The Texas Prosecutor

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"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

Reaching the *Moon* and the meaning of a pivotal juvenile law case

We choose to go to the moon in this decade and do other things not because they are easy but because they are hard," —President John F. Kennedy, 1962.

By Joshua Sandoval
Assistant Criminal District Attorney in Bexar County

With these words, President Kennedy inspired a nation, promising that these Unites States of America would land an astronaut on the moon within the decade. With great determination, the nascent space program was able to visit the moon in less than seven years.

Today, the Texas Court of Criminal Appeals has visited *Moon* not once, but twice in 15 years.[1] Though the high court's journey has been far less publicized and perhaps slightly less thrilling, its analysis of this important case has had a monumental impact on juvenile law in Texas.

The scope of this article

This case contains a vast amount of information. Simply discussing the procedural posture of a case that has spanned well over 20 years can be quite the endeavor, let alone analyzing the pertinent facts and law therefrom. It is noteworthy that the Court of Criminal Appeals has analyzed different points of law both times it has heard Cameron Moon's appeal. As such, the focus of this article will be the most recent iteration of *Moon* and what changes, if any, we can expect as Texas prosecutors. As a secondary focus I will also navigate some necessary background and reasoning. Additionally, I will highlight practical considerations, such as the process and considerations leading up to a waiver and transfer hearing.

Certification and transfer

Before addressing the rather unique history of this case, now is a good time to briefly go over the law regarding a motion

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Invitations are out for the TPS Class of 2023!

Invitations to join the Texas Prosecutors Society (TPS) in the Class of 2023 are out, so keep an eye on the mail!

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

The Society was formed in 2010 as a way to honor those who have supported excellence in our profession and esteemed allied professionals, as well as raise funds for an endowment to support TDCAA's training efforts. The Foundation Board nominates people to join TPS, and membership is by invitation only.

TPS members gather each year for a reception the same week as our Elected Prosecutor Conference; this year, it will be held on Wednesday, November 29 in Frisco.

Jalayne Robinson, TDCAA Victim Services Director

One of the TDCAA programs the Foundation supports is our effort to train victim assistance coordinators (VACs). That job is ably done by **Jalayne Robinson**, a former VAC in the Wood County CDA's Office. Jalayne has done a marvelous job to support our members when they are in need and loves to get calls from y'all. I want to give her a shout-out just so she knows people talk about her behind her back—like the glowing letter I recently got from Milam County and District Attorney **Bill Torrey**, who offered his praise for Jalayne after she jumped in to assist his staff with a recent line-of-duty death. Well done, Jalayne! ❇

Recent gifts to the Foundation*

Traci Bennett
Kenda Culpepper
Michael Guarino II *in memory of John Neal*
Wally Hatch
Lucinda Hinton *for the Mike Hinton Memorial Scholarship*
Michael Jarrett
Rob Kepple *in memory of Jeff Van Horn*
Rob Kepple *in memory of Judy Whitworth*
Bud Kirkendall *in memory of Jeff Van Horn*
Lance Long
Barry Macha *in memory of John Neal*
Sonny McAfee
Beth Toben
John Wakefield II

* gifts received between April 8 and June 2, 2023

About *The Texas Prosecutor*

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Rule 3.09 proposal goes to the State Bar board

The State Bar Committee on Disciplinary Rules and Referenda (CDRR) has voted to send a proposed amendment to Rule 3.09 to the State Bar Board for approval.

By Rob Kepple
TDCAA Executive Director in Austin

At its May 3 meeting, the CDRR approved the proposed amendment published in the January 2023 edition of the *Bar Journal* with one change recommended by prosecutors. If the board approves, the Supreme Court adopts the proposed changes, and the rule passes a referendum vote, Rule 3.09 would be amended to include a new ethical duty of prosecutors when encountering new and credible information creating a reasonable likelihood of innocence to notify the defendant, the defendant's counsel, the convicting court, and a statewide entity that examines and litigates claims of actual innocence (read: Innocence Project of Texas). If the new information relates to a conviction in another jurisdiction, the duty to notify is limited to the appropriate prosecutor in the convicting jurisdiction.

Significantly from a prosecutor's perspective, this proposed amendment does *not* include a duty to investigate or a duty to remedy, two things in the American Bar Association (ABA) model rule on the subject, Model Rule 3.8. Prosecutors who were involved in the CDRR process generally were fine with a duty to disclose, as that mirrors duties we already have under the Michael Morton Act, but they felt that investigation was often not possible (because of resources and potential conflicts) and in any event best left to other entities, such as law school actual innocence clinics and the Innocence Project.

One significant change was made to the proposed rule at the May 3 meeting: Proposed Subsection 3.09(f)(1)(iii) relating to post-conviction discovery was changed at the request of prosecutors; it now reads, "[A prosecutor shall] cooperate with the defendant's counsel by providing all new information known to the prosecutor as required by the relevant law governing criminal discovery."

We anticipate that the State Bar board will consider this amendment to Rule 3.09 at a fall meeting. We may see it in a referendum to Bar members early next year. I want to take this chance to thank all the prosecutors who served on our ad hoc Rule 3.09 committee. It has been a long process, but they stuck with it. I also want to thank Denton criminal defense attorney **Rick Hagen**, who served on the CDRR during this process and was an honest broker and thoughtful participant.

The proposed amendment (without the change noted above) can be viewed at the Texas Bar's website, texasbar.com.

Legislative A-Team

"You must be present to win." That old rule about raffles most certainly applies to a legislative session. If you decide to show up to testify in a legislative committee for or against a bill, I would suggest it is already too late to make a difference.

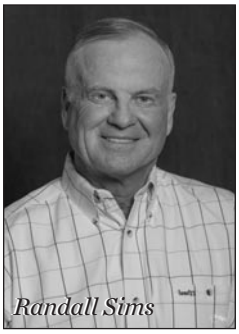
And that was doubly true this past session when prosecutors were under the microscope like never before and you, through TDCAA's Compensation Committee, were seeking enhancements to assistant and elected prosecutor pay. I am happy to report that you had the A-Team in Austin early and often for meeting after late-night meeting. Those behind-the-scenes

work sessions molded the issues of the day and produced some real results when it comes to compensation. I want to recognize and thank **Jennifer Tharp**, CDA in Comal County, and **Staley Heatly**, 46th Judicial District Attorney, for chairing the TDCAA Legislative Committee and spending countless hours roaming the halls of the big pink building. In addition, **Jacob Putman**, CDA in Smith County; **Jack Roady**, CDA in Galveston County; **Philip Mack Furlow**, 106th Judicial District Attorney; **Elmer Beckworth**, DA in Cherokee County; and **Eric Carcerano**, ADA in Chambers County, were in Austin regularly to work behind the scenes on issues of importance to you. In addition, thanks to the offices that sent folks who were here pretty much full time: **Paige Williams**, ACDA in Dallas County; **Lindy Borchardt**, ACDA in Tarrant County; and **Tiana Sanford**, ADA in Montgomery County. And I must mention the great work of **Megan Molleur**, who served as the Texas Association of Counties (TAC) liaison to TDCAA and put in countless hours on your behalf, providing critical support for your efforts in the TAC family of local officials.

Finally, I hope you all appreciate the efforts of **Shannon Edmonds**, TDCAA's Governmental Affairs Director. Shannon is a master of the legislative arena, and his reputation at the capitol for diligence and honest dealing serves you very well. Shannon's "end game" may be his finest work session after session, when the Memorial Day everyone else checks out in favor of barbecues and a long weekend, whereas Shannon is at his desk working with legislators on the bills that are being quietly amended and changed behind closed doors in the final hours of the session. An awful lot of good law comes of that work (as well as a lot of avoidable problems solved!). Thanks, Shannon, for your dedication to the profession.

Randall Sims retires

I want to take a moment to honor **Randall Sims**, the 47th Judicial District Attorney in Amarillo, pictured at right, upon his retirement in June. Randall has served the profession of prosecution in many roles during his career. Randall, an Eagle Scout and valedictorian of his Wellington High School class, knew when he finished law school at Texas Tech that he wanted to serve his community as a criminal prosecutor. He started in the Potter County Attorney's Office, then was elected as the 100th Judicial District Attorney, where he served for six years. He retired in June as the 47th Judicial District Attorney after serving for the last 11 years.


Randall Sims

It would take up way too much space to detail all of Randall's service to prosecutors through TDCAA. He was the TDCAA Board President in 2017, and during his long career he also served as a TDCAA Regional Director on three separate occasions. He was also a member of the TDCAA Nominations, Finance, Long Range Planning, Legislative, and Training Committees; the Special Prosecution Unit (SPU) President and an SPU Board member; and a member of the statewide DWI Prosecutor Task Force.

His career of service to the profession has been outstanding, but here is why we are so indebted to Randall: He always answered the call in a crisis. On more than one occasion when a prosecutor's view was needed at the capitol, Randall would be here and ready to jump right in. I have much appreciation for Randall's willingness to wade into the protracted negotiations over the journalist shield law in the late 2000s (along with former Ector County DA **Bobby Bland** and Wichita County CDA **Barry Macha**). It was a huge effort with a reasonable result that could not have happened without his selfless service. Thank you, my friend, as you ride off into the sunset with your wonderful wife, Donna. You deserve it!

Randall's career of service to the profession has been outstanding, but here is why we are so indebted to him: He always answered the call in a crisis.

Roy DeFriend honored

Congratulations to **Roy DeFriend**, the County and District Attorney in Limestone County, who was recently honored as a distinguished alumni by Navarro College. Roy, the valedictorian of the Groesbeck High School Class of 1983, graduated from Navarro College in 1985 and went on to graduate from the Baylor School of Law. Roy was honored for his career of service as an assistant and then the elected prosecutor in his home county, as well as for his many "person of the year" awards from some great outfits: Central Texas Chapter of Mothers Against Drunk Drivers, Texas and Southwestern Cattle Raisers Association, Texas Parks and Wildlife Department, and the Groesbeck Chamber of Commerce. Thanks for your service, Roy—you deserve this honor!

We all remember the drudgery of dealing with COVID-19 and the changes it brought to our lives and our work. So it was an absolute delight when Rod Ponton, County Attorney in Presidio County, made a court appearance disguised–against his will–as a cat.

A new USA for the Eastern District of Texas

On May 10, **Damien Diggs** was sworn in as the United States Attorney for the Eastern District of Texas. He takes the helm from **Britt Featherston**, the acting USA with whom we have worked so very well on the CDRR Rule 3.09 issue. Diggs has served as an Assistant U.S. Attorney in the Northern District of Texas since 2018, where he was assigned to the criminal division's violent crime section prosecuting firearms violations and fraud matters. Prior to that, he worked as an assistant U.S. attorney in Washington, D.C., from 2012 to 2018. From 2007 to 2012, he was an attorney with the Department of Education. Diggs was also an associate at Hogan & Hartson (now Hogan Lovells) for two years before beginning his service with the federal government. It is great to see so many experienced criminal prosecutors filling the ranks of United States Attorneys in Texas. Welcome, Mr. Diggs; we look forward to working with you.

Rod "The Cat Lawyer" Ponton brought us joy

We all remember the drudgery of dealing with COVID-19 and the changes it brought to our lives and our work. So it was an absolute delight when **Rod Ponton**, County Attorney in Presidio County, made a court appearance disguised—against his will—as a cat. That candid moment, which has been joyously viewed by tens of millions worldwide, allowed us to laugh with Rod and at ourselves as we all struggled with virtual meetings, court hearings, and communications.

It is only fitting that the Texas Senate honored Rod's impressive career with Senate Resolution 626. The resolution both recounts Rod's long service in the legal field as well as memorializes a much-needed lighthearted moment in a difficult time. Read the resolution at https://capitol.texas.gov/tlodocs/88R/billtext/pdf/SR00626I.pdf#navpanes=0; relive Rod's moment as "the Cat Lawyer" at www.youtube.com/watch?v=lGOofz-ZOyl8.

The Baylor Law podcast

If you are like me, you are constantly on the lookout for a new podcast series to listen to when you're in the car. If you want to hear what is going on in Texas criminal law, let me suggest the Baylor Law Criminal Law Society Podcast. There are dozens of great interviews of prosecutors, defense attorneys, and judges that highlight what is happening in our state. There are more than 50 published episodes, and the hosts crisscross the state in search of unique stories in criminal law. Find it on Spotify. ❇

State v. Espinosa, probable cause, and common sense

You probably remember the U.S. Supreme Court case of *Illinois v. Gates*[1] from law school (maybe even the holding), but you may not remember what the big deal about it was.

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

In *Gates*, the police received an anonymous letter that Lance and Sue Gates were periodically traveling to Florida (Lance flying, Sue driving) and driving back with $100,000 of marijuana in the trunk. A detective corroborated that Lance was flying there, meeting Sue, and the two were driving back to Chicago together, and he obtained a warrant. A search of their car when they arrived home revealed over 350 pounds of marijuana, which I assume they claimed was for personal use.

The problem was with the existing probable cause standard for anonymous tips and confidential informants, the *Aguilar-Spinelli*[2] two-pronged test: The magistrate issuing the warrant must be informed of the reasons to support the conclusion that such an informant is reliable and credible, and the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information. That wasn't possible here where the writer of the letter was completely unknown, but the technical application of that rigid rule here seemed to fly in the face of common sense. The Supreme Court agreed and ditched the *Aguilar-Spinelli* two-prong test in favor of the totality of the circumstances test used in other probable cause determinations.

Since then, the language in *Gates* regarding the "practical, common-sense judgment called for in making a probable-cause determination" and the "common-sense judgments of laymen" have served as a touchstone in judicial opinions analyzing probable cause determinations as a "probability and not a *prime facie* showing of criminal activity." The Court of Criminal Appeals did so most recently in *State v. Espinosa*,[3] which discussed a probable cause determination in a warrantless arrest for DWI.

Background

On August 20, 2019, Ashley Fajkus and her cousin were driving past a local elementary school at about 3:15 p.m., when the pickup line of cars waiting for the kids' dismissal was starting to form on the right side of the road. The cars were bumper to bumper, a sight with which all parents are familiar. Ashley noticed one of the drivers in a vehicle in line had her head hanging at an odd angle, and she became concerned that the woman may be having a medical emergency. Ashley and her cousin pulled over and attempted to open the door to the car, but the doors were locked and windows up, although the vehicle was still running and the car was in park. The women began pounding on the windows to rouse the driver, and another person in line called 911. The driver, Jennifer Espinosa, eventually awoke and opened her door; Ashley later said that Espinosa "smelled like a bar." Espinosa was initially unresponsive,

then spoke after a few minutes but was difficult to understand. She got out of the car and asked Ashley to drive her home. According to Ashley, Espinosa "couldn't walk a straight line."

A teacher from the elementary school approached and told Espinosa that police were on their way, causing her to go from lethargic to slightly panicked. The teacher never saw Espinosa in her vehicle. She later testified that the line begins forming at around 3:00 p.m., although this year it had begun forming before that, and that Espinosa's car was fifth in line. Espinosa told the teacher that she was headed to a local middle school.

A Houston police officer arrived and observed that Espinosa had slurred speech, was disoriented, was confused about where she lived, was unsteady on her feet, had "glossy" red eyes, and had a strong odor of alcohol emanating from her person. Four empty wine bottles were found in her car. Nobody had seen Espinosa driving the vehicle, but she told the officer that she was coming from her house, then said she was coming from her friend's house and was headed to work. She told the officer that she refused SFSTs and refused a blood sample, and she was arrested without a warrant for DWI.

Nobody had seen Espinosa driving the vehicle, but she told the officer that she was coming from her house, but then said she was coming from her parents' house and was headed to work.

In the trial court, Espinosa filed a pretrial motion to suppress "all evidence seized and obtained" as a result of her "illegal detention, search[,][4] and seizure," claiming her warrantless arrest was unsupported by probable cause because neither the arresting officer nor any witness saw her drive or operate her vehicle. At the hearing, the arresting officer admitted that nobody on the scene saw the defendant operating the vehicle and that nobody knew how long she had been waiting in the pickup line, agreeing that she might have arrived at 10 a.m. or even the night before for all he knew (adding that he did not find that likely). The two civilian witnesses were also called, which is good work by the Houston Police Department and the Harris County DA's Office.

The trial court granted the suppression, finding there was "insufficient probable cause to arrest the defendant based on the State's failure to establish the defendant 'operated' a motor vehicle as required for the offense of driving while intoxicated." The trial court's ruling relied heavily on the Third Court of Appeals case of *Tex. Dep't of Pub. Safety v. Allocca*,[5] which held that evidence of "operation" is insufficient unless there is "at least one additional factor, other than the driver being asleep with the engine running, that indicated the driver had attempted or intended to drive the vehicle."

The State appealed to the Fourteenth Court of Appeals. The opinion of the Fourteenth Court noted a number of cases in which reviewing courts had found probable cause under the totality of the circumstances despite the fact that an officer did not see the accused operating the motor vehicle.[6] The Fourteenth Court found each of these cases distinguishable: Unlike those cases, Espinosa:

> "did not admit to drinking, there were no positive breathalyzer results or failed field sobriety tests to suggest if, when, and how much, if any, alcohol was consumed, none of the witnesses knew how long [the] appellee's vehicle was in the location where she was observed, no one saw [the] appellee drive or operate her vehicle, and the testimony indicates [the] appellee did not express an intent to drive or operate her vehicle."

The Fourteenth Court upheld the trial court's ruling, saying that the circumstantial evidence was insufficient to establish a temporal link between Espinosa's intoxication and her driving.

Justice Kevin Jewell dissented, citing evidence that Espinosa indicated she had been driving and that she was found in her parked vehicle on a public roadway with the engine running in a school pickup line that had begun to form about 15 minutes before she was found. Justice Jewell stated that the majority erred in relying on legal sufficiency cases and essentially "conflate[d] the probable cause inquiry with a legal sufficiency analysis." An opinion with justices of a court of appeals in disagreement on a material question of law is one of the Texas Rules of Appellate Procedure's stated "reasons for review"[7] for the Court of Criminal Appeals, and review they did.

As the Court of Criminal Appeals saw it

Harris County Assistant District Attorney Bridget Holloway petitioned the Court of Criminal

Appeals on behalf of the State, arguing Justice Jewell's point about the majority conflating a legal sufficiency and probable cause analysis, and that the majority erred in finding no temporal link was established.

Espinosa responded that the majority had correctly held that her statements to the officers and witnesses were not admissions that she had recently operated the vehicle and there was no evidence of when she arrived, which meant that she could have driven there at any time, including before she became intoxicated.

The Court of Criminal Appeals reversed. Writing for a unanimous court, Judge Hervey disagreed with Espinosa that her statements could not be considered admissions that she had recently operated her vehicle. Although the arresting officer had agreed that it was possible that Espinosa had arrived in the pickup line long before she was seen there, Judge Hervey noted that the video admitted into evidence didn't support that, and that Espinosa "never indicated that she arrived in her vehicle hours or even a day before she was approached." Rather, her vehicle was fourth or fifth in a line of cars that had begun to form 15 to 30 minutes before she was found. In a nice bit of common-sense logic, Judge Hervey observed that:

> If Appellee's version of events were true, it could mean that the first three or four drivers to arrive after Appellee saw her sitting in the driver's seat of her vehicle and nonetheless drove past her and reversed until they were ahead of her in the bumper-to-bumper line of traffic. While that is possible, we do not look to possible innocent explanations when determining whether probable cause existed to make a warrantless arrest. Also, critically, probable-cause assessments are based on probabilities and common sense. Appellee's interpretation of the record stretches credulity. With respect to Appellee's argument that the evidence does not show that the pickup line began to form about 15 minutes before Appellee was found, we agree that the evidence does not directly show that, but it is a reasonable deduction.[8]

Judge Hervey also observed that the Court had never adopted the court of appeals' reasoning in Allocca, and even if the Court had done so, the facts are distinguishable. In *Allocca*, the defendant was found asleep with the seat reclined in his legally parked car at 1:45 a.m., explaining that the car was running because he was hot and wanted the air conditioner on. Espinosa, on the other hand, was stopped in the middle of the day in a school pickup line that had recently begun to form in a traffic lane, she was asleep at the wheel in an unreclined seat, and she had no explanation for why she was sleeping.

Finally, Judge Hervey noted Espinosa argued that the trial court's findings of fact were supported by the record and that the State was ignoring those findings. She further noted, however, that Espinosa had not identified any particular findings that the State was ignoring. Where the question before the court doesn't turn on credibility or demeanor, review of a probable cause question on appeal is a mixed question of law and fact, the trial court's determination is reviewed de novo. In other words, there was little disagreement as to what the facts were; rather, the disagreement was over the legal significance of those facts. The Court held that the commonsense view of those facts was that a reasonably prudent person could conclude that Espinosa had recently operated her vehicle in a public place while intoxicated.

The Court held that the commonsense view of those facts was that a reasonably prudent person could conclude that Espinosa had recently operated her vehicle in a public place while intoxicated.

What's this mean to the rest of us?

The immediate import of *Espinosa* is its obvious usefulness to DWI prosecutors. If you have an intoxicated defendant who is not seen driving, does not admit drinking, and refuses SFSTs but is found in circumstances where logic tells you that she was recently operating her vehicle, *Espinosa* is directly on point and offers a distinguishing set of facts should the defendant argue *Allocca*.

Of broader import is how *Espinosa* put the analysis back firmly in *Gates*'s admonition that probable cause requires only a probability of criminal activity, not a *prima facie* showing that criminal activity occurred. As Judge Hervey puts it, "We do not look to possible innocent explanations when determining whether probable cause existed to make a warrantless arrest." It's possible the defendant had innocent (albeit farfetched) explanations for her behavior and circumstances, but as the Court reminds us, probable cause doesn't require the actor to exclude every possible indicator of innocence. It requires only the probability of criminal activity, viewed through the lens of common sense. ❇

Continued on page 11 in the purple box

Photos from our Prosecutor Trial Skills Course

Endnotes

[1] 462 U.S. 213 (1983).

[2] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

[3] 666 S.W.3d 659 (Tex. Crim. App. 2023).

[4] The opinion of the Fourteenth Court delightfully adds an Oxford comma in brackets.

[5] 301 S.W.3d 364 (Tex. App.–Austin 2009, pet. denied).

[6] See, e.g., *Oliva v. State*, 525 S.W.3d 286, 296 (Tex. App.–Houston [14th Dist.] 2017), rev'd on other grounds, 548 S.W.3d 518 (Tex. Crim. App. 2018); *Abraham v. State*, 330 S.W.3d 326, 330-31 (Tex. App.–Dallas 2009, pet. dism'd); *Chilman v. State*, 22 S.W.3d 50, 56 (Tex. App.–Houston [14th Dist.] 2000, pet. ref'd); *State v. Parson*, 988 S.W.2d 264, 267-68 (Tex. App.–San Antonio 1998, no pet.); *Elliott v. State*, 908 S.W.2d 590, 591-92 (Tex. App.–Austin 1995, pet. ref'd).

[7] Tex. R. App. P. 66.3(e).

[8] *Espinosa* at *18-19 (internal citations omitted).

Reaching the *Moon* and the meaning of a pivotal juvenile law case (continued from front cover)

to waive jurisdiction and transfer a case to an adult district court.

Whether one is accustomed to referring to these hearing as "certification and transfers," "waiver and transfers," "certifications," or simply "C&Ts," the process is the same and the purpose is fairly straightforward. Texas law provides for certain circumstances in which a juvenile district court can waive its *exclusive* jurisdiction over a respondent's delinquent conduct and transfer said respondent to an adult district court for a criminal trial.

To even be eligible for waiver and transfer the respondent must be:

1) accused of a felony offense;

2) 14 years of age or older at the time he committed a capital felony, an aggravated controlled substance felony, or a felony of the first degree; *or*

3) 15 years of age or older at the time he committed a felony of the second degree, third degree, or state jail felony.

In addition, there cannot have been any adjudication hearing concerning the offense.[2]

Only respondents who fit into these specific parameters are eligible for waiver and transfer hearings.

Moreover, Texas prosecutors must take care to comport with the notice and procedural requirements outlined in the Family Code. A petition alleging delinquent conduct must be drafted, filed, and served on the respondent as well as his parent or guardian. Additionally, there must be a summons stating that the hearing is for the purpose of "considering discretionary transfer to criminal court."[3]

Prior to the hearing, the court must order an investigation to determine if the waiver and transfer is appropriate. This investigation is required to include a "diagnostic study, social evaluation, and a full investigation for the child, his circumstances, and the circumstances of the alleged offense."[4] Such information will help the court to properly apply the factual scenario to the necessary factors to be considered before waiving jurisdiction.

At the hearing itself, the court may consider live testimony from witnesses and reports from police officers, juvenile probation officers, or other experts. Yes, that's correct, hearsay is admissible. The court must determine there is probable cause to believe the respondent committed the offense and "because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings."[5]

In reaching its conclusion, the court has the following list of factors to consider:

1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

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 the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.[6]

Timeline

Now let's turn our attention to the history of Moon, both the case and the man. The procedural posture of the *Moon* cases can be a little tricky because it has twice been through juvenile district court, once through an adult district court, twice through a court of appeals, and twice through the Court of Criminal Appeals. The appellant, Cameron Moon, is now over 30 years old. In the summer of 2008, he was charged with murder when he killed Christopher Seabrook in a drug deal that went wrong. At the time, he was 16 years old.

Due to his age, he was charged in a Harris County juvenile district court. In December of the same year, state prosecutors filed a motion asking the juvenile court to waive its jurisdiction and transfer the case to an adult district court. This motion was granted, and in spring of 2010, a jury convicted Moon of murder. He was sentenced to 30 years in prison.

At this point, the appellant contested his conviction, alleging that the juvenile court abused its discretion in waiving its jurisdiction. The First Court of Appeals agreed with him, finding the evidence legally and factually insufficient to support the juvenile court's waiver of jurisdiction.[7] The Court of Criminal Appeals granted the State's petition for discretionary review and agreed with the Court of Appeals, reiterating the lower court's conclusion that "the case remains

pending in the juvenile court."[8] Then, in a move that seemed destined to stir the pot, the CCA theorized that the State *could* start from square one and reattempt to certify, which would ostensibly correct the errors that both Courts had found in the first hearing.

To no one's surprise, the State did indeed reinitiate waiver and transfer proceedings against the appellant. This move came in the wake of both the court of appeals and the CCA reasoning that jurisdiction remained with the juvenile district court based on the insufficiency of the first waiver and transfer hearing. The juvenile court had another hearing, and again waived its jurisdiction and transferred the appellant to adult district court.

Things proceeded somewhat differently this time around. After the juvenile court waived its jurisdiction and transferred Moon to the adult court, the appellant was indicted. In response, Moon immediately filed a pre-trial application for a writ of habeas corpus, which primarily attacked the issue of whether the legal criteria for waiver of jurisdiction and transfer had been met. The adult district court denied the writ, and Moon immediately filed an appeal with the court of appeals.

The First Court of Appeals looked at *only* two issues:

1) whether the appellant's claims were cognizable in pre-trial habeas proceedings; and

2) whether the criteria of Family Code §54.02(j)(3), requiring the lack of previous "adjudication," had been satisfied in the juvenile court, given the appellant's previous prosecution in adult court for murder.[9]

The court of appeals sustained the appellant's points of appeal and ordered the adult district court to dismiss the case based on a lack of jurisdiction. Which brings us to the newest iteration of *Moon*.

Moon II

The CCA granted discretionary review on three grounds raised by the State:

1) whether the appellant's claim was cognizable;

2) whether the law-of-case doctrine did control in the case; and

3) whether the appellant, having benefited from prior iterations of *Moon*, should be estopped from now arguing that they were wrong.[10]

Additionally, the CCA asked both parties to brief another issue: "whether §54.02(j)(3)'s reference to an adjudication and an adjudication hearing have applicability beyond what those terms mean in the Family Code's juvenile justice provisions themselves."[11]

As an added wrinkle, Moon attacked the jurisdiction of the CCA to even hear the matter. Typically, in juvenile law matters, it is the Texas Supreme Court that has final appellate review, not the Court of Criminal Appeals. Moon argued that the applicable law vested the CCA with jurisdiction to hear a juvenile court's waiver and transfer only once the accused was convicted or granted deferred adjudication.[12] As such, Moon argued that in this case jurisdiction would lie solely with the Texas Supreme Court.

Moon argued that the applicable law vested the CCA with jurisdiction to hear a juvenile court's waiver and transfer only once the accused was convicted or granted deferred adjudication. As such, Moon argued that in this case jurisdiction would lie solely with the Texas Supreme Court.

Before I dive further into the CCA's analysis on this matter, it is important to first look at the controlling statute, Texas Code of Criminal Procedure Article 44.47. In 1995, the legislature drastically modified the manner in which a juvenile court's waiver of jurisdiction and transfer to adult district court could be appealed. Previously, one could immediately appeal such a ruling to an intermediate court of appeals as a civil matter before the case took on its criminal aspect in adult district court. Effective January 1996, though, a new law, Texas Code of Criminal Procedure Article 44.47, eliminated one's right to immediately appeal a juvenile court's waiver and transfer. As modified, the only right to appeal the ruling was upon conviction in the adult court or upon the granting of deferred adjudication.[13] In 2015, the legislature repealed Art. 44.47, making it moot September 1 of that year.[14] As we will see below, Moon's case was controlled by the now-repealed statute.

The CCA's analysis

Understandably, the CCA first directed its attention to the jurisdictional argument by analyzing the nature of the pre-trial habeas application. The Court paid special attention to word choice, pointing out that terms such as *criminal* trial, *prosecute* the appellant, and asking for the *indictment* to be dismissed all had significance.[15] In looking at the relief Moon sought, the CCA concluded it was of the nature that could "only be obtained in the context of a criminal case."[16]

Next, in what could only be described as a gut punch to the appellant, the CCA turned the de-

fendant's jurisdictional argument on its head. When Moon focused on the propriety of the CCA's jurisdiction, he unwittingly opened the door to the CCA questioning whether the court of appeals was initially able to review the appeal. Interpreting the former Art. 44.47, the CCA reasoned that it "limits a defendant's appeal, of any kind, that challenges the validity of a juvenile court's transfer order solely to the context of criminal post-conviction (or post-deferred adjudication) appellate review."[17] At the time when his (second) waiver and transfer hearing was granted on May 7, 2015, former Art. 44.47 was still in effect. As such, his only course of action in challenging the juvenile court's ruling would be to wait for a conviction in the adult court before appealing to the appropriate court of appeals. Circling back to its original point that the CCA had jurisdiction, the opinion states that once such a motion is granted, the matter becomes distinctly criminal in nature (moving to the adult court) and loses all the protections the juvenile system seeks to afford respondents.[18] As such, Moon was unable to initially bring his claim to the court of appeals.

Given its analysis and conclusions, the CCA did not need to address other matters brought by the appellant or the State.

Next, in what could only be described as a gut punch to the appellant, the CCA turned the defendant's jurisdictional argument on its head. When Moon focused on the propriety of the CCA's jurisdiction, he unwittingly opened the door to the CCA questioning whether the court of appeals was initially able to review the appeal.

How Texas prosecutors are affected

In the end, where does all this leave Texas prosecutors? Does this latest episode in a 15-year saga really end with an anticlimactic groan? Not necessarily. Although the Court of Criminal Appeals held the court of appeals should never have heard this second round of *Moon* because it lacked the proper jurisdiction, there are still tidbits of wisdom to take away.

For starters, *Moon* and its family tree had clearly taught us some important points about supposed best practices. Previous iterations of the case have held that to survive appellate scrutiny, trial courts need to enter case-specific findings in the record and in the order when granting waiver and transfer hearings.[19] These case-specific findings refer back to statutory factors that a court should consider in making its determination. However, the CCA has more recently looked at that issue and had a change of heart. In *Ex parte Thomas*, the Court held there was no statutory requirement in place requiring the trial court to "recite the underlying facts upon which its reason for transfer is based."[20] This newer interpretation reasoned that the applicable law "allowed for findings" but didn't mandate them.[21]

For all those who have handled such matters between the first *Moon* and *Ex parte Thomas*, I am sure there is still resonating concern that a waiver and transfer order will get sent back for failing to contain the fact-specific reasons. Whereas that seems highly unlikely given the decision in *Ex parte Thomas*, it is still important to remember best practices such as making a good and clear record. Additionally, whereas case law no longer requires the court to enter case-specific findings, it is important to still elicit thorough testimony from witnesses. It is still incumbent upon prosecutors to meet all statutory requisites for waiver and transfer, as well as show the court there is probable cause to believe the felony offense occurred.[22]

Furthermore, juvenile justice practitioners should not get lulled into a false sense of confidence with this most recent *Moon* decision. Moon's case reaching the CCA under this scenario was impermissible at worst and premature at best. Impermissible because the statutory framework allowing an appeal of a waiver and transfer was not in place to benefit him (he missed the benefit of the new law by mere months). And premature because it seems likely that, upon conviction for murder, Moon could properly appeal the waiver and transfer along with any other issues that arise.

Closing thoughts

This latest *Moon* decision is a rather fact-specific opinion, as much of it turns on the timing of the waiver and transfer in relation to the former statute. It doesn't help that this case has also been around since 2008. Laws change, and unusual cases have an uncanny way of popping up. After fifteen years of going back and forth, it's hard to believe that *Moon*, the case that just doesn't seem to go away, is quietly heading to the great emptiness of space. ❇

Endnotes

[1] See generally *Ex parte Moon*, 667 S.W.3d 796 (tex. Crim. App. 2023).

[2] Tex. Fam. Code §54.02(a).

[3] *Id*. at (b).

[4] Tex. Fam. Code §54.02(d).

[5] Tex. Fam. Code §54.02(a)(3).

[6] Tex. Fam. Code §54.02 (f).

[7] *Moon v. State*, 410 S.W.3d 366, 378 (Tex. App.–Houston [1st Dist.] 2013).

[8] *Moon v. State*, 451 S.W. 3d 28, 36 (Tex. Crim. App. 2014).

[9] *Ex parte Moon*, 649 S.W.3d 700, 716-17 (Tex. App.–Houston [1st Dist.] 2022).

[10] *Moon,* PD-0302-22 at 7.

[11] *Id*.

[12] *Id* at 8.; and Tex. Code Crim. Proc. Art. 44.45(b).

[13] Former Tex. Code Crim. Proc. Art. 44.47.

[14] In a dreadful twist of irony, had the appellant been afforded the benefits of the repeal of Art. 44.47 and the new 2015 statute, he could have brought an immediate appeal to the appropriate court of appeals, not having to wait for the conviction in the adult court. The new statute also stated the court of appeals ruling would be subject to discretionary review by the Texas Supreme Court, not the Court of Criminal Appeals.

[15] All of these terms are reflective of an adult prosecution and not a juvenile case. In juvenile law the accused are referred to as respondents, and instead of indictments there are petitions filed alleging delinquent conduct.

[16] *Moon*, PD-0302-22 at 11.

[17] *Moon*, PD-0302-22 at 12.

[18] *Moon*, PD-0302-22 at 14.

[19] *Moon v. State*, 451S.W.3d 28, 50-51 (Tex. Crim. App. 2014).

[20] *Ex parte Thomas,* 623 S.W.3d 370, 379 (Tex. Crim. App. 2021).

[21] *Id*.

[22] See generally Tex. Fam. Code §54.02.

A true story of great deception

The list of attorney Cynthia Cole's wrongdoing is long and shocking, especially to other attorneys:

By Melissa Meyers
Assistant Criminal District Attorney in Dallas County

forging a federal court order and affixing the signature of a fictitious federal judge, forging a state district judge's signature on court orders for a nonexistent case, creating an intricate story through emails and text messages of attending court hearings and depositions, fabricating settlement talks and settlement agreements with signatures, and impersonating a federal agent. It was all for the purpose of billing clients for legal work that was never performed. Who would do that? Certainly not a lawyer following any rule of ethics.

Consider that same lawyer, during the same time period, working as a contract attorney for a Dallas law firm, taking over the firm's administrative duties, conspiring with her own mother, who also worked for the firm, and embezzling over $1.5 million from the business.

While it sounds like an outlandish legal novel, it all really happened, and Cynthia Cole was *that* attorney.

Cole graduated from Louisiana State University's Law School in 2001 and moved to the Dallas–Fort Worth Metroplex to practice bankruptcy law and commercial litigation. In 2009, she was working as an associate for a firm in Dallas, billing $350 an hour. While at the firm, she met Scott and Susan Meyers. The Meyerses' business had just filed for bankruptcy, and they were working with a partner in Cole's law firm. Additionally, the Meyerses filed suit in Tarrant County against a financial services company, which was a subsidiary of a Fortune 250 company, for fraudulent inducement into a business deal. The Meyerses alleged this business deal caused their company to seek protection in bankruptcy court.

Your eyes may have already glazed over and you might be wondering what this tedious fact pattern has to do with a criminal case. However, the civil law backdrop is the basis for how Cole was able to steal, by deception, over $265,000 from the Meyerses through 2018. The deception itself turned out to be a masterpiece of fiction.

During an overlapping period, Cole also stole over $1.64 million from a law firm where she was employed as a contract attorney. We decided to aggregate what began as two separate theft indictments into one charge.

This case presented several challenges, such as how to present evidence of civil litigation without confusing or boring the jury, consolidate theft cases between two victims for similar but separate thefts, summarize a continuous course of theft that lasted almost a decade, and prove that the substance of the defendant's deception never occurred.

Theft from clients

In 2010, Cole convinced the Meyerses to fire their original law firm and hire her individually to represent them in their ongoing litigation. They agreed to a fee arrangement where they would pay Cole $6,000 a month. Their company was represented by a trustee for the estate in the bankruptcy court of the Northern District of Texas. By 2011 the company's bankruptcy and associated adversary proceedings were resolved by settlement agreement between the trustee and the financial services company. The Meyerses had asserted other claims outside of the company's estate, and due to both the facts of the case and Cole's ineffective legal strategy, the Meyerses lost. Cole suggested they appeal the bankruptcy court's ruling, and the case was reviewed by a fed-

eral district judge, who dismissed all the Meyerses' causes of action.

This should have been where Cole advised her clients that their case was over. Instead, she convinced them that their claims were meritorious and they should proceed with further litigation. Around this time, the Meyerses moved out of state and began communicating with Cole primarily by phone, email, and later, text messages.

Cole advised her clients that they should refile their lawsuit in federal court. This advice resulted in another dismissal of the Meyerses' claims by the same federal judge, sanctions against Cole and her clients, Cole's disbarment from the Northern District of Texas, and her probated suspension by the State Bar for violating two sections of the Texas Disciplinary Rules of Professional Conduct. However, Cole did not disclose to the Meyerses the truth about any of it. Rather, over the next four years she lied to her clients on a daily basis, telling them about progress in a new state court case that did not exist, sending them a fabricated "Set Aside Order" that appeared to be signed by a federal judge and which she told them restored their original claims from the adversary proceedings held in bankruptcy court, claiming to represent them with the Securities and Exchange Commission (SEC) in a complaint against the financial services company and auditor, and billing them for travel expenses to attend nonexistent depositions and settlement meetings on their behalf. She repeatedly instructed the Meyerses not to talk to any third parties about anything related to their case.

These lies were documented in the thousands of emails and text messages between Cole and her clients. We found fabricated settlement agreements with forged signatures Cole sent the Meyerses, detailed descriptions of testimony that Cole claimed took place at depositions in New York City and Boston, and travel expense requests to attend such depositions and meetings. It was clear from their communications that this nonexistent legal matter not only cheated the Meyerses out of their money but consumed their daily lives for years on end. As time went on and the lies became more and more outlandish, Cole resorted to even more desperate measures. In the summer of 2018, she forged multiple orders from a Tarrant County district judge. Cole claimed she had settled with the financial services company's insurance company for $8 million and was working with the Texas Rangers and the Special Agent-in-Charge (SAC) of the Federal Deposit Insurance Corporation's (FDIC) Dallas office to obtain the funds from a local bank. Cole created a fake email address for the SAC and emailed the Meyerses as that agent. In September, she told the Meyerses she was finally in possession of an $8 million cashier's check that she would deliver to their banker in Chicago. They paid for her travel but after several days and many more excuses, Cole told them she had to return to Dallas without delivering the check.

Cole's increasingly suspicious behavior finally overwhelmed the Meyerses' long-running trust in her. Mr. Meyers tried to email the FDIC agent at the fake email address Cole had provided. When the email bounced back, he picked up the phone and called the agent at the number listed on the FDIC website. It took only a few minutes for the agent to realize that the Meyerses had been defrauded and only a few more hours to confirm that the Meyerses had no cases pending in federal court or Tarrant County and that the SEC did not have any cases involving the lender or auditor. Cole's house of cards collapsed. Everything Cole had told the Meyerses for the past four years had been a lie.

Theft from a law firm

While Cole's fraud and deception against the Meyerses was egregious due the extreme measures she took to swindle clients who trusted her as an advisor and advocate, during this same time she stole exponentially more money from a law firm for which she did contract work. In 2013, Cole's primary client was the Meyerses. Although she was still billing them for legal work at that time, she knew that their legitimate legal claims were over and she would need to find a new source of income. In January of 2014, Cole filed for bankruptcy. That same month Cole's mother, who worked as a paralegal for an insurance defense law firm in Dallas, introduced Cole to the sole partner of the firm, who hired her as a contract attorney.

In March, the law firm let its office manager go, and Cole and her mother offered to take over payroll, accounts receivable, and accounts payable, leaving the partner to act as the rainmaker. Cole then fired the firm's certified public

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accountant (CPA). As a contract attorney, she was now responsible for paying herself as a vendor. From that point on, Cole began issuing herself additional, unearned checks on a more and more frequent basis. According to billing records, Cole earned $127,660 in 2015 for hours billed, but she paid herself $563,646. In 2016, she paid herself $731,153 while the partner, who was working more than ever before to keep the firm afloat, was paid less than $200,000.

As the firm struggled and the partner made less and less money, Cole blamed his loss of income on changes to insurance company billing practices. Cole and her mother, who was claiming and receiving an additional 80 hours of overtime each pay period, kept the partner in the dark. They hid the firm's bank statements in locked offices, withheld payments to vendors until they were in collections, bullied office staff, and hired and fired multiple employees to help get invoices out the door to clients, but they would not accept offers from those same employees to reconcile the firm's books. As part of Cole's theft, she also issued herself checks with the notation "petty cash" for thousands of dollars.

In 2016, Cynthia Cole paid herself $731,153 while the law firm's partner, who was working more than ever before to keep the firm afloat, was paid less than $200,000.

Finally, in September 2017, an employee Cole had fired sent the partner and his wife a letter in the mail detailing the amounts of petty cash she knew Cole had taken. It was over $100,000. When the partner and his wife started asking questions, Cole became verbally combative. They reached out to a CPA, who told the partner to go directly to the bank and get the statements himself. A cursory review by the CPA indicated theft. By this time Cole had stolen over $1.5 million. She and her mother were terminated on November 1, 2017. That same day, she texted the Meyerses asking for $25,000. They paid it and agreed to begin paying a monthly retainer of $10,000 in addition to Cole's "travel expenses." It would be almost another year before the Meyerses found out about Cole's deception.

Proving a negative

One of the biggest challenges in our trial preparation was determining the best way to present evidence that the legal work Cole claimed she had done for the Meyerses was never performed because the underlying cases and investigations never existed. How do you prove that a deposition didn't occur? How do you prove that a defendant didn't stay at a hotel in Boston when she never identified the hotel or submitted receipts?

My trial partner, Mark Penley, and I started with the court documents—or lack thereof. We ordered all the bankruptcy and civil court documents related to the legitimate litigation with the Meyerses' business from 2009 through 2015, including all appeals to the Fifth Circuit Court of Appeals. From there, my trial partner called the financial services firm's assistant general counsel. It just so happened that the Fortune 250 firm has a small in-house legal department, and the attorney who oversaw the outsourcing of the bankruptcy and civil court litigation as its litigation counsel still worked there and still remembered the case. He is now head of litigation. He researched the firm's internal database and told us that no legal work had been performed on the Meyerses' matter since 2013, except for the perfection of judgments for the sanctions. As head of litigation, he said he would know if the bankruptcy settlement had been set aside, if the company had been party to a lawsuit in Tarrant County, if the company had authorized a multimillion-dollar settlement, and certainly if the CEO of the company had been deposed by the SEC.

From there, we reached out to officials at the auditing company, who provided us with substantially similar evidence. They had no internal records of this legal matter since 2012. Had the SEC prevented them from taking any new clients, as Cole claimed, the legal department would have been aware.

We next contacted the general counsel's office for the insurance company, the one Cole said had issued the $8 million check in 2018. Once again, no one there had record of any such settlement, nor did this company ever write insurance policies. Rather, it is an insurance broker that connects corporate clients with insurance companies. Additionally, we had records from the Tarrant County court to say that no case associated with those parties existed, and the judge to say that he never signed those orders. We were glad there were enough real characters peppered throughout Cole's fiction that multiple witnesses could testify that none of the legal events Cole had described to the Meyerses since 2014 had actually occurred.

Aggregation of offenses

The theft from the law firm was discovered in the fall of 2017 and was filed with our office shortly after that. The case was indicted as a Theft of Property Greater Than $300,000 in August 2018, and Cole was arrested within a few days. In fact, she communicated with the Meyerses so frequently that it was easy to determine from a review of their text messages when Cole was arrested, because she was silent for the better part of a day until she could make bond. Once she resumed communications, Cole told the Meyerses that she had been in a car wreck while traveling with the federal magistrate and FDIC agents and had to go to the hospital to get checked out. Once the theft from the Meyerses was discovered in September 2018, the real FDIC agent referred it to our office because we already had charges pending against Cole. The second case was subsequently indicted as a Theft of Property Between $150,000 and $300,000.

During trial preparation, the initial plan was to join the two cases for trial under §3.02 of the Texas Penal Code. The theft from the Meyerses was outrageous and we had Cole's lies in writing, but the theft from the law firm was a much larger amount of money and a first-degree offense. The defendant had a right to sever, however, and we were unsure if she planned to exercise it. While we felt that the evidence from one case would be admissible pursuant to Texas Rules of Evidence 404(b) to show motive, opportunity, intent, plan, absence of mistake, or lack of accident, we preferred not to leave that as a discretionary issue that may not be ruled on until the middle of trial.

Section 31.09 of the Texas Penal Code states that "when amounts are obtained ... pursuant to one scheme and continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated."[1] While both of the individual offenses were charged using the aggregate language to capture each instance Cole stole from the Meyerses and the law firm, they had always been separate schemes in my mind. Yet it did not feel like we could provide the jury with an accurate version of Cole's culpability without presenting evidence of how the thefts were intertwined. Caselaw described the legislative intent behind §31.09, stating that common law restricted scope of theft to a single victim and a single time and place; if more than one victim or more than one time was involved, more than one theft was committed.[2] This usually means a thief who, "pursuant to one scheme or continuing course of conduct," stole X amount from various victims at different times could not be as severely punished as a thief who stole the same amount from one victim at one time, even though the Legislature considered these two thieves to be equally culpable.[3] Relevant caselaw also stated that the terms "scheme" and "pursuant to a continuing course of conduct" were terms of common understanding.[4]

The evidence of a continuing course of conduct was clear from our timeline. We chose March 24, 2014, as the start date for our aggregated offense. This was the date Cole submitted her last invoice to the law firm. Although she was a contract attorney, once she took over the administrative duties, she never submitted another invoice for her legal or administrative work to the firm. Within a week, Cole was telling the Meyerses about a trial date for their nonexistent Tarrant County civil case. She billed the Meyerses through February 2015. At that time, Cole told them that since she had a full-time job, she would ask them to cover only her expenses.

Cole continued stealing from the law firm until she was terminated on November 1, 2017. That same day, she asked the Meyerses for $25,000. Soon thereafter, Cole billed them for her prior "travel expenses" and requested a monthly retainer going forward along with their payment of her expenses.

Rather than looking at the theft from the law firm as a pure embezzlement case, we considered the fact that Cole was a contract attorney for the firm rather than an employee. This distinction meant that the firm itself was Cole's client. If the scenario is viewed in this light, it is clear that Cole's scheme was to steal from her clients. Therefore, I reindicted the two cases into one large aggregate Theft of Property Greater Than $300,000.

Our trial strategy was to present the Meyerses' portion of the case first. From the limited information I received from the defense, it was clear that Cole wanted to fight the law firm case. The sheer magnitude of the amount of money Cole paid herself compared to what was spent on all other payroll and firm expenses made it clear that she had unlawfully appropriated the money.

Rather than looking at the theft from the law firm as a pure embezzlement case, we considered the fact that Cole was a contract attorney for the firm rather than an employee. This distinction meant that the firm itself was Cole's client. If the scenario is viewed in this light, it is clear that Cole's scheme was to steal from her clients.

Once the Meyerses discovered the truth about Cole and their nonexistent legal cases, they approached an attorney who assisted them in filing a Texas State Bar grievance against Cole in 2019. Cole never responded, resulting in a Default Judgment of Disbarment. We were thankful knowing that regardless of the outcome of our criminal case, Cole would not be practicing law again.

Yet, she had not put the offense in writing as she had with the Meyerses, and the firm had more employees and office drama for her to try and deflect from her actions. We knew that once the jury had an opportunity to review the emails and text messages between Cole and the Meyerses that we planned to highlight, her credibility would be in tatters by the time she began to defend the law firm portion of the case.

Trial approaches and a plea

Once the Meyerses discovered the truth about Cole and their nonexistent legal cases, they approached an attorney who assisted them in filing a Texas State Bar grievance against Cole in 2019. Cole never responded, resulting in a Default Judgment of Disbarment. We were thankful knowing that regardless of the outcome of our criminal case, Cole would not be practicing law again.

As trial approached, we grew more confident in and excited about our case. Our financial analyst, Connor Walsh, prepared graphs, charts, and other exhibits that clearly summarized the evidence in a handful of PowerPoint slides. We were also able to determine, based on point-of-sale transactions in Cole's debit card records, a long list of business trips for which Cole charged the Meyerses while she was in a completely different location. Additionally, because we had obtained Cole's call detail records from AT&T, we had a map showing her physical location near her home in a Dallas suburb as she texted with the Meyerses while on her supposed trip to Chicago in September 2018.

A week before trial, Cole was supposed to appear at a pre-trial hearing. She had not appeared by mid-morning. However, she reported to her attorney that her flight had been canceled and she was stuck at an airport due to the widely reported delays caused by the Federal Aviation Administration. When pressed for proof, Cole sent her attorney a screenshot of an airline reservation from Dallas to Houston from two days prior. Not only did this screenshot not sufficiently verify where she was or that her return flight had been canceled, we strongly suspected that the screenshot had been forged. That afternoon, we obtained information from the airline that the reservation number Cole had provided was actually for a ticket issued in 2017 in the name of her mother. We filed a motion to hold Cole's bond insufficient, and she was taken into custody when she appeared in court the following morning.

One week later, the defendant had hired a new attorney and entered an agreed plea of guilty to one aggregated first-degree theft charge in return for 15 years in prison. Both the Meyerses and the law firm partner were present and made victim impact statements, noting the years of trust they had placed in Cole and the betrayal they received in return.

This true story is stranger than any fiction. ❇

Endnotes

[1] Tex. Penal Code §31.09.

[2] *State v. Weaver*, 982 S.W.2d 892, 894 (Tex. Crim. App. 1998).

[3] *Id*.

[4] *Sendejo v. State*, 676 S.W.2d 454, 456 (Tex. App.–Fort Worth 1984, no pet.).

The emotional weight of justice

Whether we realize it or not, prosecutors tend to carry grief and trauma with us long after the workday ends.

By Gavin Ellis
Assistant District Attorney in Harris County

Stress, anxiety, and depression are common in our line of work. Talking about our feelings and seeking help can make us healthier people and raise the standard for mental health in our profession.

It wasn't until I experienced these difficulties on my own—burnout, anxiety, trouble sleeping—that I started asking my peers whether they had similar experiences. Without fail, almost every one of them had the same struggles and seemed thankful or relieved to talk about it. Talking to friends and family about our experiences and taking advantage of resources, such as the Texas Lawyers Assistance Program, health insurance, and private therapy, can save careers and save lives. To remain empathetic and compassionate to those we serve, we have a responsibility to care for ourselves as well.

The demands of prosecution

As we discuss so often in jury selection, our life experiences shape our perception. Prosecutors in particular are the poster children for secondary trauma. On nearly a daily basis, we confront the worst of humanity. We look at death, decay, and ruin. We analyze the foulest minds. We watch videos of the darkest moments in people's lives, and if we don't have video footage, we learn their stories so well we can see them in our minds.

While our secondary experience cannot compare to the horrific lived experience of the victims for whom we fight, we regularly immerse ourselves in those grave and severe realities. And after all of that, we argue our cases in a high-stress, high-stakes environment with an audience poised to tear us down.

We all do what we can to manage our exposure to constant conflict and harrowing imagery. But spending so much time in this kind of environment has indelible effects on our perception of the world. No matter how "seasoned" we become, we are not exempt from trauma. Over time, exposure can take a toll on our ability to see the world, and ourselves, with clear eyes.

In 2020, I almost left prosecution. Despite working alongside a group of talented prosecutors and doing work I deeply believed in, I was having a terrible time finding balance. The docket was demanding, our division served as on-call prosecutors tasked with visiting active officer-involved shooting scenes, and we were working through a stream of highly contentious trials and investigations. Some of those trials brought about media attention, which the defense used as a platform to make baseless and offensive character accusations about me and my peers. It was stressful trying to perform on serious cases when it felt like every action we took or didn't take was met with hostility. Despite the fact there were many meaningful victories worth celebrating in that time, I could not see beyond the difficulties I faced. It became a chore to find motivation and optimism about my work going forward. I could feel the pressure building in me, and I was afraid to confront it.

The effects

Acknowledging the effects of stress and anxiety can be difficult, especially when they build slowly over time. The vulnerability to challenge our self-perception can invoke feelings of weakness or insufficiency: "I'm expected to be strong—how can I let down my defenses?"

I reacted to my work anxiety the way many late-20s Millennials might: I sought distraction. I bought a PlayStation and started exercising more. While these were not unhealthy responses, I came to realize they did not help me make sense of what I was experiencing. In retrospect, I recognize I was loathe to acknowledge those feelings because I was afraid to feel weak. Even worse, I did not think I was allowed to feel sad, and I feared that I was the only one having a hard time.

Talking with my peers, even my closest friends, did not feel like an option. Everyone else seemed like they had it all figured out. It was easy for me to assume that my lingering feelings of fatigue and anxiety were a figment of my own sensitivity. I thought if I just kept going, they would work themselves out. What I didn't recognize was that those feelings were occupying mental space I needed to be the lawyer—and person—I wanted to be. To keep trucking, I needed to evaluate what I was carting around mentally.

I reacted to my work anxiety the way many late-20s Millennials might: I sought distraction. I bought a PlayStation and started exercising more. While these were not unhealthy responses, I came to realize they did not help me make sense of what I was experiencing.

When I finally spoke to a therapist about my feelings, it became apparent to me that I was not the first prosecutor she'd had as a client. Furthermore, my therapist validated my feelings and helped me recognize they are normal responses to serious emotional stressors. My doctor spoke frankly in telling me, "There's a name for people who see the darkest moments in people's lives and feel nothing: sociopaths."

It was not long before I started confiding in my family and speaking to coworkers I trusted about their own experiences. A fellow ADA opened up to me about his work-related PTSD diagnosis. A judge and former ADA told me the end of her prosecutorial career came after a relatively basic arson case evolved into a capital murder involving a child. They had both gone to therapy, too. I felt proud—proud of them for being honest. Proud of myself for facing my fears. After years of wondering, it became readily apparent to me that I was not alone.

Our work culture encourages rationality and composure. We need to be resolute to do our job. But we aren't robots. In fact, being perceptive and processing emotion is inherent in the very idea of "prosecutorial discretion." Such discretion demands that prosecutors have a compassionate but sober perspective on the world around us. It is difficult to be present when carrying the weight of anxiety and grief. When we cannot be present, we lose perspective. When we lose perspective on the world outside our courthouses, we are unable to adequately represent the communities who depend upon us to fairly assess justice. This hurts victims, defendants, and ourselves. It is incumbent upon us as a profession to foster a culture of openness and look for help when we struggle with the side effects of our labor. In short: We've got to do better.

Seeking help

Mental health issues are not uncommon in the general population, but they affect lawyers at a higher rate. While 10 percent of all people have struggled with depression, the American Bar Association's 2017 survey suggests that number is as high as 28 percent among lawyers. The same survey suggests that 11.4 percent of lawyers admitted to having suicidal thoughts in the previous year.[1]

Take a moment to consider the brilliant and gifted lawyers and judges you see every day in Texas courtrooms. Think of the friendships we have all built and memories we have created. Imagine all those razor-sharp wits, big personalities, and annoyingly skillful trial opponents packed shoulder-to-shoulder.

Now imagine more than a tenth of them gone.

That's not a reality any of us want to experience. Fortunately, we have resources to guide us.

The little things. Terry Bentley Hill, a Dallas defense attorney who lost her husband to suicide, has been around the state asking attorneys to "stop minding your own business."[2] In a training she gave to me and my peers at the Harris County District Attorney's Office, she emphasized the importance of simply asking each other "Are you OK?" While Ms. Hill did not advocate being pushy or overly assertive, she asserted that those three words might open the door to someone who is looking for help. As a professional community, we can all make that difference.

Ms. Hill also made the important point that we can become so immersed in our craft and with

family responsibilities that we forget to do the little things to care for ourselves. Even simple practices such as exercising, getting adequate sleep, drinking water, going outside, and disconnecting from our phones can improve our mood. (That Saturday night email can probably wait until Monday morning.) Practices like these can also help us set proper boundaries and have time to focus on our own wellbeing. While we can't hydrate or exercise ourselves out of depression, just being aware of the little things can help us calibrate the way we measure our well-being.

Therapy and counseling. Sometimes our emotional weight gets harder to carry. Meeting with a therapist can help us make sense of our feelings and manage them. Resources exist that we may not even be aware of; for instance, if you have county insurance, it may provide a number of free counseling sessions before a co-pay is required. A phone call to my own provider informed me that my insurance covered the first eight sessions with a licensed therapist. If there is not a connection after the first few sessions, the eight sessions would renew upon request. Private counseling is always an option as well. Ask friends or family for a trusted recommendation, and if you don't feel comfortable doing that, online resources such as Psychology Today and the American Psychological Association can provide lists of qualified professionals to help.

The Texas Lawyers Assistance Program. The Texas Lawyers Assistance Program (TLAP) provides confidential help for lawyers and law students battling substance abuse and mental health problems. The service is free and TLAP keeps all its communications confidential, except in rare instances to prevent harm, abuse, and death. That confidentiality is protected by law under Texas Health and Safety Code Chapter 467. TLAP's website provides self-assessment materials and serves as a referral service for additional types of mental health and substance abuse care. While many metropolitan prosecutors might have large offices with many people to talk to, that might not be true for many of the smaller offices in the state. TLAP makes sure we all have someone to talk to. I recently heard a coworker say, "Yeah, you can literally text them if you're crying under your desk and they'll answer." They are a call or text away. We all have access to this invaluable resource in our pockets at 800/343-TLAP and tlaphelps.org.

Conclusion

I am abundantly proud to be a prosecutor and I am glad I weathered hard times to stay in the profession. The difficulties I experienced were trying, but adversity was the push I needed to create change. Finding balance has made me a more well-rounded lawyer and a more empathetic person. Keeping balance still takes effort, too. I give my very best at the courthouse but I still visit my therapist, use my vacation time, and find time for self-reflection.

Everyone may not share these struggles or share them in the same way. But if you've taken the first, often hardest step of recognizing that you need help, know that you're not alone. Help is available. ❇

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Endnotes

[1] American Bar Association, New study on lawyer well-being reveals serious concerns for legal profession Americanbar.org (2017), www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/secrecy-and-fear-of-stigma-among-the-barriers-to-lawyer-well-bei.

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A four-part strategy to combat gun violence

Just a few short years ago, we were all looking forward to the "Roaring '20s" as we entered a new decade after 2019. But very quickly, the State of Texas, and indeed the entire country, was hit with a one-two punch.

By Erik A. Nielsen
Assistant District Attorney in Travis County

First, the COVID-19 virus took tens of thousands of lives[1] and then almost immediately, there was a large spike in homicide rates, even as the rest of the crime rate remained steady or even dropped.[2] The reasons for this spike are myriad, but one thing upon which every prosecutor can agree: We should all do what we can to lower the prevalence of acts of violence.

In 2019, Travis County District Attorney Jose Garza released a four-part strategy to combat gun violence; it uses evidence-based strategies proven successful in reducing violent crime rates in other jurisdictions.[3] He is joined in this effort by many folks in our office, but specifically Amber Goodwin, an ADA and liaison to the City of Austin Office of Violence Prevention (OVP). I sat down with Amber, who gave me a lot of insight into these strategies, which I share with you in this article.

The four-part strategy[4]

1) Use both traditional and innovative prosecution strategies for sentencing people charged with gun crimes.

2) Work with community members to prevent gun violence by creating, supporting, and implementing intervention and prevention programs.

3) Take guns out of the hands of those at high risk for committing an act of gun violence, especially in intimate partner relationships involving violence.

4) Support programming to help survivors and families of the victims of gun violence.

Prosecution strategies

For the vast majority of people charged with gun offenses, our office prosecutes the case in a traditional manner: They are charged and sentenced, and the sentences are commensurate with the level of violence they have displayed.[5] In 2021, the Travis County District Attorney's Office reprioritized our resources to focus our most experienced prosecutors on serious, violent crime.[6] Doing so opened up diversion opportunities for lower-level offenses, such as simple drug possession.[7]

The prosecutors who handle these violent cases are experts in the law, they are well-versed in forensics, they have previously handled complicated cases, and they involve themselves in the investigation of the case from the moment the crimes are reported, not just after police have completed an investigation.[8] As a result of this focus, our office has dramatically increased the conviction rate of those who commit violent crime: In 2018, our conviction rate for such crimes was 38 percent; it increased to 91 percent in 2022.

Speaking of law enforcement, we continue to work collaboratively with all law enforcement agencies to ensure the successful investigation and prosecution of serious offenses, which is another necessary strategy to combat this violence.[9] As part of this effort, ADA Victor Erbring was assigned as a liaison to regularly meet with other

prosecutors and law enforcement agencies; he described it this way:

"As part of the violence reduction program, which integrates members of law enforcement (local, state, and federal officers) and local and federal prosecutors, we meet in groups on a regular basis to discuss developments in the investigation of crimes involving firearms. Our goal is to produce leads and eventual prosecutions of high-risk offenders or those who present an ongoing and present danger to the community. These regular meetings foster an atmosphere of trust and collaboration, and importantly they allow for continued communication between law enforcement and legal prosecution.

"Prosecutors help by reviewing search warrants in a timely manner, properly identifying high-risk suspects and offenders, and ensuring investigations lead to successful prosecutions by discussing strengths and weaknesses of cases as they develop. This multi-pronged team effort ensures that law enforcement can identify people committing dangerous or violent acts of crime, build the strongest cases possible by having early legal analyses of the cases as they develop, and ensure the integrity of the evidence.

"Additionally, trust is built so when a case is disposed of in whatever manner, members of law enforcement trust that it was handled in a way that ensures agreement in the process and outcome without the rift of the unknown coming between the two types of parties."

Intervention and prevention programs

In 2020, the City of Austin funded the Office of Violence Prevention (OVP) to coordinate efforts with Austin Public Health, city leaders, and the community at large.[10] To strengthen our collaboration, the DA's Office appointed a liaison to OVP (ADA Amber Goodwin, as mentioned earlier) to coordinate violence intervention and provide additional expertise, resources, and best practices to coordinate across jurisdictions, to better understand and capture local data.[11]

Travis County is also in the process of launching a hospital-based gun violence prevention initiative as a result of the Safer Travis County Gun Violence Resolution passed in 2022.[12] What is that, you ask? Well, many studies show that gun violence is concentrated on a very small number of people who have similar risk factors.[13] This retaliatory violence is predictable and therefore often preventable.[14] Community violence prevention programs target those areas and populations with "credible messengers" who have experienced gun violence and can intervene before any retaliation happens. These credible messengers are often employed by community-based organizations (Jail to Jobs or Life Anew are two Austin examples), or government agencies, depending on the city. These programs have been enormously successful.[15]

"This work is fundamentally relationship-based," says Fatimah Loren Dreier, Executive Director for the Health Alliance for Violence Intervention. "It leverages the credibility of workers to ensure that resources flow directly to those most impacted in the areas most needed. Studies show that these approaches are effective at interrupting cycles of violence, decreasing injury recidivism and incarceration, and increasing employment."[16]

In practice, say a person goes to the emergency room with a gunshot wound. There, the "credible messenger" meets with that crime victim, discussing the facts and circumstances of the shooting, and communicating his own experiences with gun violence. But just like a good law enforcement investigator, that credible messenger follows up by going into the community where the shooting occurred and talking with the folks who witnessed the shooting and may still be affected by it. Different from a peace officer, however, this messenger may utilize cognitive and behavioral therapy and rigorous case management to both help the community heal and to ensure that the violence inflicted upon one community member does not lead to retaliation and another act of gun violence, and then another retaliation, followed by another, and so on, like lemmings over a cliff. These "wraparound" methods help communities feel safer sooner after a shooting, as the community feels seen and heard and is aware of visible steps being taken to forestall future violence.

"Utilizing proven methods, workers identify ongoing conflicts by talking to key people in the community about ongoing disputes, recent arrests, recent prison releases, and other situations, and they use mediation techniques to resolve them peacefully," says Dr. Chico Tillmon, University of Chicago Crime Lab. "When a shooting happens, trained workers immediately work in the community and at the hospital to cool down emotions and prevent retaliations—working with the victims, friends and family of the victim, and anyone else who is connected with the event."

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This hospital-based program, which has been successfully implemented in Harris and Bexar Counties as well as some smaller jurisdictions,[17] will be up and running soon in Travis County. All the stakeholders are excited about its progress and hope to branch out soon.

This approach is most effective when a violence prevention system is deployed to ensure individuals at risk of crime or violence are engaged regardless of where they are in their life: healthy in the community, recovering in the healthcare system, or under the watch of the justice system. For those in the community, violence interruption programs and targeted trauma-informed care programs, such as READI in Chicago and ROCA in Baltimore, are models.[18] Hospital-based violence intervention programs are effective at serving those with a history of injury and at risk of reinjury or retaliation.[19]

Preventing high-risk suspects' access to firearms

When domestic violence escalates, the risk of death to a female victim when the male abuser has access to a firearm increases by 1,000 percent.[20] According to the Violence Policy Center, over 90 percent of women killed by men were murdered by someone they knew, and the most common weapon used was a gun.[21] In order to address the ongoing threat that domestic violence poses to our public safety, our office is focused on accountability and prevention. As a result, we have significantly increased the conviction rate for family violence cases. In 2018, our conviction rate in family cases was 38 percent, and it increased to 75 percent in 2022.

When it comes to prevention, Austin is a part of a new federal strategy to collaborate with local stakeholders; one of the initial tasks this group will be working on is finalizing the family violence county-wide firearm surrender program.[22] Its goal is to remove weapons from people who pose an articulable threat to the safety of our community.

In Spring 2021, we enacted our own firearm surrender policy.[23] Prosecutors request that judges inquire, before a person is released from jail, whether that person possesses or has access to any firearms. If the answer is yes, instead of surrendering the firearms to a family member who may live in the same household (the previous practice), ADAs now ask the judge to order the person to surrender the firearms to the Travis County Constable of Precinct 5 and to provide proof of the surrender to the court.[24] Any violation of this order means that prosecutors will be asking for the person to face a revocation or modification of the bond.[25]

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Services for victims of violence

Since the start of 2021, our office has prioritized ensuring that victims of crime are treated with dignity and respect.[26] Our elected DA, Mr. Garza, recently announced the creation of a stand-alone unit of trauma-informed counselors to work with crime victims throughout the criminal justice process. Moreover, there has been extensive trauma training for office staff and attorneys alike.[27] But if we are serious about preventing violence in our community, we must do more to address the harm and trauma it causes in impacted communities.[28]

For example, a trauma recovery center (TRC) serves victims of gun violence who are most at risk of committing crimes if their trauma is left unaddressed.[29] Crime Survivors for Safety and Justice, along with the Alliance for Safety and Justice, have worked with communities to bring trauma recovery centers to more than 39 cities across the country.[30] They have been working hard to bring one to Travis County, and our office supported the effort to bring much-needed resources to victims of violent crime and their families.[31] To facilitate this process, our office committed to working with county and city stakeholders and pledged financial assistance toward getting a center up and running.[32] Over the last year, both the city and county officials came together to fund a pilot for the first trauma recovery center in Texas right here in Austin.

Conclusion

We aren't saying all these programs will work, and we're certainly not claiming they are a "silver bullet" that will eradicate gun violence across Austin, across Texas, and across the U.S. anytime soon. But we hope they have given other prosecutors new information to think about and perhaps spark ideas in your own jurisdictions for ways you can slow the rise of gun violence.[33] ❇

Endnotes

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