The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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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

The Fifth Circuit revisits qualified immunity in *Villarreal v. City of Laredo*

The doctrine of qualified immunity dates back to the Warren Court and the 1967 U.S. Supreme Court case of *Pierson v. Ray*.[1]

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

In that Civil Rights–era case, 15 Episcopal Priests (three of whom were black) who were taking part in the 1961 Mississippi Freedom Rides had stopped at a bus station before departing for home. They entered a coffee shop for lunch and were asked to leave by police. When they refused, all 15 priests were arrested for breach of the peace under a Mississippi statute that "makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer." The case was later dismissed by a Mississippi judge on directed verdict, and the priests sued the officers under 42 U.S.C. §1983 for false arrest and imprisonment for exercising their civil rights.

The case eventually reached the U.S. Supreme Court, which held in an 8–1 opinion that although police are not granted absolute and unqualified immunity from damages, they may have qualified immunity "from liability for acting under a statute that [they] reasonably believed to be valid but that was later held unconstitutional, on its face or as applied,"[2] similar to the principle that "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."[3] As the Court put it, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted[4] in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."[5]

More than 50 years later, the doctrine of qualified immunity has come under scrutiny from all sides of the political

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Thank you, Ken Magidson

I want to take a moment to thank our outgoing Foundation Chair, **Ken Magidson**.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Ken is the living embodiment of public service. He started as an ADA in Houston in the early 1980s, then became an assistant U.S. attorney in the Southern District of Texas in 1983. Ken accepted an interim appointment as Harris County District Attorney in 2008 and followed that with a distinguished run as the United States Attorney for the Southern District of Texas from 2011–2017.

What we all love about Ken is his enthusiasm for our profession. I personally am appreciative for his recognition that prosecutors must be the best lawyers in the courtroom at all times. To that end, he has always been a big believer in high-quality training, and as the Harris County DA, he orchestrated a gift to the Foundation to offer enduring support for our summer Advanced Trial Advocacy Course. Thanks, Ken, for all you do!


Ken Magidson

As a token of our appreciation, I am including this fun Sunday newspaper feature on Ken, complete with pictures from the way back: www.pressreader.com/usa/houston-chronicle-sunday/20170618/281500751244081.

Mandatory *Brady* training

Periodically we like to offer a friendly reminder that prosecutors have a mandatory *Brady* training requirement in §41.111 of the Texas Government Code. All criminal prosecutors, except those who try Class C misdemeanors, must complete a course within 180 days of beginning work, and then every four years thereafter. You can take the hour-long course for free on our website at www.tdcaa.com/training/mandatory-brady-training-2022. Once you complete the course, we will report an hour of ethics to the State Bar for you. Questions? Email me at Robert.Kepple@tdcaa.com.

Annual Report now available

Every year, we publish the Foundation's Annual Report for the previous year. It outlines the Foundation's accomplishments, donors, new members of the Texas Prosecutors Society (TPS), corporate sponsors, and financial numbers. It is mailed to all elected prosecutors, donors, TPS members, Association and Foundation Board members, and the Foundation Advisory Committee. If you didn't get a copy but would like to read it, it's available on the homepage of tdcaf.org. (You can also download it there.) ❇

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About *The Texas Prosecutor*

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TDCAA leadership for 2024

I am thrilled to introduce the new members of the 2024 TDCAA Board of Directors!

By Rob Kepple
TDCAA Executive Director in Austin

In the last edition of *The Texas Prosecutor*, we recognized those finishing Board service, but today I welcome new Board members: **David Holmes**, County Attorney in Hill County, moving from Regional Director to Secretary–Treasurer; **Brian Middleton**, District Attorney in Fort Bend County, District Attorney at Large; **Jessica Frazier**, ACDA in Comal County, Assistant Prosecutor at Large; **Shane Deel**, C&DA in Callahan County, Region 3 Director; **Will Durham**, CDA in Walker County, Region 5 Director; **Jacob Putman**, CDA in Smith County, Region 6 Director; **Dusty Boyd**, District Attorney in Coryell County, Region 8 Director; **Sara Bill**, VAC in the C&DA Office in Aransas County, Key Personnel–Victim Services Board Chair; **Carlos Madrid**, ACA in El Paso County, Civil Committee Chair; **Glen Fitzmartin**, ACDA in Tarrant County, Training Committee Chair; **Philip Mack Furlow**, 106th Judicial District Attorney, Finance Committee Member; and **Will Ramsay**, 8th Judicial District Attorney, Finance Committee Member.

It is going to be a busy year, so thanks in advance for your work.

The prosecutor vacancy crisis

Professor Adam Gershowitz at the William and Mary School of Law has recently explored the challenges prosecutor offices are facing in recruiting. This is a variation on a theme, of course, because we have heard about how many segments in our economy are facing staffing challenges as we recover from the pandemic. But the author looks at some themes that are perhaps all too well-known to prosecutors: lower-than-civil-firm salaries, big post-pandemic caseloads, lack of remote work options, and low morale in the post-George Floyd era. You can read the full report at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4666047.

The good news is that nothing has really changed about the core mission of the job: serving our communities and seeing justice done in every case. Everyone who has tried a tough case knows that "highway high" when you are driving home at the end of a long day in court. Everyone who has announced "ready" for the State knows how you look forward to going to the courthouse in the morning to see what is next. It is unique that a prosecutor's only mission is to see that justice is done in every case. As former District Attorney in El Paso County **Jaime Esparza** once said about doing justice: "It's just that easy—and just that hard."

On an interesting note, Professor Gershowitz followed up his research with an op-ed piece in Slate magazine that argues that those interested in criminal justice reform should really care about this issue. He writes that although some reform-minded folks may think that a "starve the beast" model is the best way to address problems in the criminal justice system, he argues that understaffed and overworked prosecutor offices end up making more mistakes and diminishing the quality of justice in their communities. That, by the way, is exactly what we discovered when we explored the problems associated with claims of widespread prosecutorial misconduct back in 2013. Understaffed, undertrained, and overworked staff is challenged to maintain a high quality of work product essential to justice in our courthouses.

To read the professor's op-ed piece, go to https://slate.com/news-and-politics/2024/01/prosecutor-crisis-criminal-justice-reform.html. To read our report, "Setting the Record Straight on Prosecutorial Misconduct," search that title on our website, tdcaa.com.

TDCAA Historian Rick Miller

Here at Texas District and County Attorneys Association World Headquarters, we proudly display an ornate ribbon that was worn by a TDCAA member at what is noted on the ribbon as the first annual meeting of the association on November 2, 1905. (Someone gave it to us when they found it at a random garage sale.) We did some research in the archives of the *Dallas Morning News* and discovered that this meeting was held in conjunction with the Texas State Fair in Dallas and that the meeting featured discussions of the big problem of the day: juvenile crime.

Enter **Rick Miller**, former County Attorney in Bell County. Rick has had a lot of jobs in his life—army paratrooper, police officer, solo practitioner, county attorney for 20 years, cartoonist, and the author of eight non-fiction histories of the Texas frontier. It is in this last capacity that he unearthed evidence surrounding the formation of our association through research in newspaper archives. The effort to mobilize district attorneys into an association was driven by **Hatton W. Sumners**, the County Attorney in Dallas County and future U.S. Senator. In addition to juvenile crime, there were many other pressing issues: the woeful DA salary of $500 a year, the "hip pocket" problem of gun violence, bigamy, pool rooms, and gambling.

On November 3, 1905, Dallas Mayor **Bryan T. Barry** welcomed Texas prosecutors to Dallas and the state fair, which required responses from prosecutor leadership (apparently a thing back then). The responses were eloquent and, not unlike today, shows that Texas prosecutors are not always of one mind. On why they gathered: "No selfish motive brings us here. It is in response to the call of the people to put more of the rascals in the State to work on the rock pile. The people demand that the robber barons of wealth wear stripes with lesser thieves." On the need for a new juvenile court system: "Save the seed corn. Save the little boys and girls, helpless ones, some with fallen and depraved parents, some hopeless orphans, mere gutter rats, some wayward children with good parentage and good homes, but all so young their minds and hearts being in the formative stage, that impressions are easily made and once made sink so deep they are never erased." On poorly drafted and difficult-to-enforce laws: "The legislative branch was responsible for the imperfect enforcement of the law in that a great many of the laws placed upon the books of the State had either through ignorance or design been framed as to permit their easy evasion."

But there's more! Rick found out that our association had formed even earlier than we previously thought. Indeed, the *Morning News* printed an article on July 19, 1891, announcing, "County and District Attorney Association Permanently Organized." The article referenced a resolution creating the association that shall meet annually and establishing dues at 50 cents a year. So what happened to this new effort? By 1894 it appears that interest in the meeting had waned, and there was no evidence of a meeting from 1896 to 1905.

Thanks, Rick, for the history lesson. If there is one thing to learn from this, nothing is new: In 2105 the issue of the day will be juvenile crime. On Mars, maybe, but juvenile crime. ❇

But there's more! Rick found out that our association had formed even earlier than we previously thought.

A changing of the guard

I am proud to serve as the President of TDCAA, a nonprofit dedicated to serving Texas prosecutors, investigators, victim assistance coordinators, and the key personnel of county and district attorneys' offices throughout the state.

By Erleigh Wiley
TDCAA Board President & Criminal District Attorney in Kaufman County

Though officially incorporated in 1971, this organization has supported district and county attorneys' offices for more than 100 years with training, education, and other resources to ensure personnel are competent to meet the demands of the profession.

My own personal experience with TDCAA exemplifies the breadth of resources available, whether you are a newly licensed attorney or an elected official. As a young prosecutor from the Dallas County Criminal District Attorney's Office, I attended my first training with TDCAA in the '90s, the Prosecutors Trial Skills Course (commonly referred to as "baby prosecutor's school"). At that time, I had no idea the impact TDCAA would have in a prosecutor's office or my own career. This first course taught the basics of trial advocacy and the techniques of prosecution and laid the foundation of my prosecution career. Since that time, I served for over 10 years as a judge and then returned to prosecution as the elected Criminal District Attorney for Kaufman County. TDCAA was there to assist me with Newly Elected Prosecutor Boot Camp and has been an invaluable resource to me and my office for the last 10 years.

The backbone of TDCAA since 2002 has been its Executive Director, Rob Kepple. Rob started his legal career as an attorney with Fulbright & Jaworski. He left that firm after two years to become a prosecutor in Harris County, and after five years he joined TDCAA as general counsel in 1990, eventually becoming the executive director. Rob, along with his staff, keeps TDCAA an effective and vital organization for prosecution and manages the largest prosecution association in the nation.

Most of us know Rob through assisting prosecutors throughout the state, attending conferences, and managing the TDCAA staff. As I have had the opportunity to work with Rob while serving on the TDCAA Board and as the President, I have begun to understand he has many other responsibilities, including managing the financials, facilitating training, and ensuring TDCAA keeps us all apprised of legislation and its impact on district and county attorneys' offices. Rob's accomplishments include increasing the solvency of TDCAA's Foundation and continuing innovative training and education to ensure Texas has the best trained prosecutors in the country. We are so proud that Rob has been the executive director of TDCAA for more than 20 years.

At our Elected Prosecutor Conference in November, Rob announced that he was retiring before the end of 2024. He effectively gave us a year to plan for, interview, and select a new executive director for our organization. Although Rob is irreplaceable, I am honored to help select the next executive director by forming a selection committee from our talented membership to assist in this task.

I contacted and asked other prosecutors to be a part of the selection committee. Some of these are board members, elected prosecutors, and others; but the most important part of this selection is *you*. Because I cannot put all of you on the selection committee, the committee will be conducting a survey in March to determine what our service group would like to see on the application for the executive director position. Be sure to

check your office email for the link to the survey, which will be sent through SurveyMonkey. From your feedback and the committee's work, the application will be posted. After we receive the applications, interviews will be conducted and an executive director selected.

I encourage each of you to take this selection process seriously. This is an opportunity to shape TDCAA into the future and ensure the association continues to provide quality support to those in prosecutor offices.

Please join me in thanking Rob for his 22 years of service as our executive director. I look forward to your feedback and responses to the upcoming survey. ❇

Recent gifts to the Foundation*

Brian Baker
Elmer Beckworth, Jr.
Dan Dent
Michael Guarino, II *in memory of Judge Jim Vollers*
James Hicks
Douglas Howell, III
Rob Kepple
Barry Macha *in memory of Chuck Rosenthal*
Sonny McAfee
Jennifer Meriwether
Greg Miller *in memory of Tim Curry*
Rick Miller
Ann Montgomery
Sarah Moore
Murray Newman
Denise Oncken
Lisa Peterson
John Rolater, Jr.
Sarah Schiff *in memory of Judge Jim Vollers*
Daphne Session
Brad Toben
Martha Warner

* gifts received between December 2, 2023, and February 2, 2024

Introducing the newest members of TDCAA's KP–VS Board

In November at the Key Personnel & Victim Assistance Coordinator Conference, board elections were held for the East Area (Regions 5 & 6) and South-Central Area (Regions 4 & 8).

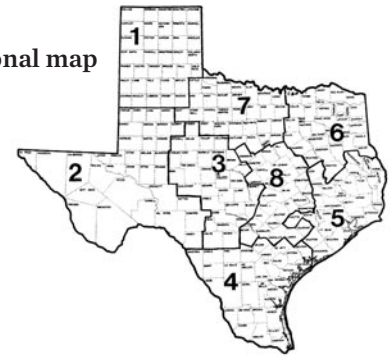
By Jalayne Robinson, LMSW
TDCAA Victim Services Director

Recent elections to the board are as follows:

Michelle Stambaugh (KP) (Region 6) of the Kaufman County Criminal District Attorney's Office was elected as the East Area representative. **Rosie Martinez** (VAC) (Region 4) of the Hidalgo County Criminal District Attorney's Office was elected as the South-Central Area representative and each has been elected to serve a two-year term. **Sara Bill** (VAC) (Region 4) of the Aransas County & District Attorney's Office was elected as 2024 Chairperson, and **Allison Bowen,** Director of Victim Services (Region 7) of the Tarrant County Criminal District Attorney's Office was elected as 2024 Vice-Chairperson.

Recent appointments to the Board are as follows: **Wren Seabolt** (VAC) (Region 8) of the County Attorney's Office in Williamson County was appointed as a designated VAC representative and **Paula Nash** (KP & VAC) (Region 5) of the Tyler County Criminal District Attorney's Office was appointed as a designated KP representative; each have been appointed to serve a two-year term. **Dale Heimann** (KP) (Region 3) of the County Attorney's Office in Gillespie County was appointed to complete an unexpired term as a designated KP representative who will serve until the end of the year. See the map below for the regions.)

Texas regional map



The KP–VS Board assists in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region. To be eligible, each candidate must have permission of the elected prosecutor, attend the elections at the annual seminar or be appointed, and have paid membership dues.

If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. Elections are held each November at TDCAA's Key Personnel & Victim Assistance Coordinator Conference, and appointments are made each January. If you have any questions, please email me at Jalayne.Robinson@tdcaa.com.

Below I have included an introduction and photos of the newest members of our 2024 TDCAA Key Personnel-Victim Services Board:

Michelle Stambaugh
East Area representative

"My name is Michelle Stambaugh, and I have worked for the Kaufman County Criminal District Attorney's Office for 21 years. During this time, I have held many positions and am currently the office manager, support staff supervisor, paralegal, and assistant to our District Attorney.

When I began with the office, we had fewer than 20 employees, and we have grown to 51 employees as of this year. The growth been both exciting and fraught with growing pains: staff training, case management, document management, personnel and management issues, etc. Our office has learned a lot throughout this growth, but we are still learning and always looking for ways to serve our county better and more efficiently. I look forward to serving on the board to be able to work with other counties sharing our knowledge and resources and being a part of a collective effort to put together training to help all Texas prosecutor offices operate as effectively and efficiently as possible serving our counties and victims."

Rosie Martinez
South Central Area representative

Rosie Martinez, CA, DVT, is a subject matter expert national trainer and has been the Director of the Victims Unit of the Hidalgo County Criminal District Attorney's Office for eight years. She has 24 years of experience in victim services in system-based and community-based programs. She has obtained national accreditation as an advanced-level Comprehensive Victim Intervention Specialist by the National Organization of Victim Advocacy and is accredited by the American Academy of Experts in Traumatic Stress in Domestic Violence Trauma and Crisis Response.

She is a member of the National Center for Crisis Management and the International Speakers and Trainers Bureau of the American Academy of Experts in Traumatic Stress, the Academy's Expert Witness Directory, and the Academy's Deployment Directory. She has attained certification as an Advanced Sexual Assault Family Violence Investigator; as a Crime Victim Advocate by the Office of Victims of Crime, the Office of the Attorney General of Texas, and the Texas Department of Criminal Justice; and she has a trainer certification for Commercial Sexual Exploitation Identification Tool and a Baylor University Certification for Motivational Interviewing for Commercially Sexually Exploited Children.

She tells us, "I am excited to join the TDCAA Board and represent the victim services field in this amazing organization that dedicates its effort to system-based victim services. I pray that I can use my acquired knowledge to help carry on this mission. I am here long term for as long as I am elected to serve in this capacity. Thank you for the opportunity to collaborate to serve Region 4."

Wren Seabolt
VAC representative at large

"My name is Wren Seabolt, and I am the Chief Victim Assistance Coordinator for the Williamson County Attorney's Office. I have been with the office since May 2022. I oversee our team of victim assistance coordinators and help develop practices and procedures to better serve victims in our community. I am looking forward to sharing my professional experiences to assist in the development of new operations, training, and educational programs, as well as aiding other professionals in the field."

Dale Heimann
KP representative at large

"After earning a degree in electrical engineering from Texas A&M University, I put some of my computer skills to work to create a Hot Check Database for the County Attorney's Office in Gillespie County in Fredericksburg. In 2003, I was hired on part-time to collect the checks in that database. After five years, I was promoted to the office administrator for the small office, and I have now worked there for over 20 years under three different elected prosecutors. As in many small offices, I have performed a wide variety of tasks including office organization, case management, paperwork preparation, victim assistance, legal research, budget preparation, CJIS reporting and IT work. I truly believe that a primary job of key personnel is to keep the attorneys out of trouble and ensure they have the information and support they need to see that justice is done. I have previously served on the KP Board in 2015 and 2016 and have presented on CJIS reporting at several previous conferences. I am honored and excited to help guide the training of Key Personnel and VACs as a newly appointed board member."

Paula Nash
KP representative at large

"Hello all, I am honored to serve you in my first term on TDCAA's KP–VS Board. I have been with the Tyler County Criminal District Attorney's Office for 20 years. Many of my duties include assisting attorneys with trial prep and during trial. I handle all felony and misdemeanor cases from intake to disposition, and I am the Crime Victim Coordinator and Liaison for our county. I am looking forward to working with each of you to learn and assist in planning future training."

National Crime Victims' Rights Week

Each April communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 21–27, with a theme of "How would you help? Options, services, and hope for crime survivors." Check out the Office for Victims of Crime (OVC) website at https://ovc.ojp.gov/program/national-crime-victims-rights-week/overview.

If your community hosts an event, we would love to publish photos and information about it in this journal. Please email me at Jalayne.Robinson@tdcaa.com to notify us with information and photos of your event.

Victim services consultations

As TDCAA's Victim Services Director, my primary responsibility is to assist Texas prosecutors, VACs, and other prosecutor staff in providing support services for crime victims in their jurisdictions. I am available to provide training and technical assistance to you via phone, email, in person, or Zoom. I can tailor individual or group training specifically for your needs. The training and assistance are free of charge.

Are you a new VAC? This training would be perfect for you! If you would like to schedule a free consultation, please email me at Jalayne.Robinson@tdcaa.com.

Many offices across Texas are taking advantage of this free victim services training. Please see photos below, on the opposite page, and on page 13 of my recent visits to offices around the state. ❇

Above, the Victim Services Division in the CDA's Office in Kaufman County (left to right): Jalayne Robinson, TDCAA Victim Services Director; Kylie Conner, VAC in Child Abuse & Family Violence; Shirley Bruner, VAC; and Michelle Stambaugh, Office Manager & Paralegal to the district attorney.

Left, at the CDA's Office in Kaufman County (back row, left to right): Holly Spindle, Paralegal, Juvenile & CPS; Kindra Helton, Paralegal, Misdemeanor; Kristen Tucker, Paralegal, Felony; Amanda Morris, Paralegal, Child Abuse & Violent Crimes; Jalayne Robinson, TDCAA Director of Victim Services; Gabi Castenada, Paralegal, Felony; and Yolanda Murphy, Paralegal, Family Violence & Street Crimes; (front row left to right): Michelle Bork, Paralegal, Civil; Rosanna Morin, Paralegal, Mental Health; Kimbralie Heather, Paralegal, Misdemeanor; Shirley Bruner, VAC; Reyna Huerta, Paralegal, Felony; Kylie Conner, VAC, Child Abuse & Family Violence; DA dog, Donne (short for Donnetello).

Left, at the DA's Office in Harris County (left to right): Jalayne Robinson, TDCAA Victim Services Director; and VACs Janet Saxon, Monica Quintero, Carolina Valdez, Daniella Claros, and Maria Reverte.

Below, at the DA's Office in Harris County (left to right): Jalayne Robinson, TDCAA Victim Services Director; Julio Bandilla, Victim Assistance Coordinator (VAC); Charlie Hernandez, Administrative Assistant; VACs Reginae Brown, Samantha Sanchez Perez, and Abril Myers; and interns Sarah Jaques and Grace Munoz.

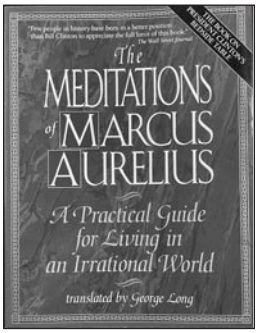
Above, at the DA's Office in Coryell County (left to right): Jim Strunk, Investigator; Jalayne Robinson, TDCAA Victim Services Director; Scott Stevens, First Assistant DA; Dusty Boyd, DA; Jenny Featherston; Laurie Parker (hidden), Sarah Rodriguez, Investigator; Kylen Kafer, ADA; Brandy Rhoades, VAC; support dog Winston; Gretchen McWhorter, VAC; Jeff Parker, ADA; Katarina Roach, ADA; Anna Ibara, Legal Assistant; Melissa Tull, Paralegal; Johann Kirby, Legal Assistant; and Delisa Sandel, Legal Assistant.

Continued on page 13

Ancient Roman stoicism for the modern-day prosecutor

There are a number of books I keep on the shelves at my desk in addition to TDCAA's excellent publications and code books.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin



One of them is a small, thin book I bought in the mid-'90s called *The Meditations of Marcus Aurelius: A Practical Guide for Living in an Irrational World*, translated by George Long.

It was popularized as the book on President Bill Clinton's nightstand, but I knew Marcus Aurelius and Stoic philosophy from my undergraduate studies. I was fascinated by them then and often surprised how many current-day adages, memes, and quotes were originally coined by Emperor Marcus Aurelius.

The emperor was known for being just (a remarkable rarity in Roman leaders), for being well educated, and for leading forces in battle. His reign was anything but calm, but it was not terribly chaotic. History most often labels his time in power as the golden age of Roman justice, logic, and moderation. He dealt with politics, betrayal, war, sickness, religious conflict, failure, and success. In short, his reign sounded kind of like my life at the time when I was working in a prosecutor's office. I was making an emperor's worth of life and death decisions every day, being criticized from all sides, and looking at the ceiling at night hoping I had not let the scales of justice fall off level. Emperor Marcus Aurelius sounded like he might understand my life—when my friends and family did not.

I found Stoic philosophy to be very helpful at the time. "Stoic" often is used to describe one who is disconnected emotionally, uncaring, or unmoved by tragedy, yet that is a gross oversimplification of a very full philosophical construct. Many Stoic philosophical pillars, which are included in this short meditation that Marcus Aurelius penned on an ancient battlefield, are solidly repeated in today's modern memes. YOLO ("you only live once") and the 12-step serenity prayer ("Lord, help me to change the things I can, accept the things I can't, and the wisdom to know the difference") are both examples of wisdom in this slim volume.

I find that things I learned in this book have crept into my own teaching. When training on courtroom testimony to peace officers, I recognize that it is the rare area in which officers are not in control—in fact, it's an environment where their core training to take control is counterproductive. So I always ask them, "What do you control?" The audience correctly responds with, "Ourselves," or "How we react." These answers are pure Stoic philosophy.

My job as a prosecutor, like that of a Roman emperor, required hundreds of hard decisions every day, constant conflict, plotting strategy and employing tactics in trials, and motivating allies. No wonder I found so much of what I read in this book to be fitting. More importantly, I also found the thought and cognitive reactions prescribed for an undertaking like prosecution. Through the book I found many life-changing mental disciplines. Thinking on the meditations helped me develop wisdom to navigate those things I could change, as well as those I had to accept. It was no overnight cure, but it opened paths that made the journey much easier.

Reading through *Meditations* gave me a number of mental disciplines and world views that allow me to deal with a job that no part of my education really prepared me for. (I imagine many of you have had the same experience.) One mental shield this book handed me is a lesser-known quote: "To seek what is impossible is madness; and it is impossible that the bad should not do something of this kind." In context, this statement is not simply a fatalistic, "Bad stuff happens"; rather, it's more like, "Bad stuff happens, which is why we must always be ready for it." I will admit there were times when reading it (and re-reading it) that I have had to set the book down because I tear up.

I am grateful I have had good friends, trusted counselors, and a supportive family, all of whom no doubt assured my survival during years in the courtroom and in prosecutor leadership. But I must also credit *Meditations* for its help too—I highly recommend giving this little 100-page gem a look. ❇

Victim Services at the CDA's Office in Tarrant County; those in attendance included Rob Catalano, First Assistant CDA; Jalayne Robinson, TDCAA Victim Services Director; Allison Bowen, Director of Victim Services; VACs Imelda Lopez, Carrie Farley, Laura Medina, Elizabeth Garcia, Cristina Rangel, Angela Stevens, Clara Salvatierra, Cecilia Jones, and Candace Burnett; Marycarmen Ramirez, Sheriff's Office VAC; MaKayla Moore, Grapevine Police Department Victim Advocate; Lindsay McCramie, Grapevine Police Department Victim Assistance Intern; Ron Shipley, Juvenile Victim Assistance Officer; Lakisha Debose, Tarrant County College VAC; Alexandra Davis, MHMR Victim Advocate; Shyanne Gines, Roanoke Police Department Crime Victim Liaison; Nancy Philip, Euless Police Department Crime Victim Coordinator; and Jared McGinley, Mansfield Police Department Community Resource & Victim Assistance.

Photos from our Investigator Conference

Photos from Train the Trainer

The Fifth Circuit revisits qualified immunity in *Villarreal v. City of Laredo* (cont'd from front cover)

spectrum. The most recent example is a case from Texas and the U.S. Fifth Circuit Court of Appeals, which dealt with qualified immunity of not only police but potentially prosecutors for activity outside the courtroom.

Background

Priscilla Villarreal (who writes under the pen name "Lagordiloca," which roughly translates from Spanish to the Crazy Fat Lady) is a Laredo citizen-journalist with a Facebook audience of more than 100,000 followers, frequently posting critically on the activities of local law enforcement, the district attorney, and other local officials. On April 11, 2017, she published the name and occupation of a U.S. Border Patrol employee who had jumped from an overpass in an apparent suicide; the information had been corroborated through a back channel by Laredo Police Department (LPD) Officer Barbara Goodman. On May 6, Villarreal posted a live feed of a fatal traffic wreck, including the location and the last name of the person killed. The information was again corroborated by Officer Goodman, again while the incident was still being investigated.

An LPD investigator received a tip from colleagues that Officer Goodman was secretly communicating with Villarreal and noted that some of Villarreal's content consisted of information not yet made public. The investigator assigned LPD Officer Juan Ruiz to investigate, and that officer prepared grand jury subpoenas for the phone records of Officer Goodman, her husband, and Priscilla Villarreal. The subpoenas were approved by an assistant district attorney. The records revealed that Officer Goodman communicated with Villarreal frequently, about 72 times a month, and that the communications coincided with law enforcement activities. Warrants were obtained for Officer Goodman's cell phones, and she was suspended for 20 days.

Officer Goodman's cell phones showed two conversations with Villarreal. In the first, Villarreal texted Goodman about the April suicide, asking the man's name and age and whether he was a U.S. Customs and Border Protection employee. In the second conversation, Villarreal sent dozens of text messages asking about the details of the fatal car collision in May, and the precise details that Villarreal asked about appeared in her Facebook posts.

Officer Ruiz prepared two probable cause affidavits to arrest Priscilla Villarreal, which were approved by the same assistant district attorney and submitted to a justice of the peace. The judge issued two warrants for Villarreal's arrest for misuse of official information under Texas Penal Code §39.06(c), which states:

"(c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:

(1) the public servant has access to by means of his office or employment; and

(2) has not been made public."

Villarreal petitioned the district court for a pretrial writ of habeas corpus. The court granted the writ and held §39.06(c) unconstitutionally vague. The State did not appeal the ruling.

After the dismissal of the criminal charge, Villarreal filed a 42 U.S.C. §1983 lawsuit alleging the deprivation of her civil rights, naming as defendants various LPD officers, Webb County prosecutors, Webb County, and the City of Laredo. The suit alleged a pattern of harassment and retaliation by various local officials in violation of her First, Fourth, and Fourteenth Amendment rights, which culminated in her arrest. She sought damages as well as injunctive and declaratory relief. The defendants filed to dismiss all her claims under Federal Rule of Civil Procedure 12(b)(6). The named officials argued qualified immunity and failure to state a claim, and the county and city sought dismissal under *Monell*.[6]

The federal district court granted the motion and dismissed all claims, but on August 12, 2022, a 2–1 panel opinion of the U.S. Fifth Circuit Court of Appeals reversed the judgment of dismissal against the officials as to Villarreal's First, Fourth, and Fourteenth Amendments claims as well as her civil conspiracy claims, finding that qualified immunity did not apply.[7] The defendants sought an *en banc* rehearing by all 16 judges of the Fifth Circuit, and it was granted. Many, many press and media organizations and outlets filed amicus briefs in support of Villarreal.

As the Fifth Circuit judges saw it

On January 23, 2024, the *en banc* Court issued a

77-page opinion, including four written dissents.[8] The majority opinion, authored by Circuit Judge Edith Jones, held that the officials were all entitled to qualified immunity.

Justice Jones observed that Villarreal's First Amendment free speech claim and her Fourth Amendment arrest claim were inextricably linked, and that overcoming qualified immunity for money damages required a showing that a) each defendant violated a constitutional right, and b) the right at issue was "clearly established" at the time of the alleged misconduct,[9] meaning that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[10] The Court found that Villarreal failed to meet either prong: "Villarreal was arrested on the defendants' reasonable belief, confirmed by a neutral magistrate, that probable cause existed based on her conduct in violation of a Texas criminal statute that had not been declared unconstitutional. We need not speculate whether §39.06(c) allegedly violates the First Amendment as applied to citizen journalists who solicit and receive nonpublic information through unofficial channels. No controlling precedent gave the defendants fair notice that their conduct, or this statute, violates the Constitution facially or as applied to Villarreal." In a footnote the Court observed that for the sake of argument it was counting the assistant district attorneys here among the defendant officers seeking qualified immunity despite being prosecutors who typically would have absolute prosecutorial immunity. "Participating in the issuance of the warrants here was arguably outside their absolute prosecutorial immunity," the Court wrote, and it cited a federal law treatise for the proposition that "prosecutorial immunity extends only to prosecutorial functions related to courtroom advocacy."[11]

Qualified immunity protects law enforcement officials who "reasonably but mistakenly conclude that probable cause is present," and Judge Jones found that the officials' beliefs here that they had probable cause was reasonable for many reasons. The Texas Public Information Act (PIA) protects certain information from public disclosure for confidentiality or crime investigation, and it imposes criminal penalties for improper disclosure. The U.S. Supreme Court has long held that statutes such as §39.06 permissibly shield from public disclosure certain sensitive "information that has not been made public." The Court cited several opinions from the Office of the Texas Attorney General protecting both criminal investigations and individual privacy in law enforcement situations that involve suicide or vehicular wrecks, including a 2022 opinion stating that "surviving family members can have a privacy interest in information relating to their deceased relatives."

Villarreal did not dispute this but rather argued that she did not solicit the information with "intent to obtain a benefit," that the information was not "nonpublic," and that the statute was obviously unconstitutional as applied to her conduct as a citizen-journalist. The Court noted that Texas law defines "benefit" broadly as "anything reasonably regarded as economic gain or advantage," and found that going through Officer Goodman rather than waiting for an official report or going through PIA procedures "bolster[ed] her first-to-report reputation." The Court held that Villarreal's own petition admitted such benefits: She "boasts over 100,000 Facebook followers and a well-cultivated reputation, which has engendered publicity in the *New York Times*, free meals 'from appreciative readers,' 'fees for promoting a local business,' and 'donations for new equipment necessary to her citizen journalism efforts.'" This did not end the analysis, however; Villarreal argued that even had probable cause existed, she was still unlawfully arrested because §39.06(c) "obviously" violates the First Amendment as applied to her. The majority found that Villarreal's argument as regards "obvious unconstitutionality" failed on three grounds:

1) no final decision of a state court had held the law unconstitutional at the time of the arrest; accordingly, even if the law were ultimately held to violate the First Amendment as applied to Villarreal's conduct, probable cause would continue to shield the officers from liability;

2) the U.S. Supreme Court and lower courts have not relevantly defined the contours of an "obviously unconstitutional" statute, and

3) the independent intermediary rule affords qualified immunity to the officers because a neutral magistrate issued the warrants for Villarreal's arrest.

The majority addressed each in turn. First, at the time of Villarreal's arrest, no state court had held that §39.06(c) was unconstitutional, and law enforcement officers aren't "expected to predict

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the future course of constitutional law."[12] Moreover, the state habeas court had not found the statute's application to Villarreal violated the First Amendment but rather that it was unconstitutionally vague, and several other prosecutions had been brought under §39.06(b), prohibiting a public servant from disclosing nonpublic information.[13]

Secondly, the majority held that §39.06(c) is not grossly and flagrantly unconstitutional as applied to Villarreal. The court observed that although officers are almost always entitled to qualified immunity, even when enforcing an unconstitutional law, *Michigan v. DeFillipo* held that there was "a *possible* exception for 'a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.'"[14] That exception did not apply here; because there was no judicial indication that the statute was unconstitutional, the officials could rely on the presumptively valid law.

Lastly, a neutral magistrate issued the warrants for Villarreal's arrest, which shielded the officers under the independent intermediary rule. Villarreal had argued that her claim came under the exception to the intermediary rule that arises "when 'it is obvious that *no* reasonably competent officer would have concluded that a warrant should issue.'"[15] The Court observed that this exception generally arises when the intermediary's decision making is tainted by malicious withholding of information, misdirecting, or mistake of law, none of which applied here.

Although the majority found the above was enough to justify the officials' qualified immunity claims, it went on to address the second step of the analysis, whether the asserted rights were "clearly established" at the time of the arrest. The Court noted that this assessment required Villarreal to show binding precedent that "'placed the statutory or constitutional question beyond debate,' so that 'every reasonable official would have understood that what he is doing violates that right.' ... In other words, 'police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.'" Because Villarreal cited no cases to show a "sufficiently clear foundation in then-existing precedent" that it is "settled law," the right is not clearly established for qualified immunity purposes. The majority distinguished the cases she did cite as involving the publication of information already released to the public, namely *N.Y. Times Co. v. United States*, vacating an injunction against the release of the Pentagon Papers, and *Fla. Star v. B.J.F.*, which involved an incident report being inadvertently placed in the pressroom by the government. These cases were different because "[a] right to *publish* information that is no longer within the government's control is different from what Villarreal did: She *solicited and received nonpublic* information from a public official for personal gain."[16]

Judge Graves noted several historical examples of American society benefitting when journalists acquired nonpublic information from unofficial sources, giving two famous examples of when American journalist Seymour Hersh learned of the Mai Lai Massacre from a backchannel Pentagon source in 1969 and when he reported in 2004 on prisoner abuse in Abu Ghraib prison after learning of it from a nonpublic military report.

Four dissents

Circuit Judge Graves wrote the first of the four written dissents, in which he was joined by Judges Elrod, Higginson, Willet, Ho, and Douglas. Judge Graves joined in Judge Ho's position that the charges against Villarreal were obviously unconstitutional in light of the right of each person to ask questions of the government, but he wished to stress that they were also obviously unconstitutional in light of the right of journalists to gather news. Judge Graves noted several historical examples of American society benefitting when journalists acquired nonpublic information from unofficial sources, giving two famous examples of when American journalist Seymour Hersh learned of the Mai Lai Massacre from a backchannel Pentagon source in 1969 and when he reported in 2004 on prisoner abuse in Abu Ghraib prison after learning of it from a nonpublic military report. He further points out that the U.S. Supreme Court itself denied the government's efforts to prevent a journalist's disclosure of classified war documents provided by an unauthorized source in *New York Times Co. v. United States*,[17] namely the Pentagon Papers, which changed the course of American involvement in the Vietnam War. (The majority distinguished the Pentagon Papers and Abu Ghraib examples because they involved unsolicited government information already in the public's hands.) In light of these contributions, Judge Graves found the majority opinion unfair to journalists, unfortunate for a functioning democracy, and unconstitutional because "[a] free press cannot be made solely upon the sufferance of government to supply it with information."

Circuit Judge Higginson also dissented, joined by Judges Elrod, Higginson, Willett, Ho, Oldham, and Douglas. Judge Higginson would remand to the district court for discovery and fact-assessment to test whether the Laredo officials

arrested Villarreal in retaliation for her news reporting, arguing that the majority erred in failing to credit Villarreal's claims as true. He cites the example of Thomas Paine as an example of the First Amendment's guarantee of the right of "engaged citizen-journalists, like Paine, to interrogate the government," and quoted the late Judge Laurence Silberman's warning that "the most heinous act in which a democratic government can engage is to use its law enforcement machinery for political ends."[18] He argued that Villarreal alleged exactly this, that the Laredo officials "arrested her because her newsgathering and reporting activities annoyed them. To silence her as a critic and gadfly, she claims, they arrested her." Judge Higginson said that Villarreal had plausibly alleged that the officers who arrested her lacked probable cause and misled the magistrate who issued the warrants, or, alternatively, even if they had probable cause, that U.S. Supreme Court precedent on how to proceed in a retaliatory arrest claim was not followed. In *Nieves v. Bartlett*,[19] the Court held that probable cause would generally defeat a First Amendment retaliatory arrest claim, except in certain narrow circumstances where officers would typically exercise their discretion not to make an arrest. That's what Judge Higginson said that Villarreal alleged here: Because her arrest was atypical, the district court erred in dismissing her claim.

The majority opinion responded to Judge Higginson's argument by pointing out that *Nieves* requires Villarreal to "present objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech" were not: "Villarreal did not provide even one example of an individual similarly situated to her in all relevant respects who was not arrested for his conduct."

Circuit Judge Willett also dissented, joined by Judges Elrod, Graves, Higginson, Ho, and Douglas. Judge Willett has long been a critic of the qualified immunity doctrine, referring to its application in a 2018 case as a part of the "kudzu-like[20] creep of the modern immunity regime" and saying, "To some observers, qualified immunity smacks of unqualified impunity."[21] Judge Willett in that case expressed grave doubts about the "clearly established law" prong of qualified-immunity analysis, in part because there was no agreement in the courts about what degree of factual similarity must exist between the case at bar and precedent, which he says had the Catch-22–like effect of allowing courts to sidestep the question of what is and is not constitutional behavior and leaving important constitutional questions unanswered. As he put it, the clearly established law prong allows "public officials [to] duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."

Unsurprisingly Judge Willett's blistering dissent in this case focuses on the application of the qualified immunity doctrine. He began by noting that one of the justifications for the qualified immunity doctrine is to protect law enforcement officers who need "breathing room" to make "split second decisions," which was absent here. He scorched the majority for overlooking the "premeditated" nature of the arrest and prosecution, saying that those involved spent "*several months* plotting Villarreal's takedown, dusting off and weaponizing a dormant Texas statute never successfully wielded in the statute's near quarter-century of existence." He argued that under the majority's view that "encyclopedic jurisprudential knowledge is imputed to Villarreal, but the government agents targeting her are free to plead (or feign) ignorance of bedrock constitutional guarantees." Observing that just as officials can be liable for enforcing an obviously unconstitutional statute,[22] they can equally be liable for enforcing a statute in an unconstitutional way, and he argued that the majority fails to consider the second possibility, which "does not account for the possibility—indeed, the real-world certainty—that government officials can wield facially constitutional statutes as blunt cudgels to silence speech." He took the majority to task for allowing the officials to claim immunity because they were acting pursuant to state statute, saying that this goes against the plain text of §1983. In other words, the Laredo officials were so clearly in the wrong, so far as Judge Willett was concerned, it did not matter if they were following a facially constitutional statute duly enacted by the legislature.

Judge Ho, who wrote the majority opinion for the original panel, wrote an impassioned dissent focusing on the First Amendment aspect, joined by Judges Elrod, Graves, Higginson, Willett, and Douglas. Judge Ho observed that the Constitution doesn't mean much if you can ask questions only the authorities allow, and he characterized

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what's at stake in this case as no less than the right to speak and inquire freely. He dismissed the Laredo officials' claim that Texas Penal Code §39.06(c) justifies their actions on both Supremacy Clause grounds and because he does not believe that the defendants showed that Villarreal violated §39.06(c) in the first place, because they failed to make the additional, necessary statutory showing under §39.06(d) that the information was prohibited from disclosure under the Texas Public Information Act. Like Judge Willett, Judge Ho believed this was an easy case for denying qualified immunity, as it should have been obvious to the defendants that they were violating Villarreal's First Amendment rights and retaliating when they arrested and jailed her for asking a police officer for information. He ended the dissent with a pithy Russian joke about a child coming home from school and telling his father, "Daddy, we had a civics lesson today, and the teacher told us about the Constitution. He told us that we have a Constitution, just like in America. And he told us that our Constitution guarantees freedom of speech, just like in America." The dad responds: "Well, sure. But the difference is that the American Constitution also guarantees freedom *after* the speech."[23]

The issue before the Court was solely whether the officials should face liability for money damages for depriving Villarreal of her federal rights.

The takeaway: What's this mean to the rest of us?

It's worth mentioning again that the Fifth Circuit wasn't deciding here whether this was a Constitutional application of Texas Penal Code §39.06(c), whether Priscilla Villarreal could be held criminally liable, or whether the Laredo officials "did the right thing." The charges against Villarreal were found unconstitutional in the trial court and went no further. The issue before the Court was solely whether the officials should face liability for money damages for depriving Villarreal of her federal rights. For what it's worth, I believe both the judges in the majority and the dissents were acting out of fidelity to the law and respect for the gravity of the First Amendment principles involved.

It's also worth mentioning that some information in an investigation really does need to be kept private. While Mayor of San Francisco, Dianne Feinstein nearly derailed the "Night Stalker" serial killer investigation by announcing in a press conference that police had made a ballistics match to the gun used in the killings, had found shoe prints left by the killer, and knew what brand and size he wore. (In her defense, she had not been told that information was not public.) There was immediate concern that the killer would dispose of both the gun and the shoes, leading to the loss of critical evidence. According to a biographer after the press conference, Richard Ramirez walked to the middle of the Golden Gate Bridge and "dropped the size 11½ Avia sneakers into the water."[24]

Something that doesn't quite sit well in the dissents is the absolute certainty expressed that the police and prosecution should know when enforcing a validly enacted statute of the state legislature amounts to an "obvious" unconstitutionality—I don't mean under the facts of this particular case, but as a more general principle. The majority held that qualified immunity applied here in part because the federal courts "do not charge law enforcement officers with predicting the constitutionality of statutes. ... Police officers are not 'expected to predict the future course of constitutional law.'" The dissenting judges find that justification intolerable, for much the same reason Judge Willett articulated in the previous *Zadeh v. Robinson* dissent: It allows officials to violate constitutional guarantees so long as they are the first to do so.

My concern here is similar to the one I voiced in my November–December 2022 column about the *Jefferson v. State* case decided by the Court of Criminal Appeals,[25] in which the Court held that defense counsel may have been ineffective because he should have known that the high court would not share the view of an unpublished case of the courts of appeal: "An attorney's failure to raise a claim is not deficient if the law is unsettled, but an unpublished court-of-appeals opinion in a criminal case does not constitute precedent, so it cannot create an uncertainty when the law is otherwise clear."[26] The problem is that what is "otherwise clear" to the reviewing court long after the fact may be anything but at the trial level.[27] Generally, we don't second-guess[28] defense counsel in hindsight when a proposition of law is not clearly settled, or when it's one on which reasonable minds (or judges) may disagree. As the late Judge Cathy Cochran of the Court of Criminal Appeals put it in another case,

> "the existence of an adversary system demonstrates that there always are lawyers who will disagree on almost any

> issue. Since law is not an exact science, no level of skill or excellence exists at which all differences of opinion or doubts will be removed from the minds of lawyers and judges. Thus, when a legal proposition or a strategic course of conduct is one on which reasonable lawyers could disagree, an error that occurs despite the lawyer's informed judgment should not be gauged by hindsight or second-guessed."[29]
>
> And, "the standard used to judge his past conduct is all too frequently a subsequent judicial decision that has clarified or altered the law under which the attorney had to make his original determination. Those who fail to accurately predict the future course of the law are accused of having been incompetent for following the law that existed—or at least was unsettled—at the time the decision had to be made. But a bar card does not come with a crystal ball attached."[30]

Again, I am neither defending not condemning the Laredo officials here (or for that matter, defending Mississippi police arresting priests doing nothing at all wrong), but rather expressing concerns about where the road may lead. It's troubling when either defense counsel or law enforcement is potentially tasked with knowing how a court will rule on an issue because a later reviewing court could declare the law "clear" or "obvious" after the fact. There's also the matter of recent legislative mandates seeking to limit prosecutorial discretion and subjecting district attorneys to removal for not prosecuting duly enacted statutes, so you potentially have legislators seeking to discipline prosecutors for not enforcing provisions of the Penal Code, and judges who would impose civil liability when they do. "Second-guessing the legislature," as the Tenth Circuit mandated in *Lawrence v. Reed*,[31] is potentially risky business.

Villarreal has already expressed an intention to seek review in the U.S. Supreme Court, so it's possible we haven't heard the last on this matter. Fortunately for most of us, considering whether we will have to rely on the protection of qualified immunity will only ever be a question in the abstract, but it's worth considering: What do prosecutors do when we face potential consequences for both enforcing and not enforcing a law? We do the right thing. I'm not saying the prosecutors and officers here did the right thing; I'm saying, "You do the right thing." Enforce the law as fairly and wisely as you can, and you can look yourself in the mirror no matter the outcome: "Just that you do the right thing. The rest doesn't matter. Cold or warm. Tired or well-rested. Despised or honored."[32] ❇

Endnotes

[1] 386 U.S. 547 (1967).

[2] *Id*. at 555.

[3] *Id*. (citing Restatement, Second, Torts §121 (1965); 1 Harper & James, The Law of Torts §3.18, at 277-278 (1956); *Ward v. Fidelity & Deposit Co. of Maryland*, 179 F.2d 327 (C. A. 8th Cir. 1950).

[4] Mulct (v.), to punish by a fine. https://www.merriam-webster.com/dictionary/mulct (retrieved Feb 21. 2024).

[5] *Id*.

[6] The U.S. Supreme Court held in *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 691-694 (1978) that a government entity (such as the city and county here) is not liable under §1983 under a theory of *respondeat superior*, i.e., solely because it employs a tortfeasor. Rather, it must be shown that the entity's "own violations" of policy or custom were behind the federal violation. *Monell*, 436 U.S. at 694.

[7] *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022) (panel op.).

[8] *Villarreal v. City of Laredo*, No. 20-40359, ___ F.4th ___, 2024 U.S. App. LEXIS 1533 (5th Cir. 2024) (en banc).

[9] *Id*. at *12 (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

[10] *Id*. at *12 (quoting *Anderson v. Creighton*, 583 U.S. 635, 639 (1987)).

[11] *Id*. at *13, fn. 9 (quoting Richard H. Fallon Jr., et al., Hart and Wechsler's *The Federal Courts and the Federal System* 1044 (7th ed. 2015)).

[12] *Id*. at *25 (citing *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 1701, 143 L.Ed.2d 818 (1999); *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 860, 55 L.Ed.2d 24 (1978)).

It's troubling when either defense counsel or law enforcement is potentially tasked with knowing how a court will later rule on an issue because a later reviewing court could declare the law "clear" or "obvious" after the fact.

[13] *Id*. at * 26 (citing *Patel v. Trevino*, No. 01-20-00445-CV, 2022 Tex. App. LEXIS 6494, 2022 WL 3720135 (Tex. App.–Houston Aug. 30, 2022); *Tidwell v. State*, No. 08-11-00322-CR, 2013 Tex. App. LEXIS 14647, 2013 WL 6405498 (Tex. App.–El Paso Dec. 4, 2013); *Reyna v. State*, No. 13-02-00499-CR, 2006 Tex. App. LEXIS 75, 2006 WL 20772 (Tex. App.–Corpus Christi Jan. 5, 2006)).

[14] 443 U.S. 31, 38, 99 S.Ct. 2627, 2632, 61 L.Ed.2d 343 (1979).

[15] *Villarreal* at *30 (citing *Messerschmidt v. Millender*, 565 U.S. 535, 547, 132 S.Ct.1235, 1245, 182 L.Ed.2d 47 (2012) (emphasis added); *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)).

[16] *Villarreal* at *36 (emphasis in original).

[17] 403 U.S. 713 (1971).

[18] Judge Silberman's speech was given while a Deputy Attorney General under President Gerald Ford, describing his experience in the mid-1970s looking into the secret files of FBI Director J. Edgar Hoover: "Accompanied by only one FBI official, I read virtually all these files in three weekends. It was the single worst experience of my long governmental service. I intend to take to my grave nasty bits of information on various political figures, some still active. As bad as the dirt collection business was, perhaps even worse was the evidence that [Hoover] had allowed–even offered–the bureau to be used by presidents for nakedly political purposes. I have always thought that the most heinous act in which a democratic government can engage is to use its law enforcement machinery for political ends."

[19] Nieves v. Bartlett, 587 U.S. ____ 139 S.Ct. 1715 (2019), 204 L.Ed.2d 1715.

[20] Fun aside here, kudzu is one of Judge Willett's go-to metaphors. See, e.g. *El-Ali v. State*, 428 S.W.3d 824, 827 (Tex. 2014) (Willett, J. concurring) (civil forfeiture law "has spread with kudzu-like ferocity in recent years"); *In re Reece*, 341 S.W.3d 360, 389 (Tex. 2011) (Willett, J. dissenting) ("[d]espite the jurisdictional thicket that has sprouted kudzu-like around us, the path out is rather linear"); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 103 (Tex. 2015) (Willett, J, concurring) ("spurring the House Committee on Government Efficiency and Reform in 2013 to lament the kudzu-like spread of licensure"); *Klein v. Hernandez*, 315 S.W.3d 1, 11 (Tex. 2010) (Willett, J. concurring) (extratextual analysis "invites jurisprudential kudzu").

[21] *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J. concurring).

[22] *Id*. at *63 ((Willett, J. dissenting) (citing *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) ("Some statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce the unconstitutional statute–or face a suit for damages if they don't").

[23] *Id.* at *99 (Ho, J. dissenting).

[24] Carlo, Phillip: *Night Stalker: The Life and Crimes of Richard Ramirez*, (Pinnacle, 1997).

[25] Online at www.tdcaa.com/journal/jefferson-v-state-presents-problems-for-the-state-and-defense-counsel-alike.

[26] *Jefferson v. State*, 663 S.W.3d 758, 762 (Tex. Crim. App. 2022).

[27] The Court's opinion there also contradicts the court's case law in place at the time of trial; *Ex Parte Rhoemer*, 215 S.W.3d 887 (Tex. Crim. App. 2007), which held that defense counsel is *not* ineffective when he relies on unpublished case law.

[28] "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

[29] *Ex parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005).

[30] *Id*. at 359.

[31] 406 F.3d 1224, 1233 (10th Cir. 2005).

[32] Marcus Aurelius, *Meditations* 6.2.

Dallas County's new wellness program for staff

Being a prosecutor is an exciting and satisfying profession. Prosecutors are tasked with fighting tough, fighting fairly, and doing justice.

By (standing, left to right) Julie Turnbull, Jennifer Balido, Lauren Black, (seated, left to right): Jenni Morse, Kim Nesbit, & Claire Crouch (not pictured)

Wellness Committee in the Criminal District Attorney's Office in Dallas County

It goes without saying that the job is never easy, and it is often emotionally, mentally, and physically taxing. Even so, there is nothing more rewarding or fulfilling than to advocate on behalf of a victim of crime.

Although extremely gratifying, the job does come with a unique perspective and experience that other legal professions do not share. The demands of the job require prosecutors to walk in the footsteps of victims, see the events through the eyes of first responders, and balance objectivity with the legal requirements to secure justice. The combination of these stressors can affect a prosecutor's daily life, both at work and at home.

The Dallas County Criminal District Attorney's Office is committed to the health and wellness of its dedicated public servants and has taken proactive steps to address these stressors head-on. The office has contracted with F1RST, a comprehensive wellness initiative designed to tackle the repercussions of continuous stress exposure on the overall well-being, performance, and relationships of those working in the criminal justice system. This initiative was conceived in February 2023 by prosecutor Jenni Morse. Following a meeting with the Dallas Police Department's Officer Wellness and Longevity Unit in March 2023, Morse and her colleague, Jennifer Balido, recruited experienced prosecutors who possessed firsthand knowledge of the profound toll that their profession can take on an individual to form the Wellness Committee. The committee is comprised of Lauren Black, Deputy Administrator; Jennifer Balido, Chief of the Appellate Division; Julie Turnbull, Chief of the Restorative Justice and Mental Health Division; Kim Nesbitt, Chief of the Pre-Trial Bond Division; and Jenni Morse, Chief of Special Projects. Each member deals with attorneys, investigators, and support staff in a supervisory capacity, and through their work, saw a need for trauma-based resources as well as increased education on the existence of and resources available through Dallas County's Employee Assistance Program (EAP).

"Through our supervisory roles, we each saw our team members struggling with the toll of vicarious trauma we endure in this profession," Jenni Morse explained. "While we appreciate the benefits that the county provides, we did not feel we had adequate resources that were specifically tailored to the type of work we do. Watching our victims die on body-worn camera footage, hearing the screams of a victim as they are being attacked on a 911 call, speaking to the loved ones of the deceased and shouldering their grief, and feeling the pressures of being the only conduit for justice for these families is a burden that few professions share."

While the initiative and the creation of the committee came together rather seamlessly, the implementation of the program was not a quick process. The five members met regularly to outline the objectives, framework, policies, and procedures, with guidance from the office's Civil Division. The committee visited F1RST's location in Frisco in May 2023 to see the facilities and learn about the services F1RST provides. After selecting the training curriculum that best fit the needs of the office, the committee then pitched the idea to the DA's administration.

As of February of this year, the office had conducted nine workshops for prosecutors, three for investigators, six for support staff, and one specifically tailored to the administrative team. Each of these workshops included discussions on the physical, emotional, and relational effects of the job.

Criminal District Attorney John Creuzot was swift in granting his approval and wholehearted support to this partnership. "Part of running this office is caring for the people," he said. "We cannot do our jobs if our people, whether they be answering phones or prosecuting cases, are not healthy both physically and mentally. I am so proud of this partnership, and I know by strengthening their mental health, our staff will be even more equipped to see that justice is done in Dallas County."

With DA Creuzot's support, the committee then began rolling out the idea to various levels of the office, culminating in an office-wide meeting on October 2, 2023. The objective of the meeting was to launch the new program and drum up excitement for the new focus on office wellness.

Beginning October 5, 2023, every member of the office was offered resiliency training, with each session carefully tailored to address the unique challenges of their specific roles within the office. As of February of this year, the office had conducted nine workshops for prosecutors, three for investigators, six for support staff, and one specifically tailored to the administrative team. Each of these workshops included discussions on the physical, emotional, and relational effects of the job. The F1RST team also provided information on general trauma; conditioning responses from repeated trauma, such as consistent viewing of autopsy and crime scene photos; the areas of the brain and their respective functions; the sympathetic and parasympathetic nervous systems; and techniques to take a person out of the stress response known as "fight or flight."

The investigator workshop was expanded to four hours to meet TCOLE requirements and included topics such as residual trauma from their past work in patrol and investigative divisions, nutrition, and physical therapy exercises to combat fatigue from desk work. Additionally, the culturally competent providers at F1RST can provide counseling and holistic treatment services, if needed, through Dallas County EAP.

"The goal is to provide not just mental and psychological services to our employees, but to give them access to nutritionists, physical and occupational therapists, and recovery specialists as well," added Jennifer Balido.

While the DA's administrative team understands that this training will not eliminate the trauma experienced by the staff, it does provide a crucial outlet and equips employees with valuable tools to manage and openly discuss the effects of the hazardous aspects of their jobs.

"By learning the effects of vicarious trauma and chronic stress on the individual, providing resources to counteract or treat these effects, and continuing to seek out ways to enhance the well-being of our office members, we hope to become healthier and more effective in our pursuit of justice for the citizens of Dallas County," said Lauren Black.

While the process has not been without its challenges, the committee has already witnessed tangible results. From fostering open dialogues surrounding work-related stressors to introducing rejuvenating activities like a prosecutor-led yoga classes on Fridays and employee Wellness Walks, the positive impact of this new initiative is unmistakable. It's evident that these changes are reshaping the overall atmosphere of the office, fostering a healthier and more supportive environment for all.

For more information on this wellness program, please email Jenni Morse at Jennifer.Morse@dallascounty.org. ❇

An at-a-glance guide to traffic violations in the Transportation Code

To the uninitiated, it would be reasonable to believe that the Transportation Code should be a common sense, easy-to-use book of regulations regarding the rules of the road and necessary vehicle equipment that almost every Texan interacts with on a daily basis.

By Joe Hooker
TDCAA Assistant Training Director in Austin

To us unfortunate souls who have looked inside the maddening 3,000-page text, though, it seems possible that the code writers have never actually seen a vehicle, and their one goal was to make sure that no part of a vehicle or driving scenario was called by its common name. It would not be a huge issue except for the fact that many, if not most, criminal cases start with a traffic stop for a violation of the Transportation Code.

Although TDCAA has yet to conduct a study on this, we would wager that the six most common words that prosecutors hear daily when discussing a case with opposing counsel is, "There's a problem with the stop." From justice-of-the-peace courts to capital murder appeals, the State's case often hinges on whether an officer had probable cause to stop a defendant's vehicle for a traffic violation. (Timothy McVeigh, the perpetrator of the Oklahoma City Bombing, was caught after being stopped because his vehicle was missing a rear license plate.[1]) Therefore, it is imperative that prosecutors are familiar both with the most common traffic violations as well as lesser-known ones that give rise to a probable cause stop. It should be remembered that many jurisdictions have local traffic ordinances that can also provide law enforcement probable cause for a traffic stop.

Officers should clearly state in their reports the traffic violation that gave rise to a stop. If more than one traffic violation is observed, those other violations should also be included. When questioning an officer during a motion to suppress or at trial, prosecutors should develop the testimony regarding the officer's observation of the traffic violation as well as have the officer state the section of the Transportation Code on which the stop was based. If more than one violation occurred, the officer should inform the judge or jury of each violation and its corresponding section in the Transportation Code. If the traffic violation can be observed on the officer's dashcam video, the officer should testify to what can be seen in the video, as well as make sure the proper time stamps are on the record for appellate purposes. Even if an officer incorrectly states the law that was used to justify a traffic stop, a traffic stop may still be justified if there was in fact a violation of the Transportation Code,[2] so it is important that the officer testify to the actual observations of the vehicle and its movements rather than just conclusory statements about what traffic violations were committed.

On the next six pages is a quick guide to common traffic violations using everyday language, plus each offense's corresponding section of the Transportation Code; I've included a note where additional explanation is helpful. Of course, please check the Code to make sure that the driving elements for your case match the elements of the Code. Much more extensive charts along with annotations can be found in several TDCAA publications, including *Transportation Code Crimes & License Suspensions, Traffic Stops*, and *Texas Crimes*. *Texas Crimes* charts all the crimes in the state that are not found in the Penal Code and covers 26 different Texas codes.

Endnotes

[1] See https://oig.justice.gov/sites/default/files/archive/special/0203/chapter1.htm and www.youtube.com/watch?v=emfOGJN4CHE&t=6s; the YouTube video is of Sheriff Charlie Hanger describing the traffic stop as well as partial dashcam video of the stop itself. The unavailability of the judge for arraignment due to the judge's son missing the school bus is most likely the main reason that McVeigh was still in custody when the FBI discovered he was the Oklahoma City Bomber.

[2] *Coleman v. State*, 188 S.W.3d 708, 716 (Tex. App.–Tyler 2005, pet. ref'd).

Offense	Transportation Code Section	Notes
Driving Without Registration Sticker	§502.473	
Driving With Wrong, Fictitious, Altered, or Obscured Registration Sticker	§502.475	
Driving with Fake or Unauthorized Temporary Tags	§503.067	
Driving Without License Plates	§504.943	
Covering, Altering, or Obscuring License Plates	§504.945	
Fake or Wrong License Plates	§504.945	
Driving Without a License	§521.021	
Driving Without a License on Your Person	§521.025	The statute indicates that an officer can stop a vehicle solely to check if the driver has a license. Such a stop must be limited in scope and will be scrutinized by the courts.
Failing to Show License Upon Officer's Demand	§521.025	
Possessing a Fake or Altered License	§521.451	
Possessing More than One Valid License	§521.451	
Driving While License Invalid	§521.457	
Stop at Red Light	§544.007	
Must Stop at Line or Before Crosswalk at Red Light	§544.007	
Stop at Stop Sign	§544.010	
"Left Lane for Passing Only"	§544.011	

Offense	Transportation Code Section	Notes
Driving on Right Side of Road	§545.051(a)	
Crossing Yellow/Center Line	§545.051(c)	
Passing On the Left Requirements	§545.053–.055	
Passing On the Right Requirements	§545.057	
Driving on Shoulder	§545.058	There are many exceptions in the statute for when driving on the shoulder is not only perfectly legal but desirable. But the driving facts may warrant a probable cause stop for driving on the shoulder.
Weaving (Failure to Maintain a Single Lane)	§545.060	To complete this violation, a driver must fail to maintain a single lane, *and* the failure must be unsafe, per *State v. Hardin*.[1] If your case took place before *Hardin* was decided, see *Daniel v. State*.[2] In *Daniel*, the CCA stated the officer could rely on a mistake of law when stopping a vehicle for this violation because the lower courts were conflicted on the proper elements of the offense, and the CCA had not decided *Hardin* at the time.
Tailgating (Following Too Closely)	§545.062	
Crossing Double Yellow Lines	§545.063	
Passing a School Bus	§545.066	
Turn Into Proper Lane at Intersection	§545.101	
Unsafe Turns	§545.103	
Failure to Use Turn Signals While Turning	§545.104	
Failure to Use Turn Signals While Changing Lanes	§545.104	
Failure to Use Turn Signals 100 Feet Before Turn	§545.104	The language of the statute is unclear whether changing lanes falls under the 100-foot rule with turn signal. But §545.104(a) makes clear that a turn signal must be used to change lanes.
Rules for Vehicles Approaching or Entering Intersections	§545.151	
Failure to Yield While Turning Left	§545.152	

Offense	Transportation Code Section	Notes
Failure to Yield at Yield Sign	§545.153	
Failure to Yield Right of Way Leaving Private Road or Drive	§545.155	
Failure to Move Over and Slow Down for Emergency Vehicles and Tow Trucks	§545.157	
Failure to Obey Railroad Crossing Signals	§545.251	
Stopping, Standing, or Parking Next to a Car Parked on the Curb	§545.302(a)(1)	For all the §545.302 violations, the Code calls a vehicle that is running but not parked "standing" (idling).
Stopping, Standing, or Parking on a Sidewalk	§545.302(a)(2)	
Stopping, Standing, or Parking in an Intersection	§545.302(a)(3)	
Stopping, Standing, or Parking in a Crosswalk	§545.302(a)(4)	
Stopping, Standing, or Parking Close to Road Work	§545.302(a)(6)	This is a violation if the vehicle would obstruct traffic.
Stopping, Standing, or Parking on a Bridge or Tunnel, or Other Elevated Structure	§545.302(a)(7)	
Stopping, Standing, or Parking on a Railroad Track	§545.302(a)(8)	
Stopping, Standing, or Parking Where Prohibited by an Official Sign	§545.302(a)(9)	
Standing or Parking in Front of a Public or Private Driveway	§545.302(b)(1)	
Standing or Parking Within 15 Feet of a Fire Hydrant	§545.302(b)(2)	
Standing or Parking Within 20 Feet of a Crosswalk at an Intersection	§545.302(b)(3)	
Standing or Parking Within 30 Feet of a Flashing Signal, Stop Sign, Yield Sign, or Traffic-Controlled Signal on the Side of the Roadway	§545.302(b)(4)	For all the (b)(4) violations in this section, the violation takes place within 30 feet of the road that the sign or signal is facing. A driver can park within 30 feet of a stop sign, for instance, as long as it is on the other side of the stop sign.
Standing or Parking Within 20 Feet of a Fire Station's Driveway	§545.302(b)(5)	

Offense	Transportation Code Section	Notes
Standing or Parking Where an Official Sign Prohibits Idling	§545.302(b)(6)	
Parking Within 50 Feet of Railroad or Rail Crossing	§545.302(c)(1)	
Parking Where Official Sign Prohibits Parking	§545.302(c)(2)	
Must Park Within 18 Inches of Curb	§545.303(a)	
Must Park In the Direction of the Flow of Traffic	§545.303(b)	
Speeding	§§545.351–.362	
Driving Too Slowly	§545.363	
Reckless Driving	§545.401	This offense is not a fine-only offense; its range of punishment includes incarceration.
Leaving Vehicle Running and Unattended	§545.404	
Following Too Closely to Fire Truck or Ambulance	§545.407	
No Car Seats For Children	§545.412	
No Seat Belt	§545.413	
Racing on Highway	§545.420	
Fleeing a Police Officer	§545.421	While similar to Evading a Peace Officer under Penal Code §38.04, the two statutes are different and a defendant can be charged with both offenses.
Cutting Through Private Property/Parking Lot	§545.423	
Texting While Driving	§545.4251	There are plenty of exceptions in this statute that need to be explored before assuming the stop is valid. But be aware that many jurisdictions have local ordinances that are stricter on cellphone use than the one in the Transportation Code.
Moving or Driving an Unsafe Vehicle	§547.004	A vehicle being driven on a rim would qualify as an unsafe vehicle.
Headlights at Night or Low Visibility	§547.302	
Headlights Requirements	§547.321	

Offense	Transportation Code Section	Notes
Tail Lights Requirements	§547.322	
License Plate Light	§547.322(f)	
Brake Light Requirements	§547.323	In the Code, brake lights are called "Stoplamps." All one word. Because who hasn't been pulled over to be told that your stoplamp is out?
Turn Signal Light Requirements	§547.324	
Vehicle Reflector Requirements	§547.325	
Vehicle Minimum Light Requirements	§547.326	
Object On Windshield Obstructing Driver's View	§547.613	
Tinted Windows	§547.613	
Excessive Smoke or Emissions	§548.306	
Collision Involving Injury or Death	§550.021	The Legislature has changed the language from *accident* to *collision*. Prosecutors are in the business of prosecuting crimes, not accidents. This change will give clarity to jurors who before had to hear serious, intentional driving facts yet then had to call the obvious result "an accident."
Collision Involving Damage to Vehicle	§550.022	See the note about the term "collision" under §550.021.
Duty to Give Information and Render Aid	§550.023	
Duty on Striking Unattended Vehicle	§550.024	
Duty on Striking Roadway Object or Structure	§550.025	
Duty to Immediately Report Collision	§550.026	See the note about the term "collision" under §550.021.
Bicycle Requirements and Restraints	§§551.101–.107	
Scooter Requirements and Restraints	§§551.351–.352	
Golf Cart Requirements and Restraints	§§551.401–.405	
Off Road Vehicles Requirements and Restraints	§§551A.001–.074	

Offense	Transportation Code Section	Notes
Pedestrians Must Use Sidewalk	§552.006	
Driver Entering or Exiting Private Roadway with Pedestrian Cross Walk	§552.006	
Solicitation By Pedestrians	§552.007	
Driving Without Insurance	§601.191	
Driving Without Evidence of Financial Responsibility	§601.195	

Endnotes for chart

[1] See *State v. Hardin*, 664 S.W.3d 867 (Tex. Crim. App. 2022).

[2] No. PD-0037-22 (Tex. Crim. App. 2024).

What I've learned from defense attorneys

I've noticed over the last couple years defense attorneys complaining about their clients more often, that clients are more stubborn and entitled.

By Daniel Cox
First Assistant District Attorney in Henderson County

The intellect of the average defendant doesn't seem to be what it used to. There have always been jailhouse lawyers doling out free advice, but apparently it's worse now, with amateur advice such as:

- "Everybody is entitled to at least one 12.44."
- "Don't take the first plea offer—the prosecutor has to make you at least four."
- "The cops didn't read my *Miranda* rights so everything gets thrown out."
- "The cops have to field-test the meth in front of me or else it doesn't count."

Today's defendants seem to value the counsel of their fellow inmates more than that of their attorneys.

I've had many defense attorneys tell me, after their clients reject reasonable and fair plea offers, that I don't know what it's like these days trying to reason with defendants. They wish I knew what they are dealing with. Which got me thinking about a couple of great lessons I've learned from defense attorneys,. With this in mind, I sought out some local defense attorneys and a new prosecutor in our office who spent 20 years in criminal defense, and I asked them what they wish prosecutors knew about their jobs. Their answers were both expected and surprising.

Plea bargaining

The first lesson I learned from a defense attorney regarded plea bargain negotiations. When I was a baby misdemeanor prosecutor, a defense attorney came up to me one day in court and said, "Look, you made a very fair and reasonable offer, which my client should accept. But he paid me a lot of money. I need to make it look like I worked for him and got him a better deal instead of just taking the first offer."

This conversation has essentially turned me into a used-car salesman. My first plea offer is like the sticker price on a 2013 Toyota Corolla at Carmax. While I consider that first offer to be fair and reasonable, there is often some wiggle room. Only instead of "checking with my manager," I'm just getting to a resolution that both I and the defense attorney can live with.

In a similar vein, when I was a baby felony prosecutor, no habitual defendant got an offer under 25 years. This unofficial policy of mine didn't last long. I was being stubborn when a defense attorney told me, "His first two pen trips were for two years and four years. He got caught with 1.5 grams of meth. Thirty years is a tough pill to swallow." It was then that I realized that not every 25-to-life case needs an offer of 25-plus years. It was another lesson I learned courtesy of a defense attorney.

As I spoke to defense attorneys for this article, a lot of what I heard was about plea bargaining. Which makes sense, seeing the vast majority of cases are resolved without a trial. The gist of what these attorneys said was that it is in the best interest of everyone to move cases quickly. And there are specific reasons defense attorneys benefit from a quick resolution. When prosecutors are stubborn or unreasonable with an offer, a case that could have been moved quickly all of a

sudden drags out for three years. And that turns into 20 docket calls, 15 visits to the jail, hundreds of jail calls from the client, and dozens of phone calls from the client's family members. That $1,500 court-appointed fee comes out to about $6.37 an hour. Now, the financial well-being of defense attorneys is not prosecutors' problem, and some cases just have to be tried, but I heard defense attorney after defense attorney say, "If we can move a case along, let's move it along."

The other side of the story

One attorney I spoke to relayed a lesson he learned when he was a baby misdemeanor prosecutor himself. He was trying to work out a family violence case with opposing counsel. This case had an independent, third-party witness who was good for the prosecution. The young misdemeanor prosecutor pointed out this fact to the seasoned defense attorney, who asked who the witness was. "Oh, that guy?!" the defense attorney responded. "You can't put him on the stand. He likes to sexually assault little boys! Everybody in town knows that!" (I should point out that this attorney used a much more vulgar term to describe sexual assault of a child.)

The young prosecutor was mortified and profusely thanked defense counsel for that revelation, and the point was made. The young prosecutor, now a defense attorney himself, learned that you can't rely on the offense report too much. As the sayings go, there are two sides to every story and there's more than meets the eye. The offense report contains a part of the story, but not all of it.

Another defense attorney I recently asked for input for this article shared a similar thought. He said he often knows more about the case than anybody in the courtroom—certainly more than the judge, but more than the prosecutors, too. And it makes sense: The defense attorney gets to see our discovery—but we don't get theirs. Sure, sometimes a defendant gives a statement to the police, but even then, the prosecutors don't get the entirety of the defendant's version of events or personal background. But the defense attorney gets to talk to his client, and he gets not just the client's story and version of the offense, but also any mitigating facts for punishment: the disturbing or challenging childhood, the PTSD from six deployments to Iraq or Afghanistan, or, as in the case of the third-party witness with a certain "proclivity" as discussed above, impeaching information about State's witnesses.

No amount of preparation and diligence changes the fact that prosecutors may talk to only one party and that we get only one side of the story. That's the nature of the non-reciprocal discovery system under which we work. We get the case file from law enforcement, whereas the defense attorney benefits from our discovery and access to his client, who has the other side of the story.

Convinced of their innocence

Jeff Herrington, an ADA in our office who spent 20 years as a defense attorney, was also the elected DA in Anderson County before he did defense work. I consulted Jeff for this article, and he mentioned something I'd never thought of. We all know that the passage of time is bad for the State. Memories fade, witnesses get lost, victims stop caring, and juries wonder, "If this case is so important, why did it take four years to get to trial?" Jeff noted that as time goes by, defendants sometimes convince themselves of their innocence. As Jeff put it, sitting in jail for months or more, with little to do but think and often with the prodding and support of their pod-mates, defendants convince themselves that they're not guilty. The victim deserved it. The cops are corrupt. The State is in on it. A snitch set me up. The witnesses are lying. Whatever the excuse may be, the longer defendants sit there, the more they become convinced of their innocence.

Which can clearly be an impediment to plea negotiations. I mentioned the need for wiggle room earlier in this article, but Jeff told me not to have too much. If the State's first offer is 12 years on a second-degree felony and a couple months later that 12-year offer turns into a four-year offer, the defendant starts to think that the State's case is weak. While the defense attorney is advising his client to jump at four years, the seed has already been planted. The defendant thinks that if he just waits a little bit longer, that four years might turn into two or maybe even something better—probation, dismissal, or a plea to time served.

Other morsels of wisdom

Some other quick hits I heard when asking around the defense bar:

We get the case file from law enforcement, whereas the defense attorney benefits from our discovery and access to his client, who has the other side of the story.

- "Not all of us are rich."
- "Just because I do a good job and fight for my client does not mean I'm a true believer."
- "I'll file a motion to suppress and ask for a contested hearing because my client needs to hear the cop testify. Sometimes that is the wake-up call that they need."
- "Sometimes, we advise our client to take the low TDCJ [Texas Department of Criminal Justice] offer because we know he'll screw up deferred and get a lot more time when the inevitable Motion to Proceed is filed."

In conclusion

Finally, another lesson I took from a defense attorney was an indirect one. It wasn't a defense attorney sitting me down and imparting sage advice; it was something I observed in court. I had a contested hearing on a Motion to Revoke Community Supervision. At the end, the judge revoked probation and sentenced the defendant to time in TDCJ.

We aren't the people facing years in prison, and we aren't the people who have been victimized. It could be worse. So let's try to leave the job at the courthouse and not take it home.

I guess this defense attorney didn't thoroughly advise his client of what might happen in this hearing (or the client wasn't listening), because the defendant asked his attorney, "What happens now?" Counsel responded with, "Well, I'm going to go home and drink bourbon. You're going to prison."

As callous (and at the same time, kind of funny) as that response was, I try to remember what he said that day to his client. Yes, prosecutors see and deal with horrible and traumatic things that happen to people. Yes, we see human suffering. Yes, we have people's liberty and freedom in our hands. We have stressful jobs. But at the end of the day, we're not going to prison. We're going home at the end of the day. We aren't the people facing years in prison, and we aren't the people who have been victimized. It could be worse. So let's try to leave the job at the courthouse and not take it home.

For the sake of my mental health and personal relationships, that may be the most valuable lesson I've learned from a defense attorney. ❇

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