

There have been an influx of post-conviction writ claims having to do with new scientific evidence or the evolving standards of forensic science.

As a practical tip, a forensic scientist or other expert at trial should be conveying the parameters and limits of his or her testimony and the science itself, and prosecutors should make sure to properly vet that testimony or evidence before presenting it to a jury. At the end of the day, a State's expert can sway a jury in deciding a contested factual issue in the case. That expert testimony can add credibility to the case theory or corroborate another witness's testimony through forensic evidence. Consequently, it is best not to push questions into territories that aren't appropriate for that particular scientific field or for that particular type of expert.

Communicate with the victim and next of kin

Victims and their family members need to know about the entirety of the legal process when it comes to a criminal conviction. Articles 56A.051(a)(3)(A) and (a)(4)(B) and 56A.051(b) of the Texas Code of Criminal Procedure require this. If a righteous conviction ends in a righteously long sentence, you can bet that the newly convicted defendant probably will not stop at a direct appeal. He might represent himself on a post-conviction writ or hire a writ lawyer to represent him. As a general practice, I will inform the victim and/or next of kin about the existence of a post-conviction writ, particularly when the judge orders a live evidentiary hearing. They might already have received a notification through the VINE system[6] when the defendant is moved from the prison unit to county jail. It's really hard to explain to victims, when they were told by a previous prosecutor that their ordeal was finally over, that it's not quite finished with a pending writ. It's disorienting and overwhelming. It's important to be up-front with victim-witnesses that there will be a direct appeal and possibly a post-conviction writ after that. They deserve our transparency. Ideally, the trial prosecutor should set aside time after trial to debrief the victim and family and explain the post-conviction process, which includes the direct appeal and a possible writ. The prosecutor handling the direct appeal should remind the victim and family once again after the direct appeal is affirmed

---

[3] See, e.g., *Ex Parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018) (had the post-conviction Y–STR DNA testing results been presented at trial, defendants would not have pled guilty or been convicted at trial); *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (medical examiner's revised opinion was new scientific evidence based on change in her own scientific knowledge).

[4] *Ex Parte Roark*, –- S.W.3d ––, 2024 WL 4446858 (Tex. Crim. App. Oct. 9, 2024).

[5] A. Choudhary, et al, "Consensus statement on abusive head trauma in infants and young children," *Pediatric Radiology* (2018).

[6] https://vinelink.vineapps.com/state/TX/ENGLISH.

that there is a potential for a post-conviction writ.

Trial prosecutors should be aware that there is no statutory limitation on when a defendant can file a post-conviction writ. He can file it as soon as the mandate issues on the direct appeal, or he can file it 20 years later. Nothing can stop a post-conviction writ from being filed in the first place. However, the State can rely on a doctrine known as laches to respond to claims made on cases that are old when we can demonstrate we are prejudiced by the delay.

In 2012, the Court of Criminal Appeals expanded the definition of prejudice under the existing laches doctrine to include "all forms of prejudice" and "anything that places the State in a less favorable position."[7] There is also a general but loose rule that waiting longer than five years after a defendant's conviction is final to raise a claim is unreasonable.[8] Previously, the Court of Criminal Appeals considered prejudice to the State only insofar as the State was prejudiced in its ability to respond to the allegations in a post-conviction petition.[9] But in deciding *Ex parte Perez*, the Court of Criminal Appeals allowed the State to show it would be prejudiced in its ability to retry a defendant if he were granted a new trial through habeas relief. Again, the State can and should raise laches if a defendant has slept on his rights to the extent that memories have faded and evidence has been lost.

That being said, laches is an equitable balancing test, and the Court of Criminal Appeals has still granted habeas relief in cases where the State raised laches.[10] It is best for prosecutors to not solely rely on laches to shelter a righteous conviction.

Conclusion

I hope this article can serve as a reminder that years after prosecutors, the defense attorney, and the judge have forgotten about the case, the person serving the sentence—as well as the victim and family—have not. Every trial prosecutor should be aware that a convicted individual may file a post-conviction writ with the hopes of selling a different story to a new audience. But it is our duty as prosecutors to see that justice is done all the way through to the end and to utilize the tools we already have at our disposal to do so. ❇

Trial prosecutors should be aware that there is no statutory limitation on when a defendant can file a post-conviction writ. He can file it as soon as the mandate issues on the direct appeal, or he can file it 20 years later.

---

[7] *Ex parte Perez*, 398 S.W.3d 206, 208, 215-16 (Tex. Crim. App. 2012).

[8] *Id*. at 216.

[9] See *Ex parte Carrio*, 992 S.W.2d 486, 487-88 (Tex. Crim. App. 1999).

[10] See, e.g., *Ex parte Saenz*, 491 S.W.3d 819, 825-826 (Tex. Crim. App. 2016).

The Cameron Moon saga ends (at least for now)

The proverbial white whale of my career as an appellate prosecutor has been the Cameron Moon murder trial.

By Jessica Caird
Assistant District Attorney in Harris County

I have assisted the trial prosecutors on retrial since 2015, and I was lucky enough to be part of the trial team in 2024 to see Moon retried, convicted, and sentenced to 25 years in prison. It took a number of years, but justice may finally stand for Christopher Seabreak, whom Moon murdered, and his still-grieving family.

Although I did not handle *Moon v. State* on its original appeal in 2010, the decision that came from the Court of Criminal Appeals in 2014 rocked the world of juvenile prosecutors and juvenile judges, as well as gave new trials to numerous serious, certified juvenile offenders in Harris County. I dealt with a number of those *Moon* reversals from 2015 until the Court of Criminal Appeals overruled *Moon* in 2021.[1]

Nevertheless, even as the Court finally overturned *Moon*, the retrial remained untried.[2] From the end of 2014 through the middle of 2024, Cameron Moon walked the streets of Harris and Montgomery Counties on bond awaiting retrial for the murder. During that time, Mr. Moon entered into relationships, had a child, shot himself with a hunting rifle, and even crashed his vehicle while intoxicated (and then ran from the scene)—all while the case remained pending, mostly on an endless pretrial writ of habeas corpus appeal.

The murder

In 2008, 16-year-old Cameron Moon shot 20-year-old Chris Seabreak in the parking lot of a Gerland's Food Town in Deer Park. Moon had planned, along with a friend, to set up a fake marijuana deal to steal $400 in cash from Chris and his cousin. Moon and his friend lured Chris and his cousin to a trailer park in hopes that Chris would give a girl they recruited the money without turning over the (nonexistent) marijuana. Chris and his cousin refused to pay the money without first getting the weed.

When his plan failed, Moon changed the plan. He got a gun. He kept contacting Chris and his cousin and convinced them to meet in the Gerland's parking lot to complete the deal. What Chris and his cousin didn't know was that Moon had no drugs and no intention of letting them walk away with their money. It was all a set-up.

When Chris approached Moon in the parking lot for the exchange, Moon pulled a gun on him. Moon fired the first shot at close range and three more as Chris ran from him. Chris died in the parking lot with four gunshot wounds as his cousin held him.

The appeals

The State originally tried Moon in 2010 as a certified juvenile in criminal district court. The State sought certification because of the seriousness of the offense, Moon's role in the offense, his juvenile history, and the evidence demonstrating he was the leader of the plot to rob and ultimately kill Chris Seabreak. At the time he killed Chris,

---

[1] See *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014); but see *Ex parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021) (overruling *Moon*).

[2] See *Thomas*, 623 S.W.3d at 378; but see *Ex parte Moon*, 649 S.W.3d 700 (Tex. App–Houston [1st Dist.] 2022), *rev'd* by 667 S.W.3d 796 (Tex. Crim. App. 2023).

Moon was on probation for criminal mischief, demonstrating that rather than improve his behavior while serving out the terms of his juvenile probation, he planned and committed a murder.

Texas Family Code §54.02(a) at the time required the juvenile court to make an assessment of a juvenile respondent—whether to try him as a juvenile or certify him as an adult—after a full investigation and hearing. Under subsection (a), the judge had to decide if probable cause existed that the juvenile committed the offense and whether, "because of the seriousness of the offense alleged or the background of the child, the welfare of the community require[d] criminal proceedings." In reaching that decision, the law required the judge to consider four factors:

1) whether the juvenile committed the offense against a person or property,

2) the sophistication and maturity of the child,

3) the record and previous history of the child, and

4) the prospects of adequate protection of the public and the likelihood of rehabilitation using the procedures, services, and facilities available to the juvenile court.[3]

The State relied heavily on the seriousness of the offense and Moon's background during the hearing. Moon countered with his own psychiatric expert who claimed he would be amenable to rehabilitation and was not prone to violence.[4] But the State explained that there was little time to rehabilitate Moon because the juvenile court's jurisdiction expired at age 18 or 19, depending on the type of petition, and even a Texas Youth Commission sentence ended at 19.

The judge ended up certifying Moon as an adult, he went to trial, a jury convicted him, and he was sentenced to 30 years in prison. Back then, certified juveniles could not complain about the certification process until after a conviction,[5] so it became part of the criminal appeal.

In 2013, the First Court of Appeals reversed his conviction for legally and factually insufficient evidence that rendered the juvenile court's certification order an abuse of discretion.[6] It held that the evidence of Moon's sophistication and maturity was legally insufficient;[7] it also held that factually insufficient evidence supported the juvenile court's finding that the prospect of adequate protection of the public and low likelihood of rehabilitation in the juvenile system supported certification.[8] In an unusual turn, the First Court declared that the case remained pending in the juvenile court—despite the criminal trial—as it had never left the juvenile court's jurisdiction.[9]

Harris County sought discretionary review, and the Court of Criminal Appeals affirmed the reversal but on a slightly different ground. It held that the certification order failed to confer jurisdiction because it lacked sufficient factual findings.[10] The Court also decided the case remained pending in the juvenile court, and it suggested using Texas Family Code §54.02(j) to recertify.[11] By now, Moon was more than 22 years old, so the juvenile court could only certify or dismiss the prosecution.

The juvenile court recertified Moon in May 2015, and the case went to a criminal district court for retrial. The same team of *pro bono* lawyers who handled his direct appeals tried to avoid recertification and then retrial. They fought tooth and nail with motions complaining about jurisdiction and demanding dismissal, a mandamus, and then a pretrial writ of habeas corpus.

The State relied heavily on the seriousness of the offense and Moon's background during the hearing. Moon countered with his own psychiatric expert who claimed he would be amenable to rehabilitation and was not prone to violence.

---

[3] Tex. Fam. Code §54.02(f).

[4] *Moon v. State*, 410 S.W.3d 366, 369-70 (Tex. App–Houston [1st Dist.] 2013), *aff'd* by 451 S.W.3d 28 (Tex. Crim. App. 2014).

[5] See Tex. Code Crim. Proc. Art. 44.47.

[6] *Moon v. State*, 410 S.W.3d 366 (Tex. App–Houston [1st Dist.] 2013), *aff'd* by 451 S.W.3d 28 (Tex. Crim. App. 2014).

[7] *Id*. at 378.

[8] *Id*.

[9] *Moon*, 410 S.W.3d at 378 ("Because the juvenile court abused its discretion in waiving its jurisdiction over Moon and certifying him for trial as an adult, the district court lacked jurisdiction over this case. We therefore vacate the district court's judgment and dismiss the case. The case remains pending in the juvenile court").

[10] *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014).

[11] *Moon v. State*, 451 S.W.3d 28, 52 n. 90 (Tex. Crim. App. 2014) (holding the case remained pending in the juvenile court with a possible alternative of certification under Tex. Fam. Code §54.02(j)).

Between four and six *pro bono* attorneys worked for Moon beginning before the first certification hearing in 2008. The first to jump on was the mother of Moon's childhood friend, who felt a personal connection to the youth. She brought in a federal criminal attorney, a law professor, and various other lawyers and associates over the years. The first lawyer's connection was clearly with Moon himself, but the others joined in the hopes of changing juvenile law to make it significantly more difficult to certify even violent juvenile offenders. If a youthful offender is left in the juvenile system, potential sentences are lower and avenues for early release more plentiful and likely. These attorneys went on to push through the legislative change allowing for immediate appeal of a certification order through the civil appellate courts during the 2015 legislative session.

As a former juvenile prosecutor and an appellate prosecutor responding to many reversals on serious violent offenses from murder to capital murder, I felt strongly that the law must still hold Moon accountable for his conduct. He should not get a pass simply because he was young—so was his victim. Youth is not an excuse for murder, and it shouldn't provide a pass on bearing the consequences for murder. Moon's conduct and the evidence supported certification, and by now, certification was our only option to hold him accountable for killing Chris.

As a former juvenile prosecutor and an appellate prosecutor responding to many reversals on serious violent offenses from murder to capital murder, I felt strongly that the law must still hold Moon accountable for his conduct. He should not get a pass simply because he was young—so was his victim.

I provided caselaw and motions backup on most of those filings. In 2017, the pro bonos filed a lengthy pretrial writ of habeas corpus raising jurisdictional and constitutional complaints. I wrote the State's answer and argued the merits, and the trial court denied relief in October 2018. Moon appealed.

The First Court received jurisdiction over the expedited appeal in November 2018. I argued the case in October 2019, and the Court issued an initial opinion affirming the denial of habeas relief in February 2020. I first spoke to and began to get to know Chris's mother before and after that oral argument.

The *pro bonos* sought rehearing. The justices delayed issuing the rehearing decision for more than two years—on an accelerated appeal. During that time, the Court of Criminal Appeals expressly overruled *Moon v. State*.[12]

I filed a motion to expedite, and the Court denied it. I filed an additional brief explaining that the overturning of *Moon* defeated the claims raised in the habeas application. With the approval of District Attorney Kim Ogg, I moved to mandamus the First Court to force a decision—any decision—as the case moldered.[13] Six days after seeking mandamus relief from the Court of Criminal Appeals, the panel issued an opinion reversing the habeas court and ordering the indictment dismissed (never to be retried).[14] The State sought discretionary review, which the Court of Criminal Appeals granted in September 2022. Finally, in May 2023, the Court of Criminal Appeals ordered the First Court to dismiss the writ appeal, not the indictment, opening the way after five years to a retrial.[15]

The preparation for retrial

By now, as you can tell, I felt invested. I had spent nearly 10 years trying to address the injustice of the *Moon* appeals and the unconscionable delays that resulted. I spoke frequently with Chris's mother, and I felt that I had to do everything in my power to see justice done for her and Chris. I

---

[12] See *Ex parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021) ("Given Moon's strained reasoning, its inconsistency with related decisions, and the legal developments since the decision, we explicitly overrule it"). Harris County Assistant District Attorney Kristin Assad handled that post-conviction writ of habeas corpus and managed to do what I had not despite my numerous attempts. ADA Assad convinced the Court of Criminal Appeals that it had misread and misunderstood Texas Family Code §54.02(h)'s requirements when it demanded that all factual findings supporting the order be included in the written waiver order. See *id*.

[13] See *In re State ex rel Ogg*, WR-93,783-01 (Tex. Crim. App. Jun. 8, 2022) (filed May 6, 2022, accepted May 11, 2022, with leave to file denied on June 8, 2022).

[14] *Ex parte Moon*, 649 S.W.3d 700 (Tex. App–Houston [1st Dist.] 2022), *rev'd* by 667 S.W.3d 796 (Tex. Crim. App. 2023).

[15] *Ex parte Moon*, 667 S.W.3d 796, 805 (Tex. Crim. App. 2023).

did not believe that I could simply walk away no matter how capable the trial prosecutor who took over the case. Although I had not been in trial since 2007—the year before Cameron Moon murdered Chris Seabreak—I wanted to be part of the trial team on this case, but we needed someone far more experienced than I to lead the team. Enter Sarah Seely, the Division Chief of the Homicide Division, who is one of Harris County's most talented, diligent, and determined prosecutors. I couldn't have asked for a better lead prosecutor. And, to her immense credit, I didn't have to ask. She offered.

By now nearly 16 years had passed since the murder, Moon was 32 years old, and much of the technology had changed. We had VHS tapes that needed conversion to a digital format. Most of the evidence came from *early* cell phones. (Do you remember the original Sidekick with the sliding keyboard? What about T9 keypads where you had to press the 2 button three times to type the letter "c"?) Those were the types of phones and messages we had in evidence. The phones were so old no one could download them. Back in 2008, former DA Investigator Mike Kelly painstakingly scrolled through each text, took a photograph of it, and then moved to the next. But when he took those photographs, no one had asked him to scroll down to get the date and time of the outgoing messages. We had to get another forensic analyst in our office, Stephen Clappart, to go through the 16-year-old phone. Fortunately, it still worked, and he found those timestamps.

The 2008 investigation and prosecution did not lend itself to 2016 standards. The State charged and tried it as a murder despite it clearly being a capital murder. The first trial predated *Miller v. Alabama,*[16] a 2012 decision saying certified juveniles convicted of capital murder could not receive a mandatory sentence of life without parole; before this decision, when Moon was first tried, it was much more difficult to certify and prosecute a 16-year-old. We wanted to avoid claims of prosecutorial vindictiveness, so it seemed too late to indict for capital after the past trial, conviction, and two appeals.

Add to it that this was the homicide investigator's first murder case (because murders don't happen often in Deer Park). Back then, no one sought out the girl from the trailer park who tried to get Chris and his cousin to hand her the cash, even though her number and photograph sat in one of the cell phones. In the first trial, the State called the co-defendant and the uncharged driver as witnesses. They did not testify well, and they claimed to remember little 16 years later. The 17-year-old co-defendant who provided the gun received a 25-year prison sentence *after* Moon's first trial despite testifying for the State. He was still in prison on the murder Moon (the shooter) was on bond for 16 years later. The co-defendant would not cooperate in a retrial.

With the problems mounting, the trial team went to work. That team included an experienced homicide investigator, Juan Viramontes, and the best paralegal I've had the pleasure of working with in my long career, Matilde Falcon. Ms. Falcon performed more investigation 16 years after the murder than Deer Park police did in 2008. She found the missing girl through her reviews of the cell phone evidence, and with the help of Investigator Viramontes, the team tracked her down. That witness met with us, reluctantly, 16 years after she tried to get Chris to give her the money. Nevertheless, though the patience and persistence of ADA Seely and Investigator Viramontes, she opened up and even testified in the retrial—a missing piece from the first trial that supported how the events transpired when neither co-actor testified.

Next came many a meeting to discuss how to present the old-fashioned text evidence in a way that modern-day jurors could read and comprehend. The photographs were old and the style of the text (gray font on black screen) very hard to read. After we had the forensic analyst create a spreadsheet of times for each incoming and outgoing text so we weren't fumbling in the dark to recreate the conversations, an intern typed each text into a PowerPoint presentation. That presentation showed that Moon came up with the plan, he pestered his co-defendant to help him, and he hounded Chris and his cousin to participate in the marijuana deal. Just organizing and putting the text messages in a format for easy review that looked more familiar (green and blue bubbles, of course) simplified the evidence and made the story clear.

In the first trial, the State called the co-defendant and the uncharged driver as witnesses. They did not testify well, and they claimed to remember little 16 years later. The 17-year-old co-defendant who provided the gun received a 25-year prison sentence after Moon's first trial despite testifying for the State. He was still in prison on the murder Moon (the shooter) was on bond for 16 years later. The co-defendant would not cooperate in a retrial. With the problems mounting, the trial team went to work.

[16] *Miller v. Alabama*, 567 U.S. 460 (2012).

Then there was additional punishment evidence to track down. The "accidental shooting," where Moon had shot himself with a rifle during the decade he was out on bond, had us meeting with the neighbor who called it in. She reported hearing frequent verbal and some physical fights coming from the home Moon shared with an ex-girlfriend in 2018. This neighbor even saw Moon push his girlfriend into a tree. We tracked down and met with the girlfriend, who unsurprisingly denied any violence, but she admitted Moon somehow managed to shoot himself as she tried to take the gun from him during one of their domestic disputes.

The team met with the driver of the car Moon hit while intoxicated in 2021. Photographs taken during that arrest showed Moon still had prison tattoos, including one with the California Penal Code Section for murder (187) and another that said, "Play now, pay later." More useful punishment evidence.

Although we had records of misbehavior in juvenile detention and in the prison system, most of those witnesses could not be located, and the ones we did find were uncooperative. Having gathered as much of the available evidence as we could and formatting it in as jury-friendly a manner as possible, the team felt ready.

The trial commenced with the same defense attorney who had tried the case originally. He and one of the pro bono attorneys fought hard for their client, setting up from voir dire that the age of the case and the age of the defendant at the time of offense should lead to an acquittal, or at least a lenient sentence.

The trial

Almost 16 years after the murder, within a few weeks of the anniversary of Chris's death, the team headed to court to retry Cameron Moon. The trial occurred in one of Harris County's Emergency Relief Docket (ERD) Courts with a visiting judge, in less-than-ideal conditions. The ERD Courts are additional trial courts (with retired judges) to work down the backlog created by a flooded courthouse in 2017 from Hurricane Harvey and the COVID-19 pandemic. The courthouse used for ERD sits across the street from our offices in the old Family Law Center, requiring a team of investigators to truck over the nine boxes of evidence, law, and the record each morning in the July heat. The victim-witness room where the family sat for more than a week had a drainage tube (which continued to leak) strung down from the ceiling into a large trashcan, along with old discarded furniture. It provided none of the comforts of home or even our usual courthouse, but Chris's family showed up every day and sat in the courtroom or that victim-witness room to show their support.

The trial commenced with the same defense attorney who had tried the case originally. He and one of the *pro bono* attorneys fought hard for their client, setting up from voir dire that the age of the case and the age of the defendant at the time of offense should lead to an acquittal, or at least a lenient sentence. The defense claimed self-defense, but Chris's cousin withstood grueling cross-examination for hours to make clear that he saw Moon empty the gun into Chris as Chris ran away. Another eyewitness, a woman just doing her grocery shopping, corroborated his account. And Moon's recorded statement did little to support his self-defense claim.

The forensic analyst and the long-retired investigator who photographed the texts testified to the timestamps and which phones the texts came from. ADA Seely and paralegal Falcon turned the most relevant texts into stickers and pasted them onto a large posterboard during the direct examination of the lead investigator, cementing in the jurors' minds the events leading up to the murder. It provided a clear visual for the jury to follow. After a show-stopping closing argument from ADA Seely, the jury returned a guilty verdict in under an hour. We reached punishment!

Punishment

The jury recessed for the weekend after hearing the State's punishment evidence, and everyone assumed the jury would sentence Moon before the end of the day on Monday. But no, Hurricane Beryl barreled into Houston Monday morning, delaying trial. We hoped to resume Tuesday, but the extent of the damage kept the courthouse closed to visitors. Finally, Wednesday morning, the jury returned to hear the defense's punishment evidence. It was a little later than expected because the bailiff had to walk a juror through opening her garage door when she (like the rest of us) was without electricity at her house.

The defense put on everything they had, including the ex-girlfriend we chose not to call. They also called Moon's current girlfriend, who is the mother of his 2-year-old special needs son and his 8-year-old special needs stepson, to testify that he was a kind and patient father. Many

of his former employers, coworkers, and friends testified as well. He made a convincing case that he had changed.

I gave the punishment closing argument and finally got to say some of the things I'd been thinking all these years. Moon had had over nine years of relative freedom despite a jury finding him guilty of murder. Instead of turning his life around and treating every day of that freedom as a gift—a reprieve—he continued to hurt people. He hurt people while on bond, while pretrial services monitored him, and after serving more than seven years behind bars. What would he do when we weren't watching him any longer? What had he learned that made him safe to be in the community? In contrast, Chris's mom still spent every day, every holiday, missing her son. Her health had deteriorated significantly over the years as she continued to mourn. Moon's conduct took her peace of mind and in many ways her freedom as the grief fundamentally changed her life and the way she parented her other children.

The jury returned with 25 years' prison time. It felt like a disappointment to the family and the trial team, but in light of the age of the case and the punishment evidence, it likely was a fair result. And when Chris's mother gave her victim impact statement, telling Moon what he took from her, I believe he finally understood, hearing it now as a father himself. For the first time in all these years, Moon apologized for killing Chris. He hadn't expressed any regret in 2010, nor did he on the occasions he ran into Chris's mother here and there while he was out on bond. After all these years, he finally realized that what he took away, he could not return. He forever changed Chris's family.

And this experience also changed me. I got to be part of a team who works every day to see justice done on the most serious of cases. I watched the compassion and care put into every phase of the trial, and the kindness showed to each witness no matter how uncooperative. Seeing the trial from this perspective—not just in a reporter's record—reminded me why we do this job even when the task seems Sisyphean. It might take a decade or more, but nothing feels better than knowing you helped a family get justice—at last—for someone they love.

Although the fight is not over yet—Moon has appealed (again)—Harris County prosecutors will keep fighting to see justice stands for Chris and Chris's family, no matter how long it takes. ❇

Detecting radioactive materials

By Charlie Johnson (left)
Program Manager, &
Ian Feldman (right)
Assistant Program Manager, Securing the Cities

As a police officer drives through a neighborhood, he hears someone shouting, "Help! Help!"

It could be benign, such as kids playing in their yard, shouting to their siblings to help them tackle their father. But it could also be a cry for help, that someone is being attacked, where that officer needs to step in to protect that person. The officer doesn't know which scenario is playing out until he investigates.

Now imagine that that same officer has a device that detects radioactive materials. There are legitimate uses of radiation, such as construction, industry, and medicine. But radiation used improperly can also present a threat to the public, whether through negligence, regulatory violations, or criminal or terrorist acts. The only way that officer can determine whether a radiation alarm is legitimate is through investigation.

That detection capability exists today and is being actively deployed across the state of Texas. This article is meant to introduce prosecutors to this program, explain how it operates, respond to common legal questions about it, and address the fact that no caselaw yet exists in this area.

Securing the Cities program

In 2015, the City of Houston was awarded funding through the U.S. Department of Homeland Security's Securing the Cities (STC) program. This cooperative agreement is intended to build preventative radiological/nuclear detection (PRND) programs across the United States. Funding provides training and equipment to public safety professionals to give them the knowledge, skills, and abilities to both detect radiation and determine if that radiation poses a hazard to the public. In addition to Houston, there are 12 other regions across the country receiving this funding.

The program relies on common operating policies among all participating agencies, which are based on national standards authored by the Department of Homeland Security (DHS), Federal Bureau of Investigation (FBI), and U.S. Department of Energy (DOE). Training also follows national guidelines and is conducted under the authority of the Federal Emergency Management Agency's (FEMA's) National Training and Exercise Directorate. Equipment must meet ANSI (American National Standards Institute) standards to ensure reliability and applicability to the program's mission. As the STC program is a cooperative agreement, staff at DHS's Countering Weapons of Mass Destruction (CWMD) office are closely involved in local programmatic decisions, ensuring compliance with all these requirements.

Initial partners for the STC program in Houston were agencies in a five-county region around Houston. All participants signed on to a single Operations Plan and Concept of Operations, and all received standardized equipment and training. Since that time, DHS granted approval for the program to expand across Texas, working through the Texas Highway Patrol, FBI-recognized bomb squads, and key cities. That expansion process uses the same standardized model as the program's original deployment.

Real-world radiation incidents

Radiation is all around us every day. We are constantly exposed to very low levels, called background radiation, which comes from a variety of natural and human-created sources. But radia-

tion is also used in multiple fields, most commonly medicine, construction, and the oil and gas industry. This means that radioactive material (often referred to as "source" or "sources") are present in industrial devices, they are used for medical treatments, and they are transported by commercial shippers and private couriers across Texas. While proper handling normally ensures these sources are safe for the public to be around, they are all still emitting radiation that can be detected, even at a distance.

In October 2023,[1] a Houston Police Department (HPD) officer who was equipped with a radiation detection device was driving to work when his radiation alarm went off. The officer's initial thought was that the alarm was triggered by an industrial source in the same area, but when the alarm went off in the same location on his return trip and again on subsequent days, he opted to exit the highway to further investigate, successfully identifying the source of the alarm as a scrap metal facility. Following his training, the officer requested assistance from the HPD Bomb Squad, who located several abandoned radiological sources, including one which was unshielded. These sources had been sent from the original industrial owner for processing as hazardous waste product. Material tracking shows that it changed ownership several times and at some point, was lost from regulatory control and ended up in this scrapyard. Because the owners of this yard had just purchased the venue at a tax auction, they were not charged for the recovery costs. Had these sources been taken by a malicious actor, they could have been turned into a radiological exposure device or a radiological dispersal device ("dirty bomb"), but fortunately, the material was recovered and safely removed. Based on available data, this was the largest recovery of material outside of regulatory control that authorities did not previously know was missing.

In July 2024,[2] first responders in Rankin (in Upton County) received reports of an oilfield truck that had caught fire. The truck had a radioactive source mounted inside a density gauge used during hydraulic fracturing, and responders were concerned about effects of the fire on the source. The Radiological/Nuclear Detection Unit from Texas's Department of Public Safety responded with two Commercial Vehicle Enforcement (CVE) corporals equipped with advanced detection equipment. These corporals assessed the area for hazards and determined the source had remained intact, responders had not been exposed to any harmful levels of radiation, and the area had not been contaminated. The corporals also served as liaisons between local responders and subject matter experts, ensuring that the incident commander had sufficient information to properly resolve the scene.

Both situations were successful because of the policies, training, and equipment provided through the Securing the Cities program and its partners.

Helpful acronyms in this article (in the order they're used)

STC — *Securing the Cities, a program from the U.S. Department of Homeland Security to build preventative radiological and nuclear detection (PRND) programs across the country.*

PRND — *preventative radiological and nuclear detection*

DHS — *Department of Homeland Security*

FBI — *Federal Bureau of Investigation*

DOE — *Department of Energy*

FEMA — *Federal Emergency Management Agency*

ANSI — *American National Standards Institute*

CWMD — *the Countering Weapons of Mass Destruction office, which is part of the Department of Homeland Security*

CVE — *Commercial Vehicles Enforcement*

---

[1] www.houstonchronicle.com/news/houston-texas/environment/article/radiation-houston-police-dirty-bombs-18516329.php.

[2] www.dps.texas.gov/news/dps-responds-fire-involving-radioactive-materials.

Primary screening

Most of the STC program's activities rely on officers, deputies, and troopers who have been trained on and equipped with personal radiation detectors (PRDs), which are body-worn devices capable of detecting gamma radiation. Unlike chemical or biological weapons, radioactive sources can easily be detected at a distance because they are constantly emitting radiation. That radiation moves at the speed of light, passing through intervening objects to reach the detector, making this a passive detection process. If the radiation levels increase above pre-set thresholds, the PRD alarm indicates that radiation was detected. Using the training they received prior to issuance of the PRD, the operator then investigates to verify the alarm, locate the source, and validate whether the cause is legitimate or illicit. This process is known as "primary screening."

In the overwhelming majority of cases, officers determine that the alarm is due to a legitimate source. In the Houston region alone, there are over 100,000 radiopharmaceutical procedures per year. For example, one of the most common procedures is the use of Technetium-99, a short-lived radioactive material cardiologists inject into patients to aid in imagery of the heart and potential blockages. Additionally, the Texas Department of State Health Services (DSHS) reports that there are at least 1,200 licensed pieces of equipment used in road construction that contain radiological sources and more than 500 portable radiological sources used for non-destructive testing (NDT). NDT is a common practice of inspecting high stress building materials and aircraft parts by using radiography (similar to dental X-rays, just stronger) to inspect welds for inconsistencies like small air bubbles that could weaken the material. Both of these industrial devices are commonly transported by road and used all over Texas. The officers' training provides them with sufficient knowledge to resolve these situations without additional assistance.

Secondary screening and technical reachback

However, there are times where an officer cannot resolve a radiation alarm solely through primary screening. In those cases, the officer requests an operator with additional training and a Radio-Isotope Identifier Device (RIID), which can analyze the radiation to determine what specific isotope is present. Knowledge of the specific isotope (which cannot be determined by a PRD alone) assists in the process, as that information can be compared with Department of Transportation (DOT) shipping papers, medical documentation, or other information to verify whether the presence of radiation is legitimate or illicit. This process is called "secondary screening."

Bomb squads and hazmat teams perform secondary screening because of their increased knowledge of the prevention and detection missions, as well as their ability to perform response operations if the source presents a danger to the public. Examples of a response operation could include recovering an abandoned source, mitigating radioactive contamination, securing malfunctioning industrial equipment, or rendering safe a terrorist weapon. These units regularly work with the FBI's WMD Directorate, ensuring smooth cooperation with federal authorities should terrorism be suspected. Note that there may be a time delay before secondary screening can take place, as the bomb tech or hazmat tech may have to travel a greater distance, including potentially from a different jurisdiction.

Secondary screening is also supplemented by a validation process known as "technical reachback." After the RIID displays the isotope information, if additional confirmation is needed, that data can be sent electronically to Department of Energy scientists who perform additional analysis on the data, helping further refine the resolution process. If a terrorist weapon is suspected, the scientists also provide data on the packaging

More helpful acronyms

PRD *personal radiation detector, a body-worn device capable of detecting gamma radiation*

DSHS *Department of State Health Services*

NDT *non-destructive testing used to inspect buildings and aircraft parts for flaws*

RIID *radio-isotope identifier device, a machine that can analyze radiation to determine what isotope is present*

DOT *Department of Transportation*

and shielding of the weapon that is valuable to the bomb squad in rendering the device safe.

Legal authorities and legal questions

During the STC program's kick-off phase in Houston, staff met with representatives from prosecutor offices from the five initial program counties to brief them on the program's activities and answer their questions about the PRND mission. The conversations covered the following questions and answers:

Is there a specific radiation "threshold" for whether a source of radiation is legitimate or illicit? No, because of the science behind radiation and radiation detection, the level of radiation does not equate to the level of threat.

The level displayed on a meter is impacted by distance and shielding, so the same source can have different readings depending on how close the detector is and what is in between the source and the detector. The level also has no bearing on how the material is being used, only that it is present.

Consider three cases: a medical patient who has received a nuclear stress test, a source projector used in non-destructive testing (NDT), and a nuclear weapon. Depending on factors such as distance from the source and whether shielding is present, each of these can cause the same readings on a radiation detector. The medical patient does not pose a threat from the radiopharmaceutical treatment he has undergone. The NDT source projector is a commonly used industrial tool if operated safely but poses a great health hazard if used improperly (such as the case of Jared Atkins in Phoenix in 2019[3]). And a nuclear weapon has the potential for catastrophic impact.

It is only through an operator's investigation of the initial radiation alarm and considering the totality of the circumstances, potentially with the assistance of secondary screening, that a formal determination of "threat" versus "no threat" can be made.

Do the detectors require calibration? PRDs do not require regular calibration, though other radiation detection equipment may, depending on its use. Because the readings displayed on a PRD do not equate to the level of threat, the exact measurement is not relevant to the primary screening process, so long as a PRD successfully indicates levels above normal background. Further determination relies on the officer's investigation, not the device's displayed levels.

This differs from speed detection, where there is a legal limit for vehicle speed. In this case, the device must reliably differentiate between speeding and acceptable speed, and calibration is necessary.

Radiation detection equipment used in a regulatory capacity (such as items carried by DOT commercial vehicle inspectors) is regularly calibrated because unlike primary screening, regulatory inspections do involve actionable levels of radiation. Similarly, RIIDs contain internal self-calibration technology to ensure they can reliably identify isotopes.

Are there any special cases that could cause a false radiation detection from a person? Officers are trained on procedures to verify alarms and localize those alarms to a person, package, or vehicle.

Alarm verification involves ensuring that an alarm is repeatable, which can be done by having a second officer with a PRD confirm the alarm or allowing a PRD to reset to background and then re-approaching the source to verify that the alarm is legitimate.

Officers are trained to separate people from packages, vehicles, and groups. There is no situation where two non-radioactive items or people would generate radiation only when in close proximity, so separation allows the officer to localize the alarm to a specific person, vehicle, or item. The training provided by STC in Houston specifically emphasizes the need for discretion in this process to not inadvertently reveal that an individual may have received a medical treatment to others in the area, ensuring the privacy of the subject remains intact.

Certain industrial uses of radiation can result in intermittent PRD alarms, caused by the fact that powerful sources are moved into an unshielded position during use and then back into a shielded position for transport. Again, training is designed to ensure that officers are aware of these situations, and in these cases, equipment

Officers are trained to separate people from packages, vehicles, and groups. There is no situation where two non-radioactive items or people would generate radiation only when in close proximity, so separation allows the officer to localize the alarm to a specific person, vehicle, or item.

[3] www.justice.gov/usao-az/pr/phoenix-man-sentenced-15-years-planning-release-stolen-radiological-materials-scottsdale

operators will have licenses and documentation for their industrial sources.

What laws and case history are present on radiation detection? Texas Health and Safety Code §401.101 restricts who can possess, transport, etc., radiation sources, and violations are a Class B misdemeanor unless that person has a license from DSHS or meets an exception under the rules (such as medical patients). However, there is no caselaw on arrests or stops based on radiation, either in Texas or elsewhere in the United States.

The presence of radiation meets the definition of reasonable suspicion to stop and investigate, as state law makes the possession or transport of radiological materials illegal, and the radiation detector confirms that those materials are present through a passive process. An officer cannot determine if an individual falls under an allowed use of radiation under the law without stopping that individual for further investigation, which potentially includes a field interview, asking to review documentation or licensure, or using context clues to determine the totality of the circumstances.

The presence of radiation meets the definition of reasonable suspicion to stop and investigate, as state law makes the possession or transport of radiological materials illegal, and the radiation detector confirms that those materials are present through a passive process.

This differs from other legal situations. It is not like requesting a narcotics canine because in that case, the original officer only suspects that someone has illicit drugs and requests the canine to confirm this via a search. It also differs from using an infrared camera which intentionally looks through barriers that would otherwise provide privacy, whereas the radiation detector is responding to radiation that has left someone's person or property and is now in a public area when it reaches the detector.

What steps are being taken to legally secure the program and its activities? Because there are no court cases within the state or nationally that establish caselaw for radiological/nuclear investigations (for example, how long can a person be detained while awaiting a secondary screener to arrive) the STC program has established several processes that should aid in prosecution as well as defend the actions taken by officers who would likely be challenged by defense attorneys.

The program relies on national standards for policies, training, and equipment, and DHS monitors this and ensures that funding is not provided if these standards are not upheld.

Programmatic reporting mechanisms are in place. Primary screening interactions are voluntarily reported by the officers who receive radiation alarms to track them, because most of those interactions do not involve any legal violations and therefore do not generate offense reports. The DHS grant program also requires that secondary screening be reported for tracking and situational awareness purposes. This data is compiled both within the Houston region and at the national level.

The STC program in Houston assists participating agencies with offering regular refresher training, designed to provide hands-on, scenario-based drills based on the types of real-life radiation alarms officers have reported encountering in the field. And policies and training are validated through periodic tabletop and functional, full-scale exercises.

Agencies perform regular in-house verifications that the provided detection equipment is functioning within normal parameters, and the STC program in Houston will replace any damaged or defective equipment at no cost to the agency and no penalty to the officer to whom the equipment is issued. The Houston program also periodically trades out equipment and subjects it to more formalized validation processes to verify it remains within manufacturer standards.

If secondary screening is necessary, there may be a time delay while the bomb tech or hazmat tech responds to the scene. Agency personnel are instructed to follow all existing procedures for holding subjects during this interval. For example, if an agency policy necessitates securing the subject in the back of the patrol car during this interval for officer safety purposes, then that process should apply here as well. But if an agency does not allow this, then the officer must follow whatever policy exists on the topic.

When caselaw will be created in the future

Ultimately, we in the STC program do not believe that caselaw will be set, either in Texas or elsewhere, through a terrorism-related arrest. Instead, consider the following scenario:

An officer is assigned a post at a special event where there is elevated security. Someone carrying a backpack approaches the post, and the officer's PRD begins to alarm. The values on the PRD increase as the individual walks up to the officer, and those values decrease after the individual has walked past. There are no other individuals or vehicles in the area, so based on this information

and his training, the officer can reasonably determine that the individual or his belongings are emitting radiation.

Given the heightened security related to the special event, the officer leaves his post to approach the person and investigate the radiation alarm. The radiation levels on the officer's PRD increase again as the officer gets closer to this person, further confirming that individual or his belongings are the source of the radiation. The officer now must try to determine if the source is legitimate by speaking with the subject.

The officer stops the person, introduces himself, explains that the PRD indicated the presence of radiation, and asks if there is any reason radiation would be present on his person or belongings. Because the vast majority of radiation alarms are legitimate, giving the individual the ability to explain the presence of radiation at the beginning of the interaction will usually lead to faster resolution and put subjects more at ease. The individual confirms he recently underwent a radiopharmaceutical treatment. The officer separates the individual from his belongings, and using the PRD, confirms that the radiation is coming from the person and not the backpack. This process rules out a "masking" situation, eliminating the possibility that the person is also carrying an illicit device in addition to being a (legitimate) medical patient.

To be thorough, the officer asks the person if he has any documentation of the medical procedure, and the individual confirms that he does. But as the man pulls documentation from his pocket, a bag of drugs also falls out and lands on the ground. The drugs are now in plain view, and the officer arrests the individual for possession of a controlled substance. The local district attorney's office accepts the charges, and the subject is taken to jail.

The subject's defense attorney will then do her best to protect her client. The drugs were found in plain view, so there is no search to challenge in court. Instead, the defense attorney would challenge the chain of events leading up to those drugs falling from the subject's pocket. In this case, the underlying reason for the stop (and the inadvertent dropping of the bag of drugs) was the radiation alarm itself. As such, this is the type of scenario the STC program expects will end up creating caselaw in this area.

To bolster the program, STC staff in Houston are prepared to assist in cases like this. Program staff can provide documentation on policies, training, and equipment showing that officers can perform radiation detection activities and resolve most alarms without further assistance. The documented alarm histories voluntarily provided to the STC program can illustrate how the program operates without infringing on civil liberties and that radiation alarms are not used for pretext stops. And program staff can provide expertise on radiation detection should technical questions arise. We hope to ensure successful prosecution in a case such as this, thus creating caselaw that supports preventative radiological or nuclear detection programs.

Program staff can provide documentation on policies, training, and equipment showing that officers can perform radiation detection activities and resolve most alarms without further assistance.

About the authors

For any questions or follow-up issues or to arrange a virtual meeting with other staff from your office to further discuss the program, please do not hesitate to reach out to our office via email at stc@houstontx.gov or via phone at 832/393-0938.

The STC Program Manager, Charlie Johnson, has been with the program since its inception in 2015. Prior to that, he worked for the Houston Police Department for over 30 years, retiring as the sergeant over the bomb squad. During his time with HPD, Charlie also served on an HPD/FBI/DOE task force that was trained and had the clearances necessary to perform render-safe actions on radiological dispersal devices and nuclear weapons.

The STC Assistant Program Manager, Ian Feldman, has been with the STC Houston program since 2022. Prior to that, he worked on a regional critical infrastructure protection program in southeast Texas. Outside of his work with the City of Houston, he is a paramedic, firefighter, and hazardous materials technician. His educational background is in emergency management and homeland security.

As part of the statewide expansion of the STC program, the Texas Department of Public Safety has stood up a specific Radiological/Nuclear (Rad/Nuc) Detection Unit under the Texas Highway Patrol's Commercial Vehicle Enforcement division. Staffed by a lieutenant, sergeant, and six corporals deployed across the state, the DPS Rad/Nuc Detection Unit is the lead group within DPS for training and operational support. In addition, the unit has assisted local agencies, the FBI, and the 6th Civil Support Team with detection activities at major special events across the state. ❇

Street racing claims three lives

Five seconds before fatally colliding his 2013 Chevy Silverado into the driver's side door of a turning Nissan Versa, Nelson Ramirez pushed his truck to the limits of its capabilities, accelerating from 81 miles per hour to 93.

By Jeanne M. Truglio & Owen C. Dewitt
Assistant Criminal District Attorneys in Tarrant County

The moment that impact occurred, Ramirez had pushed the accelerator down 99 percent of the way.

Ramirez had clocked out from his job at AutoZone around 9:00 p.m. that night, and he and his friend Milton Carranza pulled out of the parking lot in their respective trucks. A quarter mile down the road, while both were stopped at a red light, Milton began to rev his engine as he sat next to Ramirez. When the light turned green, the race was on, and both trucks leapt forward.

Only moments later, two people were dead and a third gravely injured.

Less than a mile separated the AutoZone and Griff's Hamburgers, which is where Ramirez collided with the Nissan containing Cindy Griffin, Madison Lake, and Bishop Kline. It was a clear night in Fort Worth on November 30, 2022, and that mile was a long, straight, and relatively quiet stretch of River Oaks Boulevard. Cindy had just driven her boyfriend's daughter, Madison, to pick up Madison's boyfriend, Bishop, as he got off work at Griff's. Blurry surveillance video from the restaurant shows Bishop getting into the backseat of Cindy's car at 9:11 p.m. Twenty-two seconds later, that same surveillance captured the last moments of their lives as Ramirez crashed into their car. Cindy and Madison were killed instantly from blunt force trauma, while Bishop lay in a coma after sustaining severe brain damage. Ultimately, he underwent multiple surgeries that proved unsuccessful, and he died six weeks after the crash.

Twenty-two seconds may not seem like a long time, but in less than half of one minute, the lives of scores of people would change forever. In 22 seconds, Nelson Ramirez, a 19-year-old who had never been arrested before, committed six felonies. In 22 seconds, three families found themselves in the agonizing position of having to bury a loved one far too soon. And in those 22 seconds, we prosecutors had to figure out what justice looked like for a young, probation-eligible defendant responsible for killing three completely innocent victims.

Two difficult hurdles

This was not a whodunnit—Ramirez's guilt was never truly at issue, despite his initial attempts to lie to responding officers about the circumstances surrounding his crash. The immediate challenge was not how to prove him guilty but how to punish him for what he had done. While it was clear that Ramirez did not intend to kill Cindy, Madison, and Bishop, his actions had horrific consequences. Understanding the reality of that situation, Ramirez eventually pled guilty to manslaughter and asked the judge to assess punishment following a pre-sentence investigation (PSI) report. (We had extended a plea offer that would've required prison time, but he refused.) With his guilty plea handled, we prepared for a difficult sentencing hearing.

We had two big challenges to overcome to resolve this case in a just manner. First, the defendant's age, lack of criminal history, and good behavior on bond. Second, and more importantly, negotiating and managing the expectations of

three separate families who were all grieving unexpected loss.

A sympathetic defendant. When we received the PSI report, we knew we had an uphill battle if we wanted Ramirez to be sentenced to prison. While we already knew he had never been arrested before, the PSI report detailed how Ramirez had a strong support system through his family, was working full time, and had enrolled in welding classes at Tarrant County Community College after graduating from high school. He was engaged to be married and was hoping to start a family soon. Ramirez was tested for drugs and alcohol frequently as a condition of his bond and passed each time.

The Texas Risk Assessment System—Community Supervision Tool deemed Nelson's overall risk of recidivism as "low," with men scoring in his range having a recidivism rate of only 11 percent. There was nothing listed under the "high risk" category of his evaluation. At the end of the report, the supervision officer listed seven factors in favor of Ramirez receiving probation and only one factor against.

Perhaps most helpful to our argument that Ramirez deserved to be in prison were his own statements. While he did express remorse, he also resisted the notion that he had actually been racing. Ramirez stated in the PSI report that he hadn't realized that what he had done was "considered" racing until his lawyer showed him the statute. Per §545.420(b)(2) of the Texas Transportation Code, what Nelson did that night met the statutory definition of racing as "the use of one or more vehicles in an attempt to: (A) outgain or outdistance another vehicle or prevent another from passing." It admittedly wasn't much, but it gave us some minimization that we could show the judge that Ramirez was not taking complete responsibility for his actions.

Managing three grieving families. More difficult than handling a sympathetic defendant was managing the expectations of the families. Understandably, the consensus among them was that they expected Ramirez to serve the rest of his life in prison for taking the lives of their loved ones. With the statute providing for a maximum of 20 years in prison and the possibility of probation, though, conversations with the families were difficult. As prosecutors, we have these types of hard conversations frequently. We lay out the strengths and weaknesses of our cases, the expected and possible results, and what the defendant will or won't plead to. Oftentimes we have to prepare victims and their families for outcomes that may not make any sense to someone outside the criminal justice system.

In this case, given what we had before us, we had to prepare these families for the likelihood that Ramirez would receive a lengthy probated sentence. We started with phone calls to one of the parents of each victim. There were many family and friends justifiably invested in the outcome of this case, but trying to relay the same message to dozens of people would have been inefficient and potentially confusing, so we focused on one member of each family and trusted them to pass the messages further down the line. Doing so lowered the risk of crossing wires and assigned one point of contact for each victim's family and our office.

In this case, given what we had before us, we had to prepare these families for the likelihood that Ramirez would receive a lengthy probated sentence.

The first calls made to Don (Cindy's father), Keith (Madison's father), and Sue (Bishop's mother), went smoothly enough. We introduced ourselves, expressed our condolences, and updated them on the status of the case as plea negotiations began. It cannot be stressed enough that setting expectations with families is paramount in that first contact. The easy thing would be to tell grieving families that you not only share their anger at what happened, but also that you'll put this defendant in prison for as long as humanly possible. The more difficult path is the line between empathizing with their pain and preparing them for the disappointment and anger they may feel if the defendant gets probation.

When we first told Don that probation was not just a possibility but a probability, he told us, "It was like he aimed a gun and fired a 4,600-pound bullet at my daughter." He wasn't wrong for feeling this way. There isn't anything we prosecutors can do to take away all the pain that the families feel. When Ramirez decided to race his friend down River Oaks Boulevard that night, the outcome would have been the same either way. The distinction that Ramirez did not intend to kill his victims was largely irrelevant as we endured a long and understandably angry conversation. "How can he take the lives of my son and two others and be able to walk free on probation?" Sue asked. Again, she wasn't wrong for feeling that way, and explaining the difficulties that came with a decade of probation would do little to ease that pain.

We promised to give Don, Keith, and Sue every opportunity to fully express their grief for the judge and in front of Ramirez when we called them to testify. We also promised that, despite the likelihood of probation, we would argue for the maximum of 20 years in prison. They never stopped wanting guarantees that we couldn't give them, but it went a long way to assure them that we were truly fighting to see justice done for Cindy, Madison, and Bishop.

The punishment hearing

The day of the hearing came, and the courtroom was filled with friends and family for both sides. Don took the stand first to talk about how Cindy was not just his only daughter, but his caregiver as well after he had lost his wife a few years prior. He was always the quickest to anger in our meetings, so we were slightly worried that Don would act out once he found himself sitting feet away from the man who killed his daughter, but he was measured in his delivery and appropriately restrained in his call for the judge to sentence Ramirez to the maximum possible sentence. Sue went next and described in horrifying detail what she felt as she spent weeks watching her son endure surgery after surgery before ultimately succumbing to his injuries.

After both sides closed and argued, Ramirez stood up and braced for the judge's sentence. Despite his youth, his performance on bond, his family's support, and even the recommendation of the Adult Supervision Officer, Judge Beach determined that justice required Ramirez to serve 10 years in prison.

We put Keith on the stand last. Keith had not only lost a partner in Cindy, but he had also lost a teenage daughter in Madison. He tied Don and Sue's losses together and highlighted just how many lives were affected by Ramirez's actions. Keith had always been the calmest and most reserved in our meetings. Despite the obvious pain he was feeling, he never let it show. But on the stand, knowing we were approaching the end of this process, he changed. Keith became openly emotional for the first time recalling how he had hoped to marry Cindy and how much life Madison should have had in front of her.

All the files in our case were opened to the pre-sentence investigator to write the report, so he saw the report from the State's crash analyst, who reported speeds, road conditions, etc. At the hearing, the video of the crash was played for the judge.

(A note about Ramirez's friend, Milton, the one against whom he was racing: At the time of the crash, he was a juvenile, and his case was handled in the juvenile system. After Ramirez plead guilty, Milton's case was "dismissed"—before it was ever even formally filed. He was 15 at the time of the offense.)

As we rested, we weren't sure that it would be enough to convince Judge Elizabeth Beach to choose prison over probation, but we knew we had advanced our cause.

Next, it was defense's turn. We knew Ramirez's goal while testifying would be to show sufficient remorse, empathize with the victims' families, and fully take responsibility for his decision to race that night. When Ramirez testified, he accomplished that. It wasn't until his mother and his preacher testified that we knew prison may be a real possibility.

Both Ramirez's mother and preacher decided to lay at least partial blame for the crash on Cindy. Cindy's autopsy revealed she had low levels of THC (Delta-9-tetrahydrocannabinol, which is found in cannabis) in her blood. With the Ramirez's speed and Cindy being mid-turn when he hit her, there was not anything that she could have done to prevent that collision, but Ramirez's witnesses repeatedly and emphatically declared that Ramirez wasn't the only one who had committed a crime that night. It was a questionable defensive strategy to say the least.

After both sides closed and argued, Ramirez stood up and braced for the judge's sentence. Despite his youth, his performance on bond, his family's support, and even the recommendation of the adult supervision officer, Judge Beach determined that justice required Ramirez to serve 10 years in prison.

While we were surprised, the families of Cindy, Madison, and Bishop were elated. It wasn't the maximum sentence, but 10 years in prison was better than Ramirez leaving the courtroom that day on probation. It was only by preparing them for the worst that we could celebrate the outcome we received in that hearing.

Street racing

This year there have been 66 racing-related offenses filed with our office. Illegal street racing is on the rise and each one of those 66 cases carries with it the potential to end up like Ramirez's case, with the lives of innocent people lost by the selfish actions of reckless drivers. Illegal street racing has become such a problem in Tarrant County specifically that in 2023, Governor Greg Abbott chose to sign two bills targeting the offense into law here in Fort Worth. Even as we wrote this article, another street racing case

claimed the lives of four family members, including two children, in neighboring Dallas County.

This underscores the frequency and magnitude of this issue in the Dallas–Fort Worth area and the importance of both investigating and prosecuting these cases. It's easy to dismiss them as nothing more than kids having fun and making dumb choices, but even the races that end without anyone getting hurt deserve our utmost attention. Without the hard work that Detective Steven Nance and the officers of the River Oaks Police Department put into the investigation, we could not have secured even that initial guilty plea from this defendant. These are challenging cases that require careful, prompt, and detailed investigations. It would have been easy for River Oaks PD to treat this crash as nothing more than a tragic accident, but by putting in the work and treating it as seriously as the manslaughter it was, officers helped us to reach the most just outcome possible.

If we hope to avoid having conversations like the ones we had with Don, Keith, and Sue, then we must ensure that our communities understand how seriously we take these crimes. This was a challenging case and we had to have tough conversations, but in the end, we helped ensure that justice was done. The outcome won't take away the grief of these victims' families or bring back their loved ones, but we hope it will give them a measure of closure and peace knowing that the man who killed Cindy, Madison, and Bishop will spend a significant amount of the next decade in prison. ❇

Unraveling juvenile detention hearings

In 2017 and 2018, *The Texas Prosecutor* journal ran a series of helpful articles on the juvenile justice system, covering topics from apprehension through trial.[1]

By Kathleen Takamine
Assistant Criminal District Attorney in Bexar County

On the whole, not much has changed in juvenile procedure since then. The only significant change is in the article dealing with juvenile certifications.[2] The article talks about *Moon v. State*, which was handed down by the Court of Criminal Appeals in 2014. It has been overruled by the CCA in 2021 in a subsequent case, *Ex parte Thomas*.[3] Despite this change, the 2017 articles on juvenile law are an excellent resource for attorneys to learn the basics. I highly recommend them.

However, as you can tell by this article and the rather dramatic title, there are a few additional juvenile matters that can be explored a little more deeply. One area of the juvenile system that seems to take attorneys by surprise involves detention hearings. In this article, I will fall back on a lot of juvenile practices that occur in Bexar County which, on the whole, is similar to other jurisdictions. However, it is imperative that attorneys get very familiar with the juvenile courts in their counties. Each jurisdiction has its own idiosyncrasies, and it pays to know them well to effectively represent your office or client.

[1] Five articles on juvenile law were written by Sarah Bruchmiller and Hans Nielsen, and they cover the basics of juvenile law, determinate sentencing, certifications, statements, and specialty courts; one additional article on specialty courts in small counties was written by Kristy Armstrong and Tracy Franklin Squires.

[2] www.tdcaa.com/journal/juvenile-certifications.

[3] This was discussed in another article, "Reaching the *Moon* and the Meaning of a Pivotal Juvenile Law Case" written by Joshua Luke Sandoval, which is here: www.tdcaa.com/journal/reaching-the-moon-and-the-meaning-of-a-pivotal-juvenile-law-case. See also the article on the Moon retrial on page 16 in this issue.

The law

The laws governing juvenile detention hearings can be found in the Texas Family Code under Title 3, the Juvenile Justice Code (Family Code Chapters 51–61). One important part of the Juvenile Justice Code in relation to detention hearings is ensuring that juveniles will be kept separate and away from adult offenders. We are, after all, dealing with an individual whom the code defines as a "child."[4]

The Family Code also makes clear the purpose of a separate justice system for juveniles. Not only does the code provide for the safely and protection of the public, but there is also huge consideration for the welfare of the child.[5] I often use the language of §51.01 during voir dire to empha-

[4] For our purposes, "child" and "juvenile" will be used interchangeably. See Fam. Code §51.01(2), where "child" means a person who is:

(A) 10 years of age or older and under 17 years of age; or

(B) 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

[5] Fam. Code §51.01.

size the purpose of the juvenile justice system: the rehabilitation of the child. This is an extremely important factor to keep in mind when working within this system.

So without further ado, let's talk detention hearings. It all begins when a person is taken into custody and taken to a juvenile detention center. Let's consider this scenario.[6]

A hypothetical detention

At about 2:00 o'clock on a Tuesday morning, law enforcement officers were called to the residence of Wendy Smith. She informed officers that her 15-year-old son, Peter, was missing from the home. She also reported that her vehicle was missing and she suspected Peter had taken it without permission. A description of the vehicle and of Peter is then sent out.

Hours later, Officer Jane Barrie stops a vehicle for running through a stop sign. She finds Peter in the driver's seat of the stolen vehicle and takes him into custody for theft of the vehicle and unauthorized use of a motor vehicle.[7] She takes him to the Juvenile Processing Office.[8] The officer contacts Peter's mother to let her know that Peter is in custody for criminal offenses and that she will transport him to the Juvenile Detention Center.[9]

Upon arriving at the detention center, Officer Barrie brings the case before the intake officer.[10] The intake officer acts as the gatekeeper of the detention center and has the authority to detain or release Peter. This officer must first make two determinations: whether Peter is a child as defined by the Family Code and whether there is probable cause to believe that he has engaged in delinquent conduct or conduct indicating a need for supervision.[11]

As to age, the Family Code defines "child" as those who are 10 years of age or older and under 17 years of age, or persons 17 years of age or older and under 18 years of age who are alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision, as a result of acts committed before turning 17 years old.[12] The law enforcement officer should include this information in her offense report.

To determine probable cause,[13] the intake officer will consider offense reports and any other supporting documents submitted by the law enforcement officer. If there is a directive to apprehend (essentially, an arrest warrant[14]), probable cause has already been established through the directive. I often advise officers to obtain an arrest warrant[15] if they are taking into custody

One important part of the Juvenile Justice Code in relation to detention hearings is ensuring that juveniles will be kept separate and away from adult offenders. We are, after all, dealing with an individual that the code defines as a "child."

[6] Any person or situation mentioned in this scenario is fictional and not based on any actual case.

[7] Fam. Code §52.01(3), which allows law enforcement officers to take a child into custody if they have probable cause to believe that the child has engaged in conduct that violates a penal law or ordinance of any political subdivision.

[8] A Juvenile Processing Office, or JPO, is an office designated and approved by the county's juvenile board to be used for temporary detention of a child taken into custody. See Fam. Code §52.025. This is one of the places that a law enforcement officer is allowed to bring a child in custody. See Fam. Code §52.02 for a list of all the places where a child in custody may be taken.

[9] Fam. Code §52.012(b) states that "a person taking a child into custody shall promptly give notice of the person's action and statement of the reason for a taking the child into custody."

[10] In Bexar County the juvenile board placed the responsibility of supervising the detention center with the Juvenile Probation Department, so the intake officer in Bexar County will be a probation officer who has to be on duty 24 hours a day, seven days a week. See Human Resources Code §152.0212.

[11] Fam. Code 53.01. Juvenile law does not charge a child with a crime. It alleges that the child engaged in delinquent conduct, the conduct being the criminal offense.

[12] Fam. Code §51.02(2).

[13] Fam. Code §53.01(a) requires that the determination of probable cause be done by the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the board.

[14] Fam. Code §52.015: an order issued by a juvenile court on the request of law enforcement or a probation officer. It must be based on probable cause.

[15] The phrase can be used interchangeably with Directive to Apprehend. Just because it's titled as "arrest warrant" or "affidavit for arrest warrant" will not deem it invalid in juvenile court.

a child who is alleged to have committed an offense in the past. With an arrest warrant, there is less chance that intake officers will refuse to detain a child brought before them.

If the intake officer finds that Peter is not a child or that there is no probable cause, Peter will not be detained any further. Of course, a "no probable cause" finding does not preclude the law enforcement agency from filing the case later on a non-arrest basis. It would depend on whether more evidence can be submitted that will establish probable cause as well as prove the case beyond a reasonable doubt. If the agency cannot establish the age of the child as within the jurisdiction of the juvenile courts (10–16 years old), the case cannot be filed in juvenile court. Cases with suspects 17 and older can be filed in the adult system.

If the intake officer finds that an offender is not a child or that there is no probable cause, s/he will not be detained any further. Of course, a "no probable cause" finding does not preclude the law enforcement agency from filing the case later on a non-arrest basis.

In our scenario, the intake officer finds that Peter is a child and that there is probable cause for the offenses charged.

The decision to detain or release Peter does not end there. The intake officer will have to find if other factors are present to detain him. If the intake officer determines that none of these particular factors are present, Peter must be released because there is a presumption for release in the Texas Family Code.[16] If released, the intake officer can place Peter on conditions of release to insure his appearance in court at later proceedings.[17]

These additional factors are found in Family Code §53.02(b), which states that a child in custody may be detained only if:

1) he is likely to abscond or be removed,

2) there is no adequate supervision of, care for, or protection for the child if released,

3) there is no parent, guardian, custodian, or other person able to bring the child to court,

4) he is a danger to himself or the public,

5) he has been previously found to be delinquent or previously convicted of an offense and sentenced to jail or prison, and is likely to reoffend, or

6) he is being charged with an offense involving the use, exhibition, or possession of a firearm.

With regard to the last factor, the intake officer does not have discretion in the matter. If the offense involves a firearm, only a judicial official can decide to release a child from detention.[18]

In our hypothetical, the intake officer finds that Peter is likely to abscond and that he has no adequate supervision. He is thus detained in the juvenile detention center.

A hearing before a judge

The case is then set for a detention hearing before a juvenile court judge; it must be set no later than the second working day after Peter was taken into custody.[19] If Peter had not been detained in a certified juvenile detention facility and was instead being held in a county jail or other authorized facility, the detention hearing must be held within 24 hours of him being taken into custody.[20]

Peter's parent, guardian, or custodian must be notified of the detention and told when and where to appear for the detention hearing.[21] If possible, an attorney is appointed to represent him during the detention hearing[22] and he is taken before the juvenile judge or an associate judge.[23] This attorney may or may not end up

[16] Robert O. Dawson, *Texas Juvenile Law*, p. 98 (Texas Juvenile Probation Commission, 9th ed., 2008).

[17] Fam. Code §53.02(a).

[18] Tex. Fam. Code §53.02(f): In fact, even law enforcement does not have discretion regarding firearms cases. Officers are required, under this section, to bring the child to the detention center and not simply issue a warning notice or release the child to parents or guardians.

[19] Tex. Fam. Code §54.01(a).

[20] Tex. Fam. Code §54.01(q). This happens in a case where there is not an available juvenile facility in the area.

[21] Tex. Fam. Code §54.01(b). Reasonable notice, oral or written, must be given to the parent, guardian, or custodian of the child.

[22] Tex. Fam. Code §54.01(b-1).

[23] The parties may object to the hearing being before an associate judge. If one party objects, then the hearing must be held before the juvenile judge.

being the attorney of record in the criminal case once it is filed. If it was not possible to appoint an attorney for the detention hearing, the judge will still conduct the hearing so as to not delay the proceedings. Once an attorney is appointed or hired, if the child had been detained at the initial detention hearing, the attorney is entitled to request a *de novo* detention hearing within 10 days of being appointed or hired.[24]

At the detention hearing, the presiding judge must ensure that all necessary parties are present. If Peter's parent, guardian, or custodian is not present, the judge will appoint a guardian ad litem to act as guardian.[25] At this hearing, the judge will make another determination of probable cause, usually by considering the same documents submitted at the detention intake. If the judge does not find probable cause, the judge will order Peter's release. Again, like the findings from the detention intake, a finding of no probable cause does not preclude the case being filed on a non-arrest basis by the law enforcement agency.

If the judge finds probable cause, the judge will go over the five other factors in §53.02(b) that were considered by the detention intake officer:

1) the child is likely to abscond or be removed,

2) there is no adequate supervision of, care for, or protection of the child if released,

3) there are no parent, guardian, custodian, or other person able to bring the child to court,

4) he is a danger to himself or the public, or

5) he has been previously found to be delinquent or previously convicted of an offense and sentenced to jail or prison and is likely to reoffend.

Note that the judge has authority to release a child who is accused of possession, use, or exhibition of a firearm and is not subject to a mandatory requirement of detention.[26]

[24] Fam. Code §54.01(n).

[25] Fam. Code §54.01(d).

[26] Fam. Code §53.02(f),

As with the detention intake officer, the judge must find that one or more of the conditions in §53.02(b) is true to keep Peter detained, or the judge will have to release him. If he is released, the judge is authorized by the Family Code to place conditions on his release.[27] To make this determination, the judge may consider written and oral reports and statements and testimony from anyone in the hearing, including reports on Peter's behavior while he was detained. The judge may ask for recommendations from the juvenile probation officer, State's attorney, and defense attorney.

These hearings tend to be informal with a lot of discretion given to the judge to hear any testimony, including hearsay.[28] A court reporter is not required but may be requested for a detention hearing.[29] In some instances, when the defense attorney is unable to make the hearing, judges have allowed the hearing to continue—this is based on the understanding that it's better to hold a hearing than postpone it for the attorney to appear or the judge to appoint an attorney.[30] However, in this current age of video conferencing, some judges have allowed defense counsel and other parties (including parents and Child Protective Services [CPS] caseworkers) to appear remotely. Or the judge may appoint another attorney to sit in for the missing attorney.

These hearings tend to be informal with a lot of discretion given to the judge to hear any testimony, including hearsay.

As a prosecutor in these hearings, I pay close attention to the probation officer's reports and testimony. Any reports of Peter running away from home or being disruptive at school can be used to show a history of absconding, that he is not letting himself be adequately supervised, or even that, by running away, he is a danger to himself. If the case is a particularly violent or disturb-

[27] Fam. Code §54.01(e). Remember, the preferred outcome is release. The code section is clear that the child must be released unless these factors are found.

[28] Dawson, *Texas Juvenile Law*, pp. 101–102.

[29] Fam. Code §54.09 excludes juvenile detention hearings from the requirement of having a record made. As a rule, any party may request that a record be made.

[30] Dawson, *Texas Juvenile Law*, p. 101. If the child is detained, the defense attorney can request another detention hearing.

ing one, I will argue that the facts of the case require continued detention. Ultimately, it will be up to the judge to decide the result.

In these hearings, Peter will also be given a chance to speak if he wishes. If he says anything during the hearing, those statements are not admissible in any subsequent hearing.[31] Usually in this circumstance, the judge will tell him to talk to his attorney first before making any kind of statement to the court.

Notice that there has been no mention of bail or bond during detention hearings. In Texas, a juvenile does not have a constitutional right to a bond.[32] The Family Code itself is completely silent on this matter. Courts have stated that juveniles do not have this right, basing their reasoning on the basic purposes of the Juvenile Justice Code, that the system was created for the welfare of the child.[33] I find a more compelling argument in Robert Dawson's *Texas Juvenile Law* publication, which points out that a Family Code's protective procedural and substantive provisions (i.e., presumption for release) tend to give a juvenile more protection than what is available through the bail system.[34] Needless to say, Peter will not get a bond.

Notice that there has been no mention of bail or bond during detention hearings. In Texas, a juvenile does not have a constitutional right to a bond. The Family Code itself is completely silent on this matter.

Going back to the hearing, the judge has made the same determination that the intake officer found, that Peter is likely to abscond and does not have the adequate supervision[35] to be released. So what happens next? There are several factors that come into play.

Subsequent hearings

Peter is entitled to subsequent detention hearings every 10 working days while he is detained.[36] Peter can waive his subsequent detention hearings, but the waiver is valid only if it is voluntary, in writing, and signed by Peter and his attorney. Peter also must be fully informed of and understand the consequences of waiving this right.[37]

If the juvenile does not waive subsequent detention hearings, the judge must consider all the same factors as during the initial detention hearing, with the exception of a finding of probable cause (which is done only during the initial detention hearing). The hearings will continue every 10 days until Peter is released, his case is resolved, or the petition that charges him with a criminal offense has not been timely filed.[38] If a petition has been timely filed, the detention hearings continue every 10 days so long as the judge decides to continue detention.

---

31 Fam. Code §54.01(g).

32 *Ex parte D.W.C.*, 1 S.W.3d 896 (Tex.App.–Beaumont 1999, pet. denied).

33 See *S.D.G. v. State*, 936 S.W.2d 371 (Tex.App.–Houston [14th Dist.] 1996, writ denied), *Ex parte D.W.C.*, 1 S.W.3d 896 (Tex.App.–Beaumont 1999, pet. denied).

34 Dawson, *Texas Juvenile Law*, p. 105.

35 In regard to arguing about the lack of adequate supervision, we have found it better to argue that the child is not letting him or herself be adequately supervised as opposed to arguing that the household does not have adequate supervision. It prevents parents from becoming really defensive during these hearings.

36 Fam. Code §54.01(h).

37 Fam. Code §54.01 (h); Tex. Fam. Code §51.09.

38 Fam. Code §54.01(p). See also "The Basics of Juvenile Law" from the January–February 2017 edition of *The Texas Prosecutor*. In a nutshell: The State has 15 working days to file a case alleging a misdemeanor, state jail felonies, and third- and second-degree felonies. The State has 30 working days to file a petition for first-degree felonies, capital felonies and aggravated controlled substance felonies. If these deadlines are not met, the judge must release the child from detention. This does not preclude the State from ever filing a case, but a good practice is for prosecutors to keep a close eye on filing deadlines.

Simple and complex at the same time

Detention hearings are frequently held in every jurisdiction. It is easy to learn the process by simply being a party to them. I would consider them one of the easier hearings due to their informal nature, but they also have complexity, as all parties must consider the big picture, not only what is in the case. I have found this to be true in every aspect of practicing in the juvenile system, something you too will see when you delve deeper into each case and your practice. ❇

Beloved longtime TDCAA executive director retires

After 22 years at the helm of the Texas District & County Attorneys Association, Executive Director Rob Kepple is retiring at the end of 2024.

To celebrate Rob's longtime service at TDCAA and his next adventure in retirement, we gathered our favorite memories of Rob over the past two decades.

Rob Kepple
TDCAA Executive Director in Austin

In one of my rookie years at TDCAA, Rob took over as Executive Director. He and I were both following the World Cup at the time. During one particular game, he suggested we go to The Tavern down the road for a beer and watch the second half. I was fresh out of college, having a beer with my new boss on a late-afternoon work day. I thought that was so cool! It wasn't the beer, it was the personal connection. Rob's ability to make a connection with each member of his staff has kept us working hard and wanting to stay a part of the TDCAA family.

—Andrew Smith, TDCAA Financial Officer

It was September 2005 at Austin's Convention Center Job Fair for evacuees from Hurricane Katrina. I was with three or four ladies waiting to interview for a temporary, part-time receptionist position at TDCAA. A tall, slender, very dapper man walked into the makeshift cubicle; he was looking for someone to cover phones while the staff was out of town for its Annual Conference. He stood in front of us with a warm, inviting smile, then said, "Hi, my name is Robert Kepple. Let's get started." He interviewed me last. I gave him my resume and apologized for not being appropriately dressed for the interview (I had on black trousers and a white buttondown blouse from Walmart), but I had nothing else. He then said, "When you meet everyone in the office tomorrow morning at 8, no one is going to care, and you will be just fine." It was the most heartfelt, sincere, and quickest interview I have ever had. I've been at TDCAA ever since.

—Dayatra Rogers, TDCAA Database Manager & Registrar

My favorite memory of Rob is when we hosted a summer board meeting at Vista Brewing. He mentioned that his "girlfriend" (now wife), Jennie, would join us later. The moment he saw her walk in, his face lit up like a kid in a candy store—he was just so excited to have her there. It was the most beautiful thing. It was a reminder that another chance does it exist, that your person is out there, and you don't have to settle.

—LaToya Scott, TDCAA Meeting Planner

While it has been a serious pleasure to work with Rob Kepple for so many legitimate reasons, my personal favorite "boss moment" was Rob's granting me a nickname. Early on in my TDCAA tenure, at a staff meeting Rob referred to me as "TDCAA's Road Warrior." I was grateful the task of nicknaming me had not been left to former Training Director Erik Nielsen, who would have coined something less complimentary (but doubtlessly permanent). While comparisons to Mel Gibson and one of his famous roles might explain why I like the name, the real reason is that it clearly communicated that my boss completely understands the effort and sacrifice I make to the team. Using that moniker is him saying, "Thank you and good job." So on his retirement, I don't

have a clever nickname to grant, but to Rob I want to say, "Thank you and good job."

—W. Clay Abbott, TDCAA DWI Resource Prosecutor

Rob's accomplishments over the years stretch far beyond putting together a staff of 17 and overseeing a multimillion-dollar budget. In the years he has spent at TDCAA:

- He was TDCAA's first official "Penal Code Ranger," a badge-carrying honor he passes on to prosecutors who spend a session working out of TDCAA HQ with the legislature.
- He presented Legislative Updates all over the state, including in towns so small, the hotel TVs had antennas with aluminum foil on them and the roads had feral hogs that were larger than an economy rent car. (I was there for this.)
- He ascended Mount Everest to its base camp.
- He regularly fooled young staff members into falling for his "try to grab my hand" dare, which led to a demonstration of his martial arts skills. (I was dropped like a bag of dirt. More than once.)

Rob has demonstrated and taught so many things to his staff members, including how to work hard but still make time for the important things in life, how to laugh whenever possible, and how to be a family. From snowtubing in New Mexico to tubing down the Guadalupe River, I've loved every minute of it. Here's to Rob's next great adventures! We'll never forget the adventures we've had.

—Diane Beckham, TDCAA Senior Staff Counsel

I had been working at TDCAA only a few weeks when an ice storm blew through overnight. Newly transplanted from Iowa, I scraped off my car as I normally would and drove slowly to the office—which I found nearly deserted. Only Rob was inside. "What are you doing here?" he asked, seemingly surprised to see me.

"It's Tuesday," I answered. "It's a workday."

"The office is closed," he told me.

"Oh," I said, confused. "Why?"

He looked at me strangely. "Because of the ice storm."

"But the roads are fine," I said. "Only the sidewalks are bad."

Rob smiled. "As an Iowan, you know that, and as an Ohioan, I know that—but people down here do not know that. The whole city is shut down."

We shared a good chuckle (yes, at the expense of Texans, who don't have to deal with bad winter weather most of the time), just two Midwesterners who both call Texas home. I have long been grateful for Rob's practicality (which comes from his Ohio roots), as well as his hospitality (pure Texas), as he is truly the best of both worlds. I will dearly miss these things—and so many more of his wonderful traits.

—Sarah Halverson, TDCAA Communications Director

I think one of my favorite memories of Rob is from our 2024 Annual Conference while on Galveston island's Historic Pleasure Pier. Not long after conference attendees arrived at the pier's amusement park, Rob took to the sky on the Texas Star Flyer, where he was suspended more than 230 feet in the air and swinging out over the Gulf of Mexico. As I watched him from below with my two feet planted firmly on the ground, it reminded me of what a courageous, strong, and fearless leader he has been for our TDCAA staff and for Texas prosecution.

I would like to say how thankful I am to Rob for choosing me to serve as TDCAA's Director of Victim Services and how it has been an absolute pleasure to work for TDCAA and our members for the past 10 years.

—Jalayne Robinson, TDCAA Victim Services Director

My favorite moments of Rob are when he is in such a good mood (which is most of the time) that he does a little sidestep down the hall while snapping his fingers and singing a tune (usually "Hang On Sloopy"). He is usually singing when he brings me the membership letters he has signed. It always makes me smile.

—Kaylene Braden, TDCAA Membership Director & Assistant Database Manager

It is amazing to realize how much of our state's body of law has been touched by Rob. He has had a hand in drafting, debating, or fixing many of our most important state laws, whether it be DWIs or dog maulings or the death penalty. In every courthouse in this state, lawyers and judges operate on a daily basis within the context of laws and systems that Rob helped to create or improve, and the people of Texas would be much worse off if not for his contributions. ❇

—Shannon Edmonds, TDCAA Director of Governmental Relations

Rob has demonstrated and taught so many things to his staff members, including how to work hard but still make time for the important things in life, how to laugh whenever possible, and how to be a family.

Texas District & County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701

PRSRT STD
U.S. POSTAGE
PAID
AUSTIN, TEXAS
PERMIT NO. 1557

RETURN SERVICE REQUESTED