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Criminal Justice Section

Criminal Justice Section Newsletter

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Annual Meeting Highlights

The ABA Criminal Justice Section met in Chicago and virtually for the first Hybrid ABA Annual Meeting, August 4-10, 2021. The Section hosted panels, council and committee meetings and participated in the ABA House of Delegates proceedings.

The CJS sponsored an Annual CLE Showcase panel, "Cryptocurrency Law: The Wild West or the Financing of the Future?" in which panelists discussed the current legal and regulatory regimes that govern this space and the need for standards and further regulation. The Section cosponsored another CLE Showcase panel, "The Future of Policing: Ending Senseless Violence and Igniting Transformative Reform" [photo below] where panelists discussed limits on qualified immunity for police, a ban on no-knock warrants and holding police officers accountable as transformative reform measures. The Section also presented its annual program, "Annual Review and Preview of the Supreme Court's Term, Criminal Cases."

Outgoing CJS Chair April Frazier Camara gave her closing statements as chair and passed the gavel to Incoming Chair Wayne McKenzie, who is the CJS chair for the 2021 – 2022 ABA year.

The Criminal Justice Council voted to submit five resolutions at the Annual Meeting to the ABA House of Delegates. The House of Delegates adopted the following Criminal Justice Section-sponsored resolutions:

- 503 – Urges Congress to create and fund to study the consequences of the mass incarceration of African Americans living in the U.S.
- 504 – Urges prosecutors to update their case management systems, allowing for transparency to ensure a more fair and equitable justice system.
- 505 – Urges raising the minimum of "juvenile delinquents" to 14.
- 506 – Urges lawmakers to end the use of chemical agents on youth in Juvenile/correctional facilities; educate justice system personal about adverse effects of chemical agents on children.
- 507 – Urges abolishment of private prisons and termination of contracts with private prisons.

CJS Chair, 2021-2022

Wayne McKenzie

The ABA Criminal Justice Section's new Chair for 2021-2022 is Wayne McKenzie, the General Counsel at the New York City Department of Probation.

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Southeastern White Collar Crime Institute

This year's program, held in-person on Sept. 8-10 in Braselton, Georigia, covered a number of highly topical white collar subjects, including health care fraud, the enforcement priorities of the new Biden Administration, and insights from Federal District Court Judges on litigation in the region.

Law Student Writing Competition

Erik Zimmerman of the University of Chicago Law School is the winner of the William W. Greenhalgh Student Writing Competition. The 2021 competition topic was "Police Use of Force."

Recent Webinars

- The Defense Function Committee hosted a panel "FCPA Prosecutions and Investigations: Where Are We now."
- The Young Lawyers Committee hosted a panel "Moving Criminal Justice Online: Challenges and Opportunities for Young Attorneys."
- The Homeland Security, Terrorism & Treatment of Enemy Combatants Committee hosted a panel "Guantanamo & Beyond: A Panel Discussion on Military Commissions, Torture & the Way Forward."
- The Mental Health Committee hosted a documentary screening and Q&A "Ernie and Joe: Crisis Cops Q&A Discussion."
- The White Collar Crime Committee's Ethics Sub-Committee hosted two panels: "Ethical Considerations Surrounding the New Brady Rule" and "Navigating the Ethical Minefield When Lawyers Become Witnesses, Subjects, or Targets of Investigation."
- The WCCC New England/Boston Region Sub-Committee hosted a panel, "False Claims Act Enforcement in 2021: Hot Topics and How to Mitigate Risk."

These webinars can be viewed on the CJS YouTube Channel at www.youtube.com/user/ABACriminalJustice.

Upcoming Events

- Nov. 19-20: Thirteenth Annual Fall Institute, Washington, DC
- March 2-4, 2022: 37th Annual National Institute on White Collar Crime San Francisco, CA
- June 22-24, Health Care Fraud Institute, Las Vegas, NV

For the complete list of CJS events, see www.ambar.org/cjsevents.

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Criminal Justice Section

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Alternatives To Incarceration & Diversion Committee

The Alternatives to Incarceration and Diversion (ATI) Committee is pleased to announce two important developments for the quarter.

After a few years of dedicated input and contributions of the Task Force on Diversion Standards, the proposed standards were recently approved by the Standards Committee and will be sent to the CJS Council for initial review at the 2021 Fall Meeting in November.

This set of standards will represent the first of its kind to help jurisdictions conduct diversion programs at various intercept points – early diversion, such as community-first, law enforcement and pre-filing programs; pre-plea programs; and post-plea programs.

A special thanks go out to the task force's reporter, Prof. Ion Meyn (University of Wisconsin Law School), Rachel Dykema, and Linda Britton, CJS Standards Director. The entire task force, including David Atzmon, Karen Maline, Kim Parker, Hon. Anne Swern, Jonathan Wroblewski and Steven Zeidman, worked tirelessly on producing these comprehensive standards.

Raul Ayala, ATI Committee co-chair who served as chair of the task force, also extends a note of appreciation to Prof. Bruce Green, Chair and the entire CJS Standards Committee for their thoughtful review and input. We all look forward to their approval by the CJS Council and eventual adoption by the ABA House of Delegates. Publication of the Diversion Standards, along with extensive commentary, would follow thereafter.

The committee is also happy to announce the recent appointment of Deanna Adams as ATI Committee vice-chair. Deanna is with the Judicial Council of California, the policymaking body of the California state court system, where she acts as a subject matter expert on issues at the intersection of behavioral health and criminal justice. Prior to this role, she was with The Council of State Governments (CSG) Justice Center, where she worked with local and state governments from across the country to develop research-driven strategies to improve criminal justice systems, and she served as joint staff to the CSG Justice Center and Chief Probation Officers of California. She also formerly directed a community-based organization that provides jail-based and reentry services in Santa Cruz County, CA. Her work has often focused on the development and implementation of alternative to incarceration and diversion programs, including advising various criminal justice stakeholders, such as state and local policymakers, state agencies, the courts, prosecution and defense, law enforcement, and service providers.

The Plea Bargain Task Force

The Plea Bargain Task Force (Co-Chairs Russ Covey, Lucian Dervan) was created to take a critical look at the plea system. Plea bargaining is a daily part of life in any criminal courtroom in the country, and yet the practice is fraught. Critics argue that, among other things, the modern plea system is coercive, leads to unjust outcomes and sustains overcriminalization. While proponents point to the overburdened courtrooms across the country that wouldn't be able function without plea bargaining.

With these competing visions of plea bargaining in mind, the first part of the Task Force's work has been to gather evidence about plea bargaining across jurisdictions, hearing from both its critics and proponents. The Task Force has already collected written and live testimony about a range of issues relating to plea bargaining, including the problem with innocent people pleading guilty, racial disparities in plea outcomes, and the use of coercive practices to induce pleas.

What has become clear during the evidence gathering phase is that plea bargaining is not one monolithic practice. It looks different depending on whether you're in state or federal court, a rural jurisdiction with few lawyers or a large urban center with robust prosecution and public defender offices. Indeed, even within the same courthouse, informal practices may differ between courtrooms and attorneys.

Although this variation poses a challenge to creating recommendations, the task force has been able to identify some universal concerns with plea bargaining that it plans to address in its report. While the report will focus on some particular plea bargain practices that are problematic, like the use of coercive negotiation techniques by the state, much of the report will highlight other areas of the criminal system that lead to perverse incentives and outcomes during the plea process. For instance, among other issues, the task force is examining the role of mandatory minimums, collateral consequences, a lack of pre-trial discovery rules, and systemic problems with access to defense counsel in many jurisdictions. These are not problems with plea bargaining per se, but they are manifested during the plea process. In this sense, the task force must look at the entire criminal system since plea bargaining *is* the criminal system.

The Task Force continues its work and will publish its report in 2022. The members of the task force come from a variety of institutions, including academia, The National Association of Criminal Defense Lawyers, The CATO Institute, The Innocence Project, the Federal Defenders, and the Department of Justice, among others. For more information, please contact the Reporter for the Task Force, Professor Thea Johnson at thea.johnson@ rutgers.edu.

Forensic Accounting Concepts and Considerations All Lawyers Need to Know

By James Carroll

A company in need of a forensic accounting investigation is typically faced with addressing a serious issue. The issue can range from responding to allegations of wrongdoing (e.g., alleged embezzlement of funds, misrepresentation of financial results, corruption) or addressing the financial aspects of a commercial litigation matter. To address the issue effectively, the company needs a credible, objective analysis that provides relevant insights, thereby allowing company executives, and counsel, to make the best possible decision based on the analysis of available information.

If you are an attorney handling a matter for which a forensic accounting investigation is required, you should have a clear understanding of the key concepts and terms related to the process, as well as a toolkit of effective techniques for overcoming challenges to accurate data collection and analysis. You will likely need to hire specialists with experience in forensic accounting and data collection. However, it is not sufficient to leave the technical aspects to those specialists.

Although many lawyers are not trained accountants, lawyers participating in a forensic accounting investigation have a professional obligation to develop a functional knowledge of the applicable technology and processes related to the work they are overseeing. The ABA's Model Rules of Professional Conduct address this area in Rule 1.1 on competent representation—including Comment 8 on Rule 1.1 about understanding the "the benefits and risks associated with relevant technology"—and in Rule 5.3(b) regarding lawyers "having direct supervisory authority" over the conduct of a nonlawyer they have retained as part of their work. Therefore, it is critical to understand the basic concepts, considerations and challenges for forensic accounting in order to effectively carry out an investigation.

Issues impacting forensic accounting analyses

Forensic accounting analyses are a complex set of procedures that can be further complicated by several factors. An investigation into irregularities or alleged criminal activity is bound to disrupt the company. The suspect—or those working for, or with, the suspect—may be compelled to tamper with evidence, including both qualitative and quantitative information. Those looking to evade the consequences of wrongdoing could, among other things, seek to destroy or hide financial data and guard access to source documents and key personnel. False or misleading statements during interviews, particularly during information-gathering interviews, can further impact the forensic accountant's analyses.

Sometimes the forensic analysis is unintentionally hindered as a result of cognitive biases—common biases experienced during investigations include confirmation bias and the "halo effect"—or simple disorganization. Perhaps the company has long suspected that the alleged wrongdoer has been embezzling, and the forensic accounting investigation is the first hope for concrete proof. Company representatives may steer the investigation in a direction that implicates the suspect at the expense of logical explanations (i.e., confirmation bias). Those types of representations are typically identified during the application of forensic accounting procedures and then must be addressed. In a less nefarious scenario, companies that rely on paper documents or outdated technology may simply have poor records that are difficult to locate, or data that is problematic to efficiently analyze.

By understanding these potential difficulties, lawyers can better identify and potentially avoid them when they arise during an investigation. It is also important to grasp some fundamental accounting concepts to better oversee the work of forensic accountants and data technicians in carrying out an investigation.

Understanding the types of accounting and the accounting cycle

Corporations must keep accurate books and records for both financial and tax accounting purposes. Depending on the type of forensic accounting investigation (i.e., the issues at play), the procedures applied may focus on financial accounting, tax accounting or both types of information for analysis. Financial accounting adheres to Generally Accepted Accounting Principles (GAAP) for reporting as set by the Financial Accounting Standards Board (FASB) and Governmental Accounting Standards Board (GASB). By contrast, tax accounting adheres to the Internal Revenue Code (IRC) as legislated by Congress.

Generally speaking, the accounting cycle (i.e., the recording of transactions and preparation of financial statements) consists of seven steps. The cycle begins with a transaction recorded in the appropriate journal and posted to an account in the general ledger. The trial balance summarizes the balance sheet and income statement account balances. Adjusting journal entries are then recorded, if necessary, to record estimates, reclassify amounts or record missing information. Historically, fraudsters have used adjusting journal entries to obfuscate their wrongdoing. After closing the books, the company prepares an adjusted trial balance and formalized financial statements. One

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key aspect of the accounting data is to verify that the debits and credits, in total, are equal. To improve efficiency and avoid human error or interference, many companies perform these steps using automated accounting software packages.

Required financial statements for effective forensic accounting

Balance sheets, income statements and statements of cash flows are of paramount importance to lawyers engaged in forensic accounting. These statements tell a financial story, and the analysis of those statements can determine whether that story matches the allegations received, assertions represented, or comports opposing counsel's propositions. Critically, datasets used in the execution of forensic accounting procedures should be complete, accurate and reliable. Demonstrating a clear chain of custody for electronically stored information (ESI), which may include qualitative and quantitative data, can assist in addressing the foregoing.

The balance sheet reflects a company's assets, liabilities and equity (i.e., Assets = Liabilities + Equity) as of a specific date (e.g., as of December 31, 20XX). Analysis of the balance sheet provides insight into current assets (i.e., cash and cash equivalents, accounts receivable, inventory) and long-term assets (i.e., fixed, intangible, goodwill). Balance sheets also present liabilities (i.e., accounts payable, accrued expenses, current debt) and long-term liabilities (i.e., long-term debt) as well as equity (i.e., retained earnings, shareholder distributions).

A company's income statement shows its profit and loss over a specified period (e.g., January to December 20XX). An income statement contains information related to revenue, costs of sales (expenses directly attributable to generating revenue), gross profit, operating expenses, depreciation and amortization, taxes and other income and expenses. The statement of cash flows reports the sources and uses of cash over a defined period. This statement (using the indirect method) reconciles net income, cash flows derived from operations, financing and investing to an entity's ending cash balance.

Armed with this information and other key financial datasets including, without limitation, the detailed general ledger, a forensic accountant can analyze the data to provide the insights necessary for the investigation.

Forensic accounting techniques and methods for effective analysis

Because an investigation is often precipitated by a whistleblower complaint (primary source) or the identification of irregularities or potential misconduct by management or internal auditors, it is important to approach any forensic accounting analysis with a clear and objective mindset. While the analysis is underway, it is also a critical responsibility of the forensic accountant to keep counsel updated as to results and progress to ensure the work remains on schedule and on budget.

As part of the analysis, forensic accountants must take steps to validate the foundational datasets to be analyzed. This may include procedures such as comparing the detailed general ledger balances to financial statements and/or tax returns, or analyzing disbursement and sales data for consistency. When poring over data, it is crucial to have a sense of origination and direction. Forensic accountants employ numerous techniques to analyze data. Techniques such as ratio, trend, regression and transactional analyses are common, as are data analytics and document analysis. When analyzing transactional activity, procedures such as vouching and tracing can be applied. Vouching refers to a procedure whereby an amount is followed from the financial statements to the source document, whereas tracing is the inverse, using source documents to forward to the financial statements.

A crucial consideration in any forensic accounting investigation includes the acquisition of datasets. In many instances, datasets may be obtained through digital forensics. A simplified example of an effective digital forensics process flow would be:

1. Collaboratively gain an understanding of the matter, the custodians and associated ESI.
2. Collect ESI from one or more locations simultaneously and filter it through industry-accepted software. Ensure that custodians' ESI is prioritized and that any multi-language requirements are met.
3. Cull datasets to focus on key issues and review the relevant information.
4. Proceed with production, presentation and testimony. Prepare to defend the applied methodologies and e-discovery practices.

Some common errors to avoid during the digital forensics data collection process which could impact data reliability include:

- Failing to follow the legal requirements for data collection.
- Altering evidence in any way.
- Presenting data with chain-of-custody issues.

Modes of data preservation, collection and analysis

In today's day and age, there are multiple methods available to complete digital forensics data collection, which is typically done either in person or remotely.

- **In-person data collection**: This involves targeted deployment of specialized tools and technicians on site. This is a more tailored and personal approach, though it may not scale effectively for some types of investigations.

- **Remote self-guided data collection**: This method has become more common due to challenges posed by COVID-19. There are convenient, self-guided devices that can be shipped to the data custodian to capture data and then be sent back to the digital forensics lab for processing. The devices used for remote collections include features such as encryption, limited user choices, automatic logging and full forensic file imaging, making that evidence defensible.
- **Remote backup data collection**: Companies that store files in the cloud are candidates for another remote method of data collection. In this cost-efficient option, remotely controlled tools scour the company's cloud, desktops, laptops and other devices to identify relevant systems and individuals. Credentials are easily accessed to provide a full view of data for verification.

Each of these methods for data collection has advantages and potential limitations, so choosing the best method will depend on the unique nature of the investigation and the relevant data required for analysis. Increasingly, the use of forensic technology offers many benefits for identifying, preserving, collecting and analyzing large volumes for data. For example, forensic accountants are increasingly turning to artificial intelligence (AI) to help them perform forensic data analysis. Using tools such as concept searching and cluster wheels, AI technology can analyze records of internal conversations to help lawyers determine if there is criminal intent behind suspicious transactions.

The power of forensics

If a company needs to perform a forensic accounting investigation, their leaders put their trust in you and associated specialists to sift through sensitive data to make an unbiased and accurate assessment of the issues at play. When an investigation is done effectively, it can also help safeguard the company from similar problems in the future. As the size and number of datasets grow larger each day, it is critical you understand best practices and the range of processes for conducting analyses in accordance with your professional obligations.

Legal Education Police Practices Consortium

The Criminal Justice Section is proud to announce the launch of the Legal Education Police Practices Consortium (the Consortium). The Consortium will contribute to the national effort examining and addressing legal issues in policing and public safety, including the conduct, oversight, and evolving nature of police work. Leveraging the ABA's expertise and that of participating ABA-accredited law schools, legal scholars will have an opportunity to collaborate on projects to develop, implement, and elevate police practices which strengthen the rule of law and protect all populations equally across the United States. Projects will be designed to support effective policing, promote racial equity in the criminal justice system, and eliminate tactics that are racially motivated or have a disparate impact based on race.

Member universities have access to the ABA's library of model policing policies, policing course curricula currently taught across the Consortium, as well as research projects designed by librarians at participating law schools. To-date the Consortium has enrolled 54 law schools across the country, with plans for continuous engagement and growth. Participating law school librarians are developing research assignments to be undertaken by Consortium fellows. Assignments will support the larger goals of the Consortium by examining the organization and reporting structures of local policing agencies, as well as their existing policies and training material. In this way, the Consortium will utilize the geographic diversity of participating schools, while creating a nationally reflective database of information available to members. This work will strive to promote collaboration and dialogue between fellows, legal scholars and local and federal policing agencies.

The Consortium will also collaborate on and promote the adoption of policing courses, which examine the role and law of police, in all member law schools. These courses will work to better equip the lawyers and legal scholars of tomorrow to understand the role and evolution of the police in the United States, how policy changes have been realized within policing departments, and research promising approaches to policing practices in compliance with local laws. Findings from these courses and assignments from research fellows will further support the ABA in promoting policing policy at the federal, state, local and territorial levels.

The Consortium strives to be a clearinghouse of information related to policing events, policy, training, and transformation and hosts a national calendar of public events related to police practices.

For additional information about participating schools please visit the project page at www.americanbar.org/groups/criminal_justice/police_practices. For inquiries on law schools wishing to join the Consortium, please contact Jessalyn Brogan Walker (she/her) at jessalyn.walker@americanbar.org.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Arizona Bans Use of Peremptory Strikes in State Jury Trials

• Rule applies to civil, criminal trials in 2022

• State attorney general among opponents

Arizona state courts will be the first in the country to eliminate peremptory strikes of jurors, the Arizona Supreme Court announced.

The rule changes, which take effect Jan. 1, 2022, come as an attempt to improve the fairness of the jury selection process, according to a court news release.

Peremptory strikes raise concerns of discrimination because attorneys can remove potential jurors without explanation.

Arizona will prohibit the practice for civil and criminal jury trials. The state had previously put temporary restrictions on peremptory challenges.

"Eliminating peremptory strikes of jurors will reduce the opportunity for misuse of the jury selection process and will improve jury participation and fairness," Chief Justice Robert Brutinel said in a statement.

Supporters of the new rules said in written comments that the move would help juries be more reflective of the community and help eliminate discrimination or unconscious bias.

Opponents, including the office of Attorney General Mark Brnovich (R) argued the changes are unnecessary and could make it more difficult for litigants to receive fair jury trials.

As part of the changes, Arizona will focus on "sharpening the process for removing potential jurors for cause, such as conflicts of interest or personal biases that prevent impartiality," the news release said. Trial judges also will be trained to make sure lawyers have enough time to argue why a juror should be removed for cause.

About 600 criminal jury trials are conducted annually by the superior courts in Arizona, the release said.

Lack of Conflict Rule 'Negatively Impacted' U.S. Prosecutions

• Justice Department gap for attorneys participating in matters involving ex clients, IG says

• DOJ should modify policy, consider guidance for incoming attorneys on conflicts, IG says

The Justice Department's lack of a requirement that its lawyers receive authorization to participate in matters involving former clients has "negatively impacted" the outcome of criminal prosecutions, the DOJ's inspector general said.

Federal ethics regulations and state bar rules of professional conduct "do not sufficiently address circumstances that can arise in connection with DOJ investigations and prosecutions of former clients," Inspector General Michael Horowitz wrote Wednesday in a management advisory memorandum to Deputy Attorney General Lisa Monaco.

The Justice Department currently directs U.S. attorneys and their offices to contact the Executive Office for U.S. Attorneys' general counsel's office when they become aware of an issue that might require recusal related to an actual or apparent conflict of interest. But the current guidance "does not obligate individual Department attorneys to raise potential conflicts with their respective offices, so the office can seek guidance," the IG report said.

The absence of a requirement may have contributed to the failure of a U.S. attorney to disclose a prior representation while in private practice of a subject of a criminal case in which the prosecutor later participated, the IG report said.

The U.S. attorney's failure to disclose the potential conflict and another potential conflict in the same case resulted in "significant reductions" in the two defendants' sentences after post-conviction appeals. The U.S. attorney resigned in 2015, according to an investigative summary of the matter released by the IG's office in July.

The IG is investigating similar issues involving two DOJ trial attorneys, the latest report said. The inspector general recommended that the Justice Department should modify its existing policy "to ensure that any such participation does not cause a reasonable person to question that attorney's impartiality." The DOJ should also consider what requirements, guidance or training should be provided to incoming attorneys regarding how to handle these potential conflicts, the inspector general said.

Judiciary Seeks Comments on Proposed Emergency Rules Change

• Rules aim to provide flexibility, uniformity for future emergencies

• Target date for rules to go into effect is December 2023

The federal judiciary asked the public on Friday to weigh in on proposed changes that would allow courts to continue operations during a future emergency.

The biggest change would give the Judicial Conference the sole ability to declare a "rules emergency" when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

The declaration must generally specify which rules are subject to change and may last no more than 90 days. The Judicial Conference, the policy making arm of the judiciary, can extend the emergency by making additional declarations.

Once a rules emergency is declared, individual courts and judges may alter rules as necessary, except as to certain statutory deadlines, like the time to file an appeal.

Changes can include modification to service of process, videoconferencing, and the selection of juries.

The proposed changes affect appellate, bankruptcy, and trial level federal courts. They are largely uniform, with some additional protections for criminal proceedings given the strict constitutional requirements imposed on such cases.

The rules must still go through a number of administrative hoops, and aren't expected to go into effect until December 2023.

Comments on the proposals are due by Feb. 16, 2022, with the judiciary set to hear public testimony on the proposals late this year and into the next.

In addition to authorizing certain changes for courts to deal with the Covid-19 pandemic, the Coronavirus Aid, Relief, and Economic Security Act passed in March 2020 asked courts to look into formal rules that would provide flexibility and uniformity for dealing with emergencies.

Such emergencies aren't limited to pandemics, but can include more localized situations like hurricanes, civil unrest, and even a disruption to communications systems.

Police Can't Lie to Juveniles in Questioning Under Illinois Law

• Affects confessions obtained during interrogations

• Oregon poised to be second state to enact prohibition

While police officers can lie to suspects of crimes and get away with it in every state, that's no longer the case in Illinois—at least when it comes to juveniles.

Illinois Gov. J.B. Pritzker (D) is scheduled to sign pioneering legislation (S.B. 2122) today that makes Illinois the first state to prohibit any oral, written, or sign-language statement made by someone 17 years old or younger to be admissible as evidence in criminal or juvenile legal proceedings if law enforcement officials intentionally deceived the suspect to get the statement.

Police use the tactic because it works, compelling people to make confessions that later prove to be false, said Oregon state Sen. Chris Gorsek (D), sponsor of a similar bill on his governor's desk.

Younger people are particularly susceptible to the practice because of a propensity to favor short-term gains, such as ending an interrogation, over longer-term consequences, or a desire to please authority figures, advocates of the legislation said. Younger people also might not consider the totality of the actions because their brains aren't fully developed, they said.

"We know from our research that kids are between two and three times as likely to confess to a crime they didn't commit because they are more vulnerable in interrogation rooms, more susceptible to pressure," Laura Nirider, co-director of the Center on Wrongful Convictions at Northwestern University Pritzker School of Law, said in an interview.

Police primarily use deception to make false promises of leniency and make false claims about the existence of incriminating evidence in order to obtain confessions, she said.

Several factors may lead to coerced confessions, including mental limitations and the length of interrogation, Rebecca Brown, director of policy at New York-based Innocence Project, said in an interview. "That said, deception is known to be a huge factor on contributing to the conditions that will elicit a coerced confession," she said. "There are other ways to solve crime and elicit confessions."

Despite enactment of the Illinois legislation, it's still legal in the state—and everywhere else in the U.S.—for police to deceive suspects 18 or older during interrogations. Legislators in several states are pushing to ban the ability of police to lie to any suspect, regardless of age.

‘Astonishingly High Rate’

The National Registry of Exonerations reported that since 1989 at least 342 false confessions were given to police, and in at least 89 of those instances researchers could verify police were lying about aspects of investigations to eventual exonerees.

“There are many, many factors that go into false confessions, but lying was one of a very few that we were able to isolate as a major contributing factor,” said Klara Stephens, a research scholar at the registry before becoming in 2020 a Cook County, Ill., assistant public defender.

Of those 89 cases, law enforcement personnel lied to suspects in Illinois in at least 24 instances, the largest number of episodes where police lied to suspects in any state, according to registry data.

By comparison, New York had 12 instances during the period where police lied and obtained a false confession. Virginia had five instances of lying, while Texas and Michigan each had four instances during which police lied during an interrogation and obtained a false confession, the data said.

“Deception is a prevalent, common interrogation tactic that police are trained to use across the country,” Nirider said. “It happens at an astonishingly high rate,” she said. “There are hundreds of proven false confession cases around the country, real cases in which people are brought into the interrogation room, questioned by police using tactics that are legal, and end up confessing to often serious crimes—rapes and murders—that forensic evidence proves later they didn’t commit.”

Bipartisan Support

The Illinois law defines deception as the knowing communication of false facts about evidence or unauthorized statements regarding leniency by a law enforcement officer or juvenile officer.

The prohibition may be overcome by a preponderance of evidence the confession was voluntarily given based on the totality of the circumstances.

Illinois isn’t alone in considering outlawing the practice. Oregon state Sen. Gorsek, a former Portland police officer, introduced legislation (S.B. 418) that labels statements by suspects 17 and younger involuntary and thus inadmissible in court if law enforcement knowingly used false information to elicit the statements. The bill passed the state Senate in May and Gorsek’s chamber in June.

Oregon Gov. Kate Brown (D) has a history of supporting progressive legislation and will likely sign the bill into law, Gorsek said during an interview. Brown’s office didn’t respond to a request for comment.

New York state Sen. Zellnor Myrie (D) introduced legislation (S. 324) that would be more expansive, banning police use of deception in custodial interrogations involving suspects of any age. But that bill wasn’t approved by either of New York’s legislative chambers before they adjourned for the year on June 10.

Gorsek said while he wants to prohibit police from using deception during all custodial interrogations, he took an incremental approach to the issue to enhance chances of its enactment.

Others agreed. “When we approach lawmakers with this issue, many times they say, ‘We agree this is a problem plaguing the entire system. But for this to be politically viable we want to begin with young people, and then we’ll work over time to expand it,’ ” Brown, of the Innocence Project, said.

Marathon Bomber, CIA Black Sites to Kick Off Supreme Court Term

- **Justices to consider death sentence for Boston marathon bomber Oct. 13**

- **CIA “black sites,” Kentucky abortion law also on October calendar**

The U.S. Supreme Court will consider whether to reinstate Boston marathon bomber Dzhokhar Tsarnaev’s capital sentences on Oct. 13, releasing the schedule for its first month of arguments for the 2021 term.

The court announced on Tuesday that the first sitting would also include the case of a long-detained terror suspect who’s seeking information about CIA torture at an alleged “black site” abroad in the years after the Sept. 11 attacks.

The justices also will consider a Kentucky abortion case, which is a prelude to a second challenge out of Mississippi that could limit or even overturn a half-century of precedent dating to the landmark ruling in *Roe v. Wade*.

The sitting of nine arguments begins Oct. 4 and runs through the 13th. It’s not clear yet if the justices will hear cases in person or continue with remote arguments conducted by phone during the pandemic.

Marathon Bomber

Tsarnaev and his brother, Tamerlan, killed four and injured hundreds more in the 2013 bombing along the famed mara-

thon route. Tamerlan was killed during a confrontation with police, and a federal jury convicted Dzhokhar of multiple counts and he was sentenced to death.

The Boston-based U.S. Court of Appeals for the First Circuit vacated those sentences, saying the trial court didn't do enough to ensure that jurors weren't impermissibly biased. The justices will review that ruling.

The high court will also consider the case of Zayn al-Abidin Muhammad Husayn, better known as Abu Zubaydah, who was the first "War on Terror" detainee subjected to torture abroad by U.S. intelligence, according to Supreme Court filings.

Zubaydah is seeking information about alleged CIA "black sites" abroad in the wake of the 9/11 attacks. The justices will consider that case Oct. 6.

Additionally, the justices will consider Kentucky Attorney General Daniel Cameron's request to defend the state's abortion law. The law, which restricts the use of the most common type of second-trimester abortion, was struck down in 2019.

The Sixth Circuit rejected Cameron's attempts to defend the law after a change in gubernatorial administrations. The court said he'd waited too long to make his request. The Supreme Court will review that ruling Oct. 12.

Bond Conditions Don't Delay Window to Sue Over Made-Up Evidence

- **Defendant called planted bullet unconstitutional seizure**
- **Limitations period starts when released from custody**

The statute of limitations for civil rights suits, alleging criminal suspects' Fourth Amendment rights are violated by pretrial detention due to fabricated evidence, starts running when they are released from custody, the Seventh Circuit said.

The U.S. Supreme Court's recent opinion in *McDonough v. Smith*, which held that due process claims involving made-up evidence accrue at the favorable termination of the suspect's legal proceedings, is inapplicable here because Keith Smith brought this claim against the City of Chicago for a seizure under the Fourth Amendment instead, the opinion by Judge Michael B. Brennan said.

Smith also argued the clock on his claim, which alleged city police lied about finding a bullet in his car, got tolled by the bond conditions placed on his release. But that too was rejected by the U.S. Court of Appeals for the Seventh Circuit.

A circuit split exists over whether bond conditions can ever be a Fourth Amendment seizure, the court said. The Fifth Circuit decides the issue on a case-by-case basis, the Third Circuit says that a requirement to appear is a seizure, and the First and Eleventh circuits say that standard bond conditions aren't seizures, it said.

Joining the Fifth, the Seventh Circuit here said that the issue should be addressed on a case by case. But the conditions placed on Smith—requirements to appear in court monthly and to ask permission before leaving the state of his arrest—aren't a seizure because they don't involve physical force or a show of government authority, it said.

Smith was arrested in September 2013, released on bond March 29, 2014, and acquitted of his charges July 21, 2016, the court said. But because he waited to file his civil rights suit until July 18, 2018, and the applicable two-year limitations period wasn't tolled by his bond conditions, Smith's suit was untimely, the appeals court affirmed Monday.

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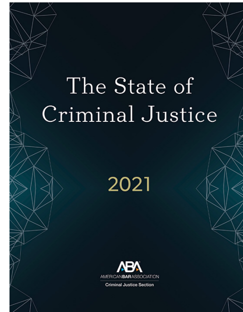
The State of Criminal Justice 2021

Edited by Mark E. Wojcik

Published by the ABA Criminal Justice Section

Reviewed by Elizabeth Kelley



Last year, when I reviewed the 2020 edition of *The State of Criminal Justice*, I concluded the review with the following paragraph:

> 2020 has been a year like no other in US history – economic devastation, political division, racial unrest, and a pandemic which has impacted every facet of our lives. The field of criminal justice has had, nonetheless, some positive developments such as bail reform and the election of progressive prosecutors. All of this foretells that the 2021 edition of *The State of Criminal Justice* will be equally compelling.

So too, I could write that 2021 has been a year like no other. The economic devastation which we suffered last year continues in some sectors, blunted only by programs like the Paycheck Protection Program (PPP) and eviction moratoriums. Political division reached an apex with the insurrection of January 6, while public health measures such as vaccination and masking have become politicized. Racial unrest continues, with some sorts of violence such as attacks on Asian Americans receiving much-needed attention. But regretfully, the pandemic remains the major story, even as the world has struggled to re-open in the midst of the Delta variant. And as aspects of our society will be forever changed by the pandemic, so too will be the field of criminal justice. As such, the 2021 edition of *The State of Criminal Justice* is not only compelling, but shatters any illusion that time stood still.

As with previous editions, this volume is a collection of approximately 300 pages detailing the developments in the field of criminal justice during the past year. The year roughly encompasses June of 2020 through June of 2021. The chapters are written by a cross section of writers: ABA staff, judges, law professors, defense lawyers, and prosecutors. Also included is a list of ABA Resolutions related to criminal justice where were passed during the past year. Chapters about a cross section of topics such as the Anti-Money Laundering Act (Bruce Zagaris), juvenile justice (Jay D. Blitzman), the expansion of the Military Subpoena Power (Michael S. Waddington, Alexandra Gonzalez-Waddington, Major M. Arthur Vaughn II, and Terra Johnson), and public defense (Malia N. Brink).

As in last year's edition, this edition is enhanced by a thorough Executive Summary written by Professor Mark E. Wojcik of the University of Illinois Chicago School of Law who also serves as the editor. The Summary entices readers to explore any or all of the chapters. One particularly noteworthy is titled "Copayments in Correctional Health Care: The Implications of Covid-19 and the Renewed Need to Consider Reforms." This chapter was written by Deanna M. Adams, and shines a spotlight on a little-known practice which had devastating consequences during the Pandemic. Another noteworthy chapter is titled "Corporate America Can Be a Powerful Force for Good to Root Out Modern Day Slavery." It is written by Andrew S. Boutrous, Andrew J. Lavender, David N. Kelley, Vincent H. Cohen, Jr., Michael J. McGinley, Sozi P, Tulante, and Shiriram Harid. This chapter reminds us of our global responsibilities reinforced by existing law such as the Federal Corrupt Practices Act (FCPA).

Once again, Ronald J. Tabak, Special Counsel and *pro bono* coordinator at Skadden Arps Slate Meagher and Flom LLP, writes a magnificent chapter on capital punishment. The chapter thoroughly discusses the Trump Administration's reinstatement of the federal death penalty and the ten executions which took place during his final days in office. The chapter also deals with the perennial topics of the decline of public support for the death penalty; abolition and moratoriums by various states; factually problematic executions, racial disparities, prosecutorial misconduct, and mental disabilities. This chapter complements the chapter titled "Trending Issues in Criminal Justice" by Marissel Descalzo.

If *The State of Criminal Justice 2021* had a subtitle, it would be "The Impact of Covid-19." Virtually every chapter discusses how stakeholders in that subject area confronted, sometimes creatively, sometimes desperately, the challenges wrought by the pandemic. As a result, the administration of justice continued, sometimes imperfectly. I would hope that next year's edition reflects that the pandemic caused us to examine policies and procedures, to embrace technology, and to re-establish this country as a true model of equal justice under the law.

Elizabeth Kelley is a criminal defense lawyer with a nationwide practice focused on representing people with mental disabilities. She is a member of the editorial board of Criminal Justice *magazine.*

Articles Wanted for *The CJS Newsletter*

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Submission Deadlines: Dec. 15, April 15, Aug. 15

For inquiries, contact: Kyo Suh, Managing Editor, kyo.suh@americanbar.org

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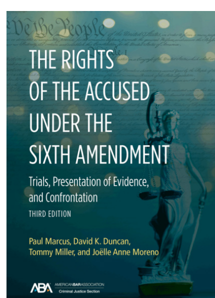
By Paul Marcus, David Duncan, Tommy Miller, and Joelle Moreno

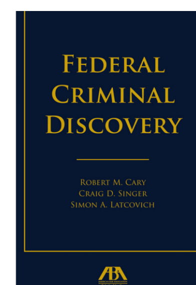
Both criminal defense lawyers and criminal prosecutors must thoroughly understand the rights of the accused under the Sixth Amendment in order to provide competent service and ensure that they are following all court procedures according to the rule of law. This book offers fascinating historical perspective, modern interpretations, and insight on this critical component of the U.S. Constitution.



Federal Criminal Discovery, Second Edition

By Robert M Cary, Craig Singer, and Simon Andrew Latcovich

Federal Criminal Discovery thoroughly covers each of the different methods of discovery available to the parties in federal criminal cases. It serves as an invaluable resource for judges, academics, prosecutors, and defense lawyers by providing an exhaustive discussion on the statutory and constitutional bases for discovery, and by covering the existing law fairly while examining all sides of the issues. This second edition brings this essential guide up to date with the latest significant cases and developments in the law. All chapters have been updated with new authorities and changes to the law since the first edition



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