

**KINKEADE &
McCOLLOCH'S
TEXAS
PENAL CODE
ANNOTATED**

WITH RELATED TEXAS LAW

ANNOTATIONS BY

**JUDGE ED KINKEADE
S. MICHAEL McCOLLOCH**

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The Honorable Ed Kinkeade is a United States District Judge for the Northern District of Texas. He formerly served as a justice of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas for fourteen years. He received his undergraduate and law degrees from Baylor University, and a Master of Laws degree from the University of Virginia. He left private practice in 1981 when he was elected judge of County Criminal Court No. 10 of Dallas County, Texas. Less than a year later, he was appointed judge of the 194th Judicial District Court in Dallas County, a court with primary criminal jurisdiction. After seven years on the district bench, he was appointed by the Governor to the Court of Appeals in 1998, where he served until his appointment by the President to the federal bench. He is a prolific lecturer and author, having written numerous articles for law reviews and various bar publications. He served for twenty years as an adjunct professor of law at Texas Wesleyan (now Texas A&M) University School of Law, where he was repeatedly selected as the outstanding adjunct professor. Since 2011 he has served as Jurist in Residence at Baylor University School of Law. While on the state appellate court he served as an active member of the legislative committee of the Judicial Section of the State Bar of Texas. He lives in Irving, Texas, with his wife Melissa, daughter Mandy, and son Brad.

S. Michael McColloch received his B.A. degree from Washington & Lee University and his Juris Doctorate from St. Mary's University School of Law. A criminal defense veteran of over forty years, he has a national practice with offices in Dallas and restricts his practice to criminal litigation in federal and state courts, defense of parallel administrative and civil enforcement actions by government agencies, qui tam litigation, and internal corporate and public integrity investigations. He has been rated "AV Preeminent" by Martindale Hubbell for over 35 years and was long ago named a "Super Lawyer" for White Collar Defense by Thomson Reuters. McColloch has represented prominent federal and state public officials, professional athletes, lawyers and physicians, state and local government entities, banks, public companies, large non-profits, hospitals, and individuals from all walks of life. He currently serves as an adjunct professor of law at Baylor Law School. Named to the Society of Legal Scholars by the Texas State Bar College, he is the author of numerous law review and bar journal articles on criminal law and procedure, including six annual survey articles on Texas criminal law and criminal procedure for *Southwestern Law Journal*. He is the co-author of the two-volume *Erisman's Reversible Errors in Texas Criminal Cases*, 3rd ed. A former bar president and frequent lecturer, he has spoken on constitutional and criminal practice issues at law schools and before many local, state and national bar organizations. McColloch was the recipient of the 2022 Cincinnatus Award bestowed by the New Civil Liberties Alliance in Washington for his constitutional litigation successes in advancing civil liberties against the enforcement overreach of the federal administrative state. He successfully argued *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), before the Supreme Court in 2023, ending the nearly century-old use of in-house administrative courts for the trial of fraud and other common law claims by more than two dozen federal agencies. He has extensive experience in legislative affairs, having represented clients as a registered lobbyist and presented State Bar of Texas criminal justice proposals to the Texas legislature through his work on behalf of the State Bar Penal Code and Code of Criminal Procedure Committee. A Fellow of the Texas Bar Foundation and a member of the State Bar of Texas and the State Bar College, he has represented clients before all levels of state courts, multiple United States Courts of Appeals and the United States Supreme Court. He is the sole member of S. Michael McColloch PLLC, www.mccolloch-law.com.

Publisher's Preface

This publication is designed to provide a compact and authoritative presentation of the Texas Penal Code and selected penal provisions from other Codes. The publication is intended to combine the most salient features of an unannotated code—compactness and portability—and those of a fully annotated code—interpretive materials—into a single publication incorporating the essential features of both. Thus, the publication contains the full text of the Texas Penal Code accompanied by interpretive aids which have been constructed by the authors and the publisher's editorial staff to provide materials which are highly focused, concise, practical, and authoritative.

In addition to the Texas Penal Code, this publication contains selected penal provisions from other Codes, including the Alcoholic Beverage Code, Chapter 106 (offenses involving minors); Family Code, Chapter 59 (progressive sanctions model, Juvenile Justice Code); Government Code, Chapter 411, Subchapter H (concealed handgun licensing); and Health and Safety Code, Chapters 481–489 (controlled substances and drugs); and selected provisions from Chapters 502, 521, 522, 524, 545, 550, 705, and 724 of the Transportation Code, relating to driving while having alcohol, controlled substance, or drug in system, including the provisions relating to implied consent. We have included punishment range tables and a standard value ladder table to provide users with a convenient means of determining the punishments relating to offenses governed by the Penal Code, and the current text for Controlled Substances Schedules I–V, which are referenced in Chapter 481 of the Health and Safety Code.

The Commentary, Leading Cases, and Leading CLE/Law Review materials have been prepared by the authors. The remainder of the editorial components were prepared by the editorial staff of the publisher.

This publication contains the text of the Texas Penal Code and the related laws from other Codes as amended through the Regular, Second, Third, and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023, general election (2023). The Commentary and Leading Cases cover decisions rendered through July, 2024. The Leading CLE/Law Review materials cover course materials, articles, notes, and comments published through July, 2024. The Ethics Opinions cover decisions rendered through July, 2024.

To order additional copies of Kinkeade & McColloch's Texas Penal Code Annotated, please call 1-888-728-7677.

Authors' Preface

When the modern Texas Penal Code was first enacted by the 63rd Legislature in 1973, its publication was accompanied by useful interpretive practice commentaries on each section authored by Seth S. Searcy III and James R. Patterson, who were intimately familiar with the history and purpose of its new provisions. These commentaries provided the bench and bar with a valuable background perspective not readily available from any other source on applicable legal principles, objectives and legislative intent. Over the next two decades, the Code was subjected to countless supervening judicial interpretations and hundreds of legislative amendments, including the addition of a number of new offenses and adjustments to the elements and defenses in the original sections. This natural evolution eventually resulted in a Code that was becoming increasingly cumbersome and unwieldy and which ultimately left many of the original commentaries obsolete.

Faced with both a state prison population crisis and the need to update and streamline the Code, the 72nd Legislature in 1991 committed to various reforms and prospectively repealed the entire Code effective September 1, 1994. The Punishment Standards Commission was established to study the sentencing and release laws and to rewrite the Code. The eventual product of that exhaustive effort came to be embodied in S.B. 1067, which passed the 73rd Legislature in May of 1993. As it turned out, this wholesale “amendment” of the Code accomplished a major overhaul, which significantly consolidated and revised many aspects of the Code, but did not eliminate most of its familiar provisions. When the “new” Code was published in 1994, the old interpretive commentaries from the original 1973 version were finally discarded.

This publication is intended to fill that void and ultimately to provide the practitioner with a truly portable reference guide to the Penal Code which effectively incorporates the essential components of a fully annotated “library” version, in a single volume. Unlike other, partially “annotated” desk books or pamphlets on the Penal Code, this work endeavors to supply updated, practical analysis in commentaries for every substantive provision; the commentaries are designed to provide the user with a quick synopsis of the most salient elements and current judicial construction pertaining to each section. Most of these commentaries also include background information on relevant legislative history to facilitate a contextual understanding of the purpose and intent underlying the respective section and its evolution over successive legislative sessions, for most sections going back to the genesis of the current Code in 1993. This is necessarily the emphasis with regard to recent legislative changes and newly created offenses, for which the last legislature in 2023 manifested considerable enthusiasm. The legislature’s appetite for complexity and its passion for increasing penalties through new victim-related punishment enhancements continues unabated. All significant amendments and additions from the 2023 legislative sessions—indeed all legislative sessions since the advent of this Code more than thirty years ago—have been noted and explained. Practice pointers, for both prosecutors and defense counsel, have also been included where appropriate and as space allows.

The remaining elements of this publication are designed to supply a comprehensive, yet concise, overview of the current state of the case law and a cross-reference to further research. The sampling of case authority under the “Leading Cases” heading following each section is designed to provide the most significant, or at least representative, rulings applicable to each section. Rather than simply quote from the opinions, an approach that can leave the reader without a proper contextual bearing, the summaries included with each citation seek to analytically summarize the essence of each opinion’s holding. Because much of the useful resource material available to today’s practitioner is found in publications of bar-sponsored seminars, the authors have included references to available coursebooks from recent continuing legal education courses, at least where those materials contain some substantive treatment of the pertinent section or helpful practice guidance for cases involving that section.

Finally, this book provides the Texas criminal justice community with integrated references to resources in the Thomson Reuters library of publications which is especially useful when there is no Texas case “directly on point.”

This book is extensively updated annually. During legislative years, a timely analysis of all of the new substantive legislative changes are incorporated. All updates cover the past year’s significant case authority, both in the case listings and, where appropriate, in the practice commentaries.

In a project of this magnitude, it is inevitable that certain issues may have received insufficient treatment or that some notable cases or resource materials may have been inadvertently omitted. The authors would welcome the input of practitioners and judges in any area of this work which would make the publication more useful in future editions.

Dallas, Texas

August, 2024

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The authors gratefully acknowledge the expert assistance of many individuals who contributed their time, advice and critical analysis in the preparation of this publication. With advance apologies to those whose names have been inadvertently omitted, the authors would like to express particular gratitude to our original West Group editor Jim Watson, whose patience, dedication and occasional prodding kept the initial publication of this book on schedule and ensured a high quality product. The authors also wish to express their gratitude to original project manager Terrie Jenevein, who provided valuable conceptual advice and support for the first edition in 1997; current Thomson Reuters Attorney Editor Lisa Dittmann, who has assumed the duties of chaperoning the authors; the office of the Governor, for its biennial assistance in cataloging the legislation signed just weeks before manuscripts are due, resulting in a timely publication schedule; and recent Columbia University Law School graduate Taylor Sutton, whose many hours of very capable research assistance were invaluable to the compilation of this edition.

Dedication

This volume is dedicated to the authors' wives, whose patience, encouragement and support during long hours and late nights of research, drafting and proofing made this book possible.

Melissa Kinkeade

Janet McColloch

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