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VT DIGGER 2022 Question and Answer for State's Attorney Candidates

A. Do you support efforts to raise the age at which offenders are prosecuted in adult criminal court? Why or why not?

I support efforts to raise the age at which individuals may be prosecuted in adult criminal court. For many years research has shown that ongoing brain maturity and development extends well beyond teen years (*see e.g.*, NPR and ABA articles from 2011 and 2015: <https://www.npr.org/templates/story/story.php?storyId=141164708>; https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/).

Based on the science I support *raising the age*. However, in practice, there must be an expansion of staff, services, programming, and capacity carefully designed to best support the system and the young people it aims to serve. DCF, the Judiciary, Offices of State's Attorneys, Public Defenders, and DOC should be provided with training and additional resources to best serve an expansion of "raise the age."

Young people, depending on the seriousness and severity of the conduct and victim-impact, should not have to have bear the weight, and field of lifelong barriers, of an adult conviction hanging over head because of something that occurred at young age. However, for certain deeply serious charges and factual circumstances raising the age may not be appropriate.

B. What changes, if any, do you believe are needed to Vermont's Court Diversion and Community Justice Center Programs?

As a current Deputy State's Attorney I work closely with the local Community Justice Centers (or "CJCs") and Diversion programs who work with our community members who receive referrals. I am supportive of expanding CJC and Diversion programming as long as adequate staff, training, and resources are made available. I would support efforts to expand services within CJC and Diversion Programs to include expungement and sealing opportunities, as well as public and consumer education about the Criminal and Juvenile Justice systems. This may require an increase in staff, training, and resources – including legal oversight. I believe that providing further services to our community members who are already engaged in programming is the next step to effectively provide catered pathways to better outcomes and reduction of taxpayer cost.

CJC and Diversion programs have been proven to provide cost-effective and outcome-driven opportunities to engage with the underlying conduct outside of the court process with an ally-perspective and outcome-driven approach. CJC and Diversion programs across the State, and in each county, should be heavily utilized, and potentially presumptive in many cases involving non-violent misdemeanor charges as a means to prudently engage with community members that come into contact with the criminal justice system.

I firmly believe that CJC and Diversion programs are a prudent and effective means of diverting cases out of the overburdened and resource-intensive court process. As Addison County State's Attorney I will refer cases, where appropriate, to local CJC and Diversion programs in as many instances as possible based on application of prosecutorial discretion, engagement with Defense Counsel, and community partners. Successful CJC and Diversion programming allows State's Attorneys to focus on the most serious cases.

From both a taxpayer and reform perspective Diversion and CJC programs remain as essential as ever and expansion of services should be explored.

C. What is a State's Attorney's role in holding police accountable, especially in use of force cases?

State's Attorneys have a duty, embedded in Vermont's founding documents, to serve as a representative and voice of the people in the context of the criminal justice system. Concerning law enforcement accountability, State's Attorneys must, can, and should play an active role, in practice and advocacy. While I support our frontline, hardworking, and ethical officers who I work with each day, I will not hesitate to hold officers accountable for misconduct, including excessive use of force, that would impair the fair and impartial administration of justice. I would hold officers accountable who damage the trust between law enforcement and the communities that we serve. Accountability in and out of the courtroom will strengthen the relationship between the community and law enforcement.

In the limited context of discovery, State's Attorneys should, under their discretion and careful review, disclose "Brady letters" and "Brady material" to defendants and defense counsel concerning law enforcement officers. The responsibility to draft and issue Brady letters should not be taken lightly but the duty to provide Brady discovery is essential in the pursuit of an accountable criminal justice system and is in line with United States Supreme Court and Vermont caselaw.

Beyond the Brady doctrine, and broad concepts of accountability, there are substantive steps that Vermont could, and should take, to better serve the needs of integrity-driven law enforcement while furthering and improving the bonds of trust between the public and the law enforcement community. Detailed in brief form below, I have outlined a series of accountability solutions.

Potential Vermont Accountability Solutions

(1) Creation of the Office of the Special Prosecutor. I would support the study, and eventual creation of an office of a Special Prosecutor, unattached from the Attorney General's Office and Offices of State's Attorneys. The role of the Special Prosecutor could be narrowly tailored to provide neutral review when a conflict arises that may prevent a State's Attorney or Attorney General's Office from neutral review and objective pursuit of criminal charges concerning law enforcement. The office of the Special Prosecutor must be independent from State's Attorneys and the Attorney General's Office with a limited but important role in our criminal justice system. The Special Prosecutor's office should function as the presumptive referral office concerning criminal charges alleged against law enforcement officers. Further, the Special Prosecutor could provide a review function, policy guidance, training, and issuance of neutral legal opinions, when officers discharge their weapon or apply the use of force. The Special Prosecutor should have all the powers of a typical prosecutor with funding and oversight separate from the Attorney General. The current system of occasional and discretionary collateral review amongst fellow State's Attorneys and the Attorney General's Office is opaque with a high likelihood of inconsistency.

(2) Expanding the Scope of the Office of Professional Regulation, within the Secretary of State's Office, to include oversight of Law Enforcement Certification and Professional Responsibility. Separate from review of criminal conduct, I would support expanding the role of the Office of Professional Regulation ("OPR"), within the Secretary of State's Office, to include substantive support and oversight concerning certification of law enforcement officers. OPR is already tasked with licensure and professional accountability for thousands of other Vermonters and a multitude of other high

-skill and high-risk professions. Expansion of OPR's role should accompany appropriate resources to effectively serve professional oversight of law enforcement certification and review.

(3) Accountability Action Plan Recommended by WCSA Rory Thibault. In August 2020, Washington County State's Attorney Rory Thibault produced a commentary entitled "Accountability is key to law enforcement reform." (See https://www.timesargus.com/opinion/perspective/thibault-accountability-is-key-to-law-enforcement-reform/article_c696bbf1-e379-53f3-a41e-e82231b485ac.html). In that commentary State's Attorney Thibault made four recommendations. In supplement to the recommendations above, I am supportive of State's Attorney Thibault's recommendations and repeat and quote from them below:

First, he called on the Legislature to authorize and "**fund creation of an independent Office of the Inspector General** for law enforcement activities to provide oversight of all law enforcement agencies in the state of Vermont. This would include a duty to collect and administer statewide data on alleged and substantiated misconduct, as well as matters that were addressed at a supervisor level and not resulting in formal disciplinary action – critical in abating poor performing personnel moving from one department to another without repercussion."

Second, he called for the creation of a "**Statewide Law Enforcement Advisory Council**, based on the existing statutory structure and model of the State Police Advisory Council (SPAC). Like SPAC, this body would advise and assist law enforcement agencies and would be empowered to ensure appropriate corrective action is taken, provide advice to agencies and municipalities concerning the response to substantiated and unsubstantiated misconduct allegations, and offer recommendations, reports or other support to state and local governmental stakeholders and public on law enforcement activities, and internal affairs practices. Further, if created, this council should have the power and discretion to initiate de-certification proceedings, expanding that role outside the Vermont Criminal Justice Training Council itself."

Third, he called for adoption of "**a system of regionalized internal affairs units**. Many small municipal departments struggle to field an effective internal affairs program – the independence and impartiality integral to these investigations is difficult to achieve in departments with limited personnel. I strongly encourage the Legislature to create the statutory, training and funding structures to support the creation of regionalized internal affairs units (e.g., North and South), drawn from statewide and local agencies, to promote full, fair and impartial investigations under the supervision of an inspector general and authority of a Law Enforcement Advisory Council."

Fourth, he called for the "**creation of an anonymous tip line and whistleblower protections to encourage 'policing within the ranks.'** A tip line or anonymous reporting channel for law enforcement or other public persons, with whistleblower protections, may facilitate early investigation of, and intervention of, alleged law enforcement misconduct. It is a necessary tool to ensure claims of misconduct are not suppressed, lost or otherwise 'swept under the rug.'"

As we review law enforcement accountability we must also pause to note that it is nearly always officers and other emergency first responders that arrive first at the scene of an overdose event or at the scene of a similarly traumatic event. This is especially true as Vermont finds itself in the grips of the deadliest wave of the opioid epidemic – involving Fentanyl. In 2021 210 Vermonters died from opioid overdoses. This is the highest number of fatal opioid overdoses Vermont has ever recorded. Deaths deemed to be an overdose increased by 1/3 in 2021 when compared to 2020. Rutland County, neighbor to Addison County, had the highest fatality rate in the state.

With increased focus on law enforcement accountability we should take stock of the unavoidable human trauma attached to the daily duties of our law enforcement officers. Likewise, we must hold ourselves accountable at all levels of government when we review the law enforcement profession. We must do more to provide for the health and wellbeing of our officers and first responders who confront many of Vermont's most traumatic life and death situations in the course of each shift: unlivable, unhealthy, and unsafe housing; substance use disorder; mental health crisis events; domestic and family violence; sex crimes; gun violence; assaultive crime; homicide scenes; opioid and stimulant related property and community crime; overdose events; generational abuse; violent or serious motor vehicle accidents; etc. In this vein, I 100% support the recent efforts to embed social workers with law enforcement at State Police barracks. I would advocate for similar support and funding within our municipal departments and agencies.

D. Do you support a statewide database of "Brady" or "Giglio" letters? Why or why not?

Yes. I support a statewide database of "Brady" letters. It is essential for all stakeholders in the criminal justice system to know which law enforcement officers have been issued a Brady letter, especially when law enforcement officers move to new law enforcement jobs in other agencies or departments. Beyond the bounds of what is required by law, I believe that access to Brady letters and a Brady list should not be shielded from public inspection. In the vein of transparency, publication of the list may, if provided with the proper context, assist in more effective prosecution, and build public trust. Disclosure and publication of Brady letters to the public, defense counsel, and defendants is an important pillar in the context of accountability and proper administration in pursuit of the ends of justice.

As noted in a recent ACLU of Vermont publication, <https://www.acluvt.org/en/news/are-vermonts-prosecutors-failing-report-bad-cops>, "... the 1963 U.S. Supreme Court case Brady v. Maryland and the line of cases that followed it established that when police officers commit acts that undermine their credibility – including bias, lying, and theft – prosecutors are obligated to disclose that information to defense counsel. Since then, the courts have been clear: prosecutors have a constitutional obligation to uncover and disclose evidence that could help a defendant's case, including an officer's credibility issues, and must err on the side of disclosure." The Brady case imposed a duty on the Government to disclose relevant information about the law enforcement officer (or officers) involved in a particular case. In practice, Brady letters are memorialized and sent to defendants and defense counsel when an officer involved in the case had prior relevant conduct which may impact the instant case.

Depending on the reasons for issuance of a letter for a specific officer, that officer may still be able to perform some or all functions of a law enforcement officer. In other circumstances, officer conduct and subsequent issuance of a Brady letter may effectively render an officer incapable of performing the duties required to perform as a law enforcement officer.

The ACLU of Vermont recently published Vermont's list of Brady letters. In response to the ACLU's request for any policies relating to Brady requirements, "only one state's attorney's office (Washington County) had a formal policy of disclosing Brady letters to defense counsel." As State's Attorney in Addison County I would propose adoption and application of a Brady policy, not unlike the Washington County policy, to ensure consistency and transparency when issuing Brady letters. (See ACLU investigation here: <https://www.acluvt.org/en/news/are-vermonts-prosecutors-failing-report-bad-cops>); (Washington County's policy is linked here: https://www.acluvt.org/sites/default/files/2021-03-15_brady-giglio_policy_and_guidance.pdf). The Washington County Brady Policy establishes a framework for the assessment, management, and disclosure of exculpatory and impeachment information in prosecutions handled by the State's Attorney.

As detailed in VTDigger's 2020 series on Brady letters, it is important to note that the standard for when an officer gets a 'Brady letter' "varies greatly across Vermont, depending on the location and the prosecutor. . . A Brady letter can be the death knell for an officer's career, particularly if the county prosecutor won't take their cases anymore." (See <https://vtdigger.org/2020/12/17/brady-letters-vary-vermont-counties/>). As noted above, as Addison County State's Attorney I would implement a Brady policy not unlike the Washington County policy.

County policies aside, a centralized vetted standard whereby State's Attorneys and the Attorney General's Office agree to a Brady framework would serve to educate prosecutors, defendants, defense attorneys, the public, and the law enforcement community. A vetted and accepted set of guidelines as to a Vermont Brady standard would assist in determining the framework, weight, and relevance of a particular Brady letter, placed within context.

E. Should Vermont end qualified immunity for law enforcement officers? Why or why not?

There is often confusion, in media reports, in public discussion, and in discussion at the legislative level, concerning qualified immunity (or "QI"). Many people believe that the qualified immunity doctrine protects officers from criminal prosecution. However, qualified immunity does not apply to criminal charges. Law enforcement officers are not immune or protected from criminal prosecution or criminal liability. Qualified immunity only applies in civil lawsuits, not criminal prosecutions. Thus, the Attorney General's Office and State's Attorneys in Vermont can file criminal charges against law enforcement officers, and any other government employees, as long as there is probable cause.

Further, there is often confusion concerning the differences between the Federal QI standard and the Vermont QI standard. The Federal QI standard employs an "objective" test and is often cited by Federal Judges as nearly impossible to overcome. (See *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020)). Unlike the Federal standard, the Vermont QI standard allows for the plaintiff to pierce the veil of QI protection with proof of subjective bad faith by a law enforcement officer. Put another way, the Vermont standard allows for plaintiffs to put on subjective evidence of bad faith by law enforcement as one way to overcome QI. Unlike the nearly impossible Federal QI standard, the Vermont QI standard provides for a legitimate pathway to pierce the veil of QI. The Vermont QI standard, as detailed by the Vermont Supreme Court in *Zullo v. State* (2019) openly rejects the rigid Federal QI standard for cases brought under Vermont law and justified under Vermont's Constitution.

I support the continuance of Vermont's QI standard as established by *Zullo*. While Vermont cannot change federal law or federal precedent, for cases brought under Vermont law, I support ensuring that *Zullo* remains the law in Vermont.

As a related aside, and as noted above, if there is probable cause that a law enforcement officer violated criminal law State's Attorneys should not hesitate to review the case and pursue criminal charges. In addition, and as detailed above concerning police accountability, if a State's Attorney is not in a position to provide neutral review and prosecution of a case involving a defendant who is a member of law enforcement, the case should be referred to a Special Prosecutor, unattached from State's Attorneys and the Attorney General, who could review the case and potentially bring criminal cases against law enforcement officers.

F. Should state's attorneys cease requesting cash bail for defendants? Why or why not?

If elected as State's Attorney in Addison County I would work with the community to draft and create a bail policy, to put into place guardrails for the use of bail to serve the aims of accountability but prohibit use of bail for improper purposes. Bail should never be used to punish individuals charged with crimes as they await the disposition or trial in a pending case. Likewise, bail should never be imposed as a cudgel against those in our communities with limited financial resources and, or, limited or lack of housing.

In practice, I have requested bail, sparingly, in cases to ensure that individuals with pending or filed cases appear in court and do not abscond. For example, I have requested bail where a person has repeatedly refused to come to court proceedings, including for arraignment, jury trials, jury draws, change of plea events, motion hearings, and status conferences etc. I have learned that each Judge is different, each situation is different, and each county is different. A request for bail may be accepted in County A and then rejected in County B. Likewise, a request to hold-without-bail, in an attempt not to impose monetary bail, may be rejected in County A but accepted in County B.

Prior to the imposition and grant of bail, non-monetary conditions of release must be considered, and, in certain, limited situations, use of a hold-without-bail request may be appropriate. Unfortunately there are certain situations where conditions of release will not ensure that an individual will appear in court. Cash bail should only be imposed if conditions of release are deemed to be insufficient and the situation either does not warrant hold-without-bail or a hold-without-bail does not apply.

I would support a legislative effort to set an automatic time period for bail review within a certain number of days (e.g., 60-70 days). Automatic review would force judges, prosecutors, and defense attorneys to stay focused on cases where there has been bail imposed and where that bail is holding that person in an incarcerated setting.

For all members of our community (defendants, alleged victims, and witnesses) who come into contact with the criminal justice system it is essential to keep cases moving in an efficient manner. When individuals refuse to appear it grinds the system to a halt and impairs our delicate and already painfully slow process. The criminal justice system has deep and historic flaws and State's Attorneys must do everything in our power to keep cases from languishing. While I try to avoid the use of bail, limited use of bail can be justly applied to keep cases moving by engaging individuals who might otherwise never appear in court despite the ability to do so. In most cases where I have requested bail, once the person, who had been missing, appears in court I request to strike the bail.