The ABA Criminal Justice Section met in San Francisco for the 2019 Annual Meeting, August 8-11. The Section hosted CLE programs, Council and committee meetings and participated in the House of Delegates deliberations. Additionally, the Section co-sponsored Resolution 105. The House of Delegates voted and approved the following Resolutions related to criminal justice:

101 - Urges Congress to make the ameliorative provisions of the First Step Act retroactive and urges the President and Attorney General to take action to implement the provisions of the Act. Adopted as revised.

104 - Urges Congress to enact legislation to resolve the current stalemate between state and federal law over marijuana regulation and to update federal marijuana policy. Adopted.

105 - Urges state, local, territorial, and tribal governments to enact statutes, rules or regulations and judges to promulgate policies to limit the possession of firearms in courthouses and judicial centers to only those persons necessary to ensure security. Adopted.

114 – Urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. The Section withdrew its co-sponsorship of this Resolution prior to the vote. The House of Delegates voted to postpone indefinitely for further discussion with The Commission on Domestic and Sexual Violence and other entities.

119 - Provides that any legislation and related regulations to detect and combat money laundering and terrorist financing must be consistent with the eight fundamental principles outlined in the resolution. This Resolution was withdrawn for further discussion with International Law and other entities.

The Section’s CLE programs featured many panel discussions, with a range of topics from diversion programs, to public-interest attorney well-being to gathering evidence abroad, a review of the Supreme Court term, internal investigations and women in the courtroom.

The Task Force: Women in Criminal Justice continued its work at the Annual. The Task Force hosted a listening session for women of varying backgrounds at the University of California Hastings College of Law.

The Section Council welcomed Kim T. Parker of Kansas County and District Attorneys Association as the new Chair for 2019-2020 and thanked the outgoing Chair Lucian E. Dervan for his service.

The Criminal Justice Section sponsored four Resolutions at the Annual Meeting of the ABA House of Delegates.
Alternatives to Incarceration & Diversion

The federal Office of Personnel Management (OPM) recently proposed an amendment to their application process whereby any prospective employee would have to disclose whether she or he had ever participated in a pretrial intervention or diversionary program leading to the dismissal of a criminal charge. The chilling effect of such a requirement would be significant -- either to seek treatment and/or to apply for federal employment. In response, the Criminal Justice Section (CJS) Alternatives to Incarceration & Diversion (ATI) Committee took action to oppose this amendment.

The ATI Committee, through the efforts of co-chair Raul Ayala, contacted the CJS leadership and the ABA Governmental Affairs Office to solicit the support of ABA President Robert M. Carlson in opposition to the proposed amendment. On May 1, 2019, President Carlson sent a letter to the OPM requesting that it withdraw the proposed amendment. His primary arguments against disclosure included:

1. The proposed amendment would directly contradict the underlying objectives of current criminal justice reforms, such as the First Step Act, Ban the Box initiatives, and the provision of supportive resources made available through the Second Chance Act. As we know, there is on-going discussion on both sides of the aisle to better address substance use and mental health issues as drivers of criminal conduct, and to reduce the number of criminal justice involved persons across the board.

2. Disclosure would unnecessarily discriminate against those individuals who have acted in good faith and who have made positive changes in their lives by participating in such programs. By completing these programs without the onus of a criminal conviction, for example, many are able to avoid hiring bias and personal stigma -- principle benefits of participating in these programs along with addressing the underlying issues that contributed to their offense in the first place.

3. Decades of positive contributions that collaborative courts have made to American jurisprudence and to society at large would be jeopardized, since it would discourage participants from seeking available supportive services. As a result, the lack of treatment would likely lead to higher recidivism costs, affect public safety, as well as deny opportunities for personal growth and positive community contributions.

4. The criminal justice system should also seek to emphasize its rehabilitative goals, a core principle of our state and federal sentencing policies. Over the past several decades, the political pendulum has swung in favor of heavy punishment and sentencing schemes, with very little resolve for rehabilitative efforts and programs. To make it more difficult to obtain employment, particularly when an applicant has taken advantage of an alternative sentencing option as provided by law, would be a significant step backwards.

President Carlson’s letter on behalf of the ABA, along with scores of other such correspondence with the OPM, proved to be successful. By the end of May 2019, the proposed amendment was formally withdrawn by the Administration, signaling a victory in favor of non-disclosure for prospective federal employees. In all, a great opportunity for Section and Committee members to make an impact on criminal justice policy. (Submitted by Co-Chair Raul Ayala)

Victims

The Victims Committee, in conjunction with the National Crime Victim Law Center (NCVLI), drafted a survey to gauge the level of understanding of victim’s rights during the criminal justice process among practicing attorneys. To see how well you understand constitutional victim’s rights, please visit http://bit.ly/VictimSurvey. If you would like to learn more about victim’s rights, please register http://bit.ly/ABAVictims with promotional code VRMAY19ABA (valid through October 2019). The training is free and presented by the National Crime Victim Law Center (NCVLI). It provides an overview of crime victims’ rights and discusses how attorneys can help victims assert and seek enforcement of their rights.
CJS Podcast

The offering of the Section’s podcast, The JustPod, is growing. The podcast is available on iTunes, Spotify, Stitcher, and other platforms. Recent episodes include:

- Check-in with the Chair: Passing of the Gavel – featuring Lucian Dervan and Kim Parker.
- Prosecutorial Discretion – featuring Melba Pearson.
- Supreme Court Review: October 2018 Term, Criminal Cases – featuring Rory Little.
- Examining the Epstein Charges – Past and Present – featuring Ilene Jaroslaw.
- Young Lawyers and Mentorship – featuring Deanna Adams.
- Mental Health Standards to Help Prepare for Testimony – featuring Dr. Eric Drogin.

Implict Bias Project Recognized

Congratulations go to Judge Bernice Donald, former CJS Chair (second from the left) and Professor Sarah Redfield, CJS Council member (far right). Their work on the Section’s Implicit Bias Project won the ABA Section Officers Conference Meritorious Service Award during the 2019 ABA Annual Meeting in San Francisco. Joining the celebration are the incoming CJS Chair Kim T. Parker (far left) and outgoing Chair Lucian E. Dervan (third from the left).

2020 Calendar of Events

- Midyear Meeting: Feb. 14-16, Austin, TX
- 34th National Institute on White Collar Crime: March 11-13, San Diego, CA
- Spring Meeting: April 23-26, Kansas City, MO
- National Institute on Health Care Fraud: May 11-13, Las Vegas, NV
- Annual Meeting: July 30 - Aug. 2, Chicago, IL
- Southeastern White Collar Crime Institute: Sept 9 – 11, Braselton, GA
- Financial Crimes Enforcement Conference: Dec. 6-8, Washington, DC

Please see the CJS calendar at www.ambar.org/cjsevents for more listing of events.
The Third Global White Collar Crime Institute: Pressing Issues & Enforcement Frontiers

By Dmitriy Kamensky

The American Bar Association Criminal Justice Section's Third Global White Collar Crime Institute convened in Prague, Czech Republic, in June 27-28, 2019 to examine some of the most pressing issues in the field. The beautiful city of Prague provided an excellent setting for participants to gain deep insights into the legal complexities of white collar crime in the growing central and eastern European legal markets and beyond. Previous Global Institutes had been held in Shanghai (2015) and São Paulo (2017).

Professor Lucian E. Dervan of Belmont University College of Law, Chair of the ABA Criminal Justice Section and the Global Institute, opened the Prague event. He briefly touched on the last two Institutes, outlined the agenda for the current one, and, based on the previous experiences, offered his vision for continuing to expand the ABA CJS’s international reach to new parts of the world. Another welcoming speaker – Mr. Martin Maisner of the Czech Bar Association – supported him in this vision.

In his opening keynote address, Matthew Miner, Deputy Assistant Attorney General of the United States, U.S. Department of Justice, discussed some specific DOJ enforcement actions and what he perceived as a promising future for international cooperation between the U.S. Department of Justice and public enforcement agencies in other countries (namely – United Kingdom, Germany, Brazil, Switzerland and Czech Republic). He also commented on some current high profile corporate crime prosecutions and informed the participants about recent updates in the Department policy regarding new corporate compliance guidelines. DAAG Miner was also specific in his remarks regarding the DOJ’s zero tolerance approach to foreign corrupt practices under the FCPA and provided two recent cases of large-scale corruption in foreign countries, facilitated by large multinational corporations, as examples of the DOJ approach.

After Mr. Miner’s address, the Third Global Institute proceeded with the “Meet the Enforcers” panel moderated by Professor Dervan and featuring Mr. Miner, Mr. Matthew Wagstaff (Head of the Bribery and Corruption Division, Serious Fraud Office, United Kingdom), and Mr. Pavel Zeman (Prosecutor General of the Czech Republic). Mr. Zeman and Mr. Wagstaff, both representing high public enforcement offices in their respective countries, furthered the American-led discussion of pressing legal issues related to white collar criminal enforcement across the borders, specifically in the highly harmonized European Union legal environment.

The Institute also welcomed Dr. Adrian Jung, Special Counsel on “Internal Investigations” with the German Federal Ministry of Justice. Dr. Jung presented a detailed overview of draft legislation for Germany regarding corporate criminal liability and internal investigations with a strong potential for changing the corporate criminal enforcement framework in Europe. It is worth mentioning that a few of the discussed elements of the proposed corporate criminal enforcement regime in Germany mirror relevant provisions of the U.S. corporate criminal liability model.

Other panels in the course of the intensive two-day conference gathered outstanding practitioners from various countries and provided detailed expert insight into the current developments of traditional as well as new areas of white collar criminal law and enforcement. Among the topics covered: Lessons Learned from the VW Internal Investigation, Data Privacy and GDPR, Extradition Process and Interpol Red Notice Enforcement, Current Global Anti-Corruption Trends, and Changes in Enforcement Policies after Brexit.

The VW internal investigation panel dealt with the critical issue of the attorney-client privilege in cross border investigations. The panel discussed the ramifications of the March 2017 raid
by German law enforcement agents of the Jones Day law firm’s Munich office to obtain confidential client documents and Jones Day work product from its internal investigation of VW Group and its subsidiary Audi AG. The German public prosecutor’s office seized electronic data as well as a significant number of paper files which constituted Jones Day work product regarding its interviews and other work on the internal investigation. The highest court in Germany upheld the legality of the raid, which has led to deep concerns on the issue of attorney-client privilege among legal communities on both sides of the Atlantic. This particular case, as well as many other cross-border white collar crime scenarios presented and discussed by the Institute participants, clearly demonstrates the urgent need for joint, cross-border solution-making in the ever-globalized business and legal environment.

It is worth adding that every panel discussion, held by outstanding speakers and providing deep insights regarding the particular economic crime issues covered, was followed by numerous thought-provoking questions from the professional audience. Thus, the two intensive days of the Institute proceeded in a thoughtful, solution-oriented and intellectually intense manner.

The whole event was made possible (and incredibly successful) thanks to the generosity and continuing support of its sponsors and partners, the conference planning committee, and the staff members of the American Bar Association Criminal Justice Section.

Though he has not yet revealed the location of the Fourth Global White Collar Crime Institute, Professor Dervan told participants that the next Institute will occur in 2021. I look forward to that next Institute in some new corner of the globe.

The Southeastern White Collar Crime Institute took place in Braselton, GA on September 4-6.

**Articles Wanted for the CJS Newsletter**

- Practice Tips
- Section/Project News
- Committee/Task Force Updates
- News from the Field

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

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

**CJS Diversity Goal**

The ABA Criminal Justice Section values diversity in all aspects of our membership, participation, publications, and programming. The ABA CJS encourages and seeks active involvement of lawyers and associate members of color, women, members with disabilities and LGBT members in ABA CJS’s publications.
Market Manipulation in Milliseconds:

Spoofing in Commodity Futures Exchanges

By Luke Cass

Enforcement of the “Anti-Spoofing” provision of the Commodity Exchange Act, 7 U.S.C. § 1 et seq., on the commodity futures exchanges is at a unique juncture where law and technology have seemingly intersected at the right place and at the right time. This article examines this seldom known, but increasingly used, criminal statute in its first prosecution and spoofing’s potential to wreak havoc in commodity futures markets in a matter of seconds.

Background

The CME Group based in Chicago is the largest futures exchange in the world and operates the Chicago Mercantile Exchange (CME), the Chicago Board of Trade (CBOT), the New York Mercantile Exchange (NYMEX), and the Commodity Exchange, Inc. (COMEX). CME Group’s trading is diverse and occurs on everything from lean hogs to Bitcoin futures, from copper to corn.

Despite the diversity of these goods, all futures contracts operate the same way.1 The futures contract seller agrees to deliver the commodity in the future and is said to be in a “long” position.2 The buyer agrees to accept delivery and is said to be in a “short” position.3 Most futures contracts are not “traded” in the normal sense of that word, rather, profits are collected off the difference in price between the original contract and the offsetting transaction. If the price of the future has declined, – the short profits. However, if the futures price has risen, the long profits.4 “Futures trading is a zero-sum game. Since money is made from the change in futures contract prices, and every contract has a long and a short, every gain can be matched with a corresponding loss.”5

Trading on commodity futures exchanges presents significant risk. The U.S. Commodity Futures Trading Commission cautions that “[t]rading commodity futures and options is a volatile, complex and risky venture that is rarely suitable for individual investors or ‘retail customers’” and “[m]any individuals lose all of their money, and can be required to pay more than they invested initially.”6 The trading volume on these exchanges is colossal. This past May, CME Group reached its second-highest monthly trading volume ever, averaging nearly 24 million contracts daily.7 Greater still is the number of cancelled contracts or placed orders, which the former chief of the Securities and Exchange Commission estimated as being as high as 90 percent.8

The days of floor brokers conducting the majority of trading on these exchanges from the inside of a “pit” or “ring,” shouting or gesticulating trades with hand signals – as made famous by Eddie Murphy and Dan Aykroyd in Trading Places – are largely long gone. Most trading now is done electronically, but trading volatility nonetheless persists with price fluctuations occurring in milliseconds. One former U.S. Senator described it as being a “‘wild west’ trading environment.”9 This perfect storm of factors including high-frequency and algorithmic trading has provided fertile ground for abuse in the form of spoofing.

The Anti-Spoofing Statute

Spoofing, which Congress criminalized in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act,10 is an illegal shortcut through the risky volatility of these markets. Title 7 of the United States Code, § 6c(a)(5)(C) makes it unlawful for “any person to engage in trading, practice, or conduct on or subject to the rules of a registered entity that –” “is, of the character of, or is commonly known to the trade as, “spoofing” (bidding or offering with the intent to cancel the bid or offer before execution).”11

Spoofing is illegal because it “can be employed to artificially move the market price of a stock or commodity up and down, instead of taking advantage of natural market events.”12 A spoofing trader can create artificial supply and demand by “placing large and small orders on opposite sides of the market. The small order is placed at a desired price, which is either above or below the current market price, depending on whether the trader wants to buy or sell. If the trader wants to buy, the price on the small batch will be lower than the market price; if the trader wants to sell, the price on the small batch will be higher. Large orders are then placed on the opposite side of the market at prices designed to shift the market toward the price at which the small order was listed.”13 “In short, the trader shifts the market downward through the illusion of downward market movement resulting from a surplus of supply. Importantly, the large, market-shifting orders that he places to create this illusion are ones that he never intends to execute; if they were executed, our unscrupulous trader would risk extremely large amounts of money by selling at suboptimal prices.”14

United States v. Coscia

United States v. Coscia, the first spoofing case ever brought, is instructive. Michael Coscia was a longtime commodities futures trader at a high-frequency trading firm.15 Coscia enlisted the help of a computer programmer to design two computer

Luke Cass, a former federal prosecutor for over ten years, is a partner at Quarles & Brady, LLP and teaches White Collar Crime and Securities Fraud at the Georgetown University Law Center.
programs that would work in 17 different CME Group markets and three different European futures markets. Coscia’s high-frequency trading strategy allowed him to enter and cancel large-volume orders in a matter of milliseconds, which created an artificial supply and demand. Accordingly, Coscia was able to purchase contracts at lower prices or sell contracts at higher prices by artificially pumping and then deflating the market by placing and cancelling orders. “Within milliseconds of achieving the desired downward market effect,” Coscia cancelled the large orders. The computer programs detected when conditions were ripest and operated through a system of trade orders and quote orders and the “entire series of transactions would take place in a matter of milliseconds.”

In August of 2011, Coscia employed this strategy with various futures commodities, including gold, soybean meal, soybean oil, high-grade copper, Euro FX and Pounds FX currency futures. In one instance involving copper futures, Coscia risked up to $50 million by placing large orders, which drove the price up. The buy orders created the illusion of market movement in copper futures and Coscia sold the contracts at his desired price point. Coscia then placed large volume orders to sell the contracts, which created downward momentum on copper future prices by fostering the appearance of abundant supply. This allowed Coscia to buy his small orders at the artificially deflated price. Coscia then immediately cancelled the large orders. Coscia’s whole process was repeated tens of thousands of times resulting in over 450,000 large contract orders. This all took place in two-thirds of one second, earning Coscia profits of over $1.4 million.

What makes spoofing criminal is the trader’s intent when placing the order. “Prosecutors can charge only a person whom they believe a jury will find possessed the requisite specific intent to cancel orders at the time they were placed.” “Legitimate good-faith cancellation of partially filled orders” does not violate the anti-spoofing statute. In Coscia’s case, he would be guilty of spoofing if he knowingly entered trades with the present intent to cancel them prior to execution. This is harder to prove than one might think and can lead to competing inferences. Coscia argued that his trades were “concededly conditional” and that his trading strategy was “virtually identical to other durational or contingent orders routinely permitted by exchange trading interfaces.” As Coscia pointed out, cancelled trades are common in the high-frequency trading world where 98% of orders are cancelled before execution.

A Chicago jury disagreed and convicted Coscia. The U.S. Court of Appeals for the Seventh Circuit affirmed the conviction and found that Coscia had the requisite criminal intent. The Court found that Coscia’s conduct was spoofing based on several key pieces of evidence introduced at trial: (1) Coscia was responsible for 96 percent of all cancellations on the European exchange during the two months when he used the computer program; (2) on the Chicago Mercantile Exchange 35.61% of Coscia’s small orders were filled, but only 0.08% of his large orders were filled; (3) the designer of the computer program offered devastating testimony that the computer programs were made to avoid large orders being filled and that “quote orders” were used to “pump” the market; (4) only 0.57% of Coscia’s large orders were on the market for more than a single second, but 65% of Coscia’s large orders were open on the market for more than a second; and (5) Coscia’s order-to-trade ratio was 1,592% and that ratio for other market participants was between only 91% and 264%, which meant that Coscia’s average order was far greater than his average trade. The Seventh Circuit found that while “single piece of evidence necessarily establish[ed] spoofing” the proof taken together allowed jurors to determine that Coscia entered his orders with the intent to cancel them before execution.

Coscia argued that the anti-spoofing statute was impermissibly vague and attempted to equate his conduct with various legal trading strategies such as “stop-loss orders” (an order to sell when a certain price is reached), “fill-or-kill orders” (an order that must be filled immediately or it’s fully cancelled), “partial-fill” orders (a pre-programmed order that cancels the balance of an order once a portion is filled), “Good-til-date orders” (orders that cancel with a defined period of time), “ping orders” (small orders used to detect trading activity), or “iceberg” or hidden quantity orders” (orders designed to obscure the underlying supply or demand). The Court, unpersuaded by these arguments, found that those trading strategies were markedly different from what Coscia did because they are designed to be executed under certain conditions whereas Coscia’s large orders “were designed to evade execution” altogether.

Outlook

The U.S. Department of Justice’s Fraud Section has made spoofing prosecutions a priority. In January of last year, the Department announced a spoofing takedown that charged eight individuals in six cases across three federal districts and several spoofing trials are set for 2019. As the then-Acting Assistant Attorney General of the Criminal Division stated, “The Criminal Division’s message is clear. We are watching. We are closely monitoring the markets. And we will leave no stone unturned in our efforts to combat and eradicate illegal, fraudulent, and manipulative market conduct.” The record supports the rhetoric – in the past five years, the Department of Justice has brought a total of 12 spoofing cases against sixteen defendants. In an August 20, 2019 press release for a trader’s guilty plea in the Eastern District of New York, the trader admitted as part of his plea allocation that he “learned to spoof from more senior traders, and spoofed with the knowledge and consent of his supervisors.” The release noted that the trader was “cooperating” and twice described the investigation as “ongoing,” suggesting that additional charges may be imminent.

Continued on the next page.
In addition to the anti-spoofing statute and depending on the facts of the case, other statutes may come into play for similar market manipulation conduct such as 18 U.S.C. § 1348 (securities and commodities fraud), 18 U.S.C. § 1343 (wire fraud), and 7 U.S.C. § 13(a)(2) (commodity price manipulation). Coscia was also convicted of a § 1348 violation, which was affirmed despite Coscia having made no specific false statements or representations, which, while not required, is often compelling proof.40

Despite mounting a vigorous defense, Coscia was found to have “designed a system that used large orders to inflate or deflate prices, while also structuring that system to avoid the filling of large orders.”41 Coscia essentially made, pumped, and then dumped the market in milliseconds, profiting enormously in a matter of seconds. While Coscia’s evidence of spoofing was circumstantial it was also clear and the U.S. Supreme Court denied his petition for certiorari.42 However, there may be closer calls in the near future. The second spoofing trial involving a Swiss trader in the District of Connecticut resulted in six of the seven counts being dismissed for lack of venue and an acquittal on the remaining charge.43 This past spring federal prosecutors in Chicago dismissed spoofing charges against a software developer after his trial ended in a hung jury.44 The software developer’s $24,200 program was alleged to have aided a trader with a $40 million spoofing scheme of S&P 500 futures that caused a “flash crash” on the equity markets in May of 2010.45

There may be more challenges in the future as high-frequency trading and technology continue to evolve. The introduction and use of artificial intelligence to effectuate high-frequency trading could obfuscate spoofing’s intent element and allow for a more persuasive defense about an individual’s intent to cancel trades before execution.

Endnotes

2. Id.
3. Id.
5. Leist, 638 F.2d at 286.
9. Id.
11. United States v. Coscia, 866 F.3d 782, 787 (7th Cir. 2017), reh’g and suggestion for reh’g en banc denied (Sept. 5, 2017), cert. denied, 138 S. Ct. 1989, 201 L. Ed. 2d 249 (2018)
12. Id.
13. Id.
15. Id.
16. Id.
17. Coscia, 866 F.3d at 787.
18. Coscia, 100 F. Supp. 3d at 655.
19. Coscia, 866 F.3d at 788.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id. at 794.
28. Coscia, 866 F.3d at 795.
29. Coscia, 100 F. Supp. 3d at 658.
30. Id. at 793.
31. Id. at 795-96.
32. Id. at 796.
33. Coscia, 866 F.3d at 794.-95, 800.
34. Id. at 800 (emphasis original); 2018 WL 741613, at *8.
37. Id...
40. Coscia, 866 F.3d at 796-97.
41. Id. at 797 (emphasis original).
45. Id.

Members of the Standards Task Force for Sentencing met in Washington, DC on September 13th.

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A Maryland Prosecutor: Fights With Judges, Politicians, Police, and Some Criminals Along the Way

By Andrew L. Sonner

former Criminal Justice Section Chair Andrew L. Sonner was the progressive, influential elected State’s Attorney for Montgomery County, Maryland from 1970 until 1996, when he was appointed to the state’s intermediate appellate court. He has just published a memoir, A Maryland Prosecutor: Fights With Judges, Politicians, Police, and Some Criminals Along the Way. It is a compelling account of his accomplished career as a prosecutor, and a thoughtful reflection on lessons learned, some hard, as he strove to implement his belief that “prosecutors could do meaningful good by ensuring that the criminal justice process is fair and just.” He describes tough battles, some won, some lost. The memoir is a colorful, anecdotal local history. But it is also full of valuable insights for criminal justice professionals nationwide confronting today many of the enduring social, legal, and political challenges Andy faced: embedded racial and economic inequities; police shootings; unwisely harsh sentencing laws and policies; and politicization of criminal justice issues.

Early in his career, Andy took advantage of opportunities, initially through the National District Attorneys’ Association, to learn first-hand about prosecutors’ best practices around the country, and adapted them to his office. Andy describes how this led him to initiate programs and policies—such as open-file discovery, case-screening and diversion programs, victim assistance units, and coordinated, county-wide efforts to achieve earlier intervention to protect children at risk of abuse—as he worked to shape an office whose prosecutors would exercise discretion intelligently, mindful of the impact their decisions have on victims, witnesses, and defendants. While at the NDAA, Andy was its liaison with the Criminal Justice Section Council, where he enjoyed discourse enriched by the participation of defense attorneys, academics, judges, and court administrators in addition to prosecutors. This led to his election to chair the Section Council, where he worked with then-Section director Laurie Robinson and served on the Standards Committee guided by its director Susan Shaffer. He was introduced to the American Society of Criminology and attended ASC meetings where he met leading criminologists like James Q. Wilson, Carnegie Mellon’s Alfred Blumstein, University of Chicago Law School sentencing expert Norval Morris, James Fyffe, and Michael Tonry.

The book’s chapter on the War on Drugs exemplifies how Andy’s approach to prosecution evolved through these broadening experiences. After reading Tonry’s Malign Neglect, documenting the destructive impacts of the war on drugs on African American communities, Andy reexamined his participation in Montgomery County’s war on drugs. Concluding that the drug enforcement policy was not just failing but doing harm, particularly to the county’s young African Americans, he used his office to try to do better. Recognizing that he could not effect needed change simply by altering his office’s prosecution policies, he persuaded Maryland’s Attorney General to support a drug policy task force composed of representatives of the county’s several police departments and drug treatment experts. To stimulate the initial discussions, he gave the members a copy of Tonry’s Malign Neglect.

The task force reached a consensus for reform combining principles of community-oriented policing with expanded provision of drug treatment to replace reliance on arrests and imprisonment. There was a problem, however. The county executive, a long-time political adversary, ordered the county police chief not to cooperate, and told the press that the proposal was soft on crime, tantamount to inviting offenders to do drugs in Montgomery County. That stymied the effort to implement a coordinated, rational drug enforcement policy during Andy’s tenure. Over the following decade, however, the county adopted much of what the task force recommended. And in 2010, the ASC gave Andy its annual President’s Award for Distinguished Contributions to Justice for his efforts to implement a more sensible drug enforcement policy.

Andy’s memoir is an amusing, sometimes poignant, personal history of a particular place during a transformative time, from the Great Depression to the 21st century. He describes vividly what he experienced as a young boy when World War II began. He tells of his passage through adolescence, including narrowly avoiding prosecution after being handcuffed for tackling a cop who was about to use his nightstick on a friend wrongfully accused of a misdemeanor, to adulthood, when he thought he could “do some good” as a high school history teacher. Then, stories his lawyer friends told of interesting people and trials in the nearby courthouse caught his attention, and led him to drop in unannounced on the dean of American University’s law school, who admitted him to its part-time program with little more than a handshake. The rest is the history told in this captivating memoir.

Matt Campbell was Deputy State’s Attorney for Montgomery County, Maryland, and served on the CJS Council and the Criminal Justice magazine editorial board. He is currently a hearing officer for FINRA, the Financial Industry Regulatory Authority. The book is available through the Amazon Store.
**ABSTRACT**

A criminal defendant may get his longer-than-expected sentence vacated on the basis that his attorney should have consulted with him about filing an appeal, the Eleventh Circuit said Aug. 5.

Juniel B. Rios’s attorney allegedly told him to expect a 5-to-7-year sentence when he pleaded guilty to drug and firearms charges in federal court in Florida, according to the court. But the judge sentenced him to 15 years. Rios’s plea agreement waived appeal except in certain circumstances, including if the sentence was higher than the guideline range.

His lawyer, Jorge Del Villar, allegedly ignored numerous, increasingly desperate calls and texts from Rios and his mother after the sentencing, according to the court. Rios and Del Villar never spoke about the possibility of an appeal within the applicable 14-day window.

Rios asked the lower court to vacate his sentence. He argued the sentencing judge set aside a “career offender” classification that would have yielded a higher sentencing range, but then departed upward from the lower range because he was disturbed by the firearm and paraphernalia allegedly found in Rios’s home. He said Del Villar was ineffective because he didn’t file an appeal, and because he didn’t consult with Rios about an appeal. The lower court denied the request.

The U.S. Court of Appeals for the Eighth Circuit agreed with the lower court that Del Villar didn’t fall below the effectiveness standard by failing to file an appeal. But it reversed on the consultation issue, in a per curiam opinion. “While Del Villar may have believed that an appeal would be a waste of time, he still had a duty to consult with his obviously distressed client about an appeal,” the court said. A decision to appeal is the defendant’s to make, it said. The case is Rios v. United States, 2019 BL 289123, 11th Cir., No. 18-12251, 8/5/19.

**Death Row Inmate Can Request Extra Lawyer, Ninth Circuit Rules**

- Court disagrees with Sixth Circuit’s approach
- Inmate seeking clemency from governor

A California death-row prisoner challenging his sentence in state court can request additional counsel under federal law even though state law also provides for the appointment of counsel, the Ninth Circuit ruled.

The July 3 decision gives Richard Gonzales Samayoa, who was convicted of a double murder and sentenced to death in 1988, another chance to get a second attorney on the le-

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**Lawyer’s Failure to Consult Over Appeal May Mean New Sentence**

- Duty exists despite appeal waiver
- Sentencing judge may have ‘departed upward’

**ABSTRACT**

On May 9, 2019, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 486, which addresses prosecutors’ obligations when negotiating and entering into plea bargains for misdemeanor charges with unrepresented individuals. The opinion notes the unique role of prosecutors in the criminal justice system and their duty “to seek justice, not merely to convict,” as well as “the expansion of misdemeanor criminal enforcement and … the displacement of trial by plea bargaining.” The opinion concludes:

“Under Model Rules 1.1, 1.3, 3.8(a), and 8.4(a) and (d), prosecutors have a duty to ensure that charges underlying a plea offer in misdemeanor cases have sufficient evidentiary and legal foundation. Under Model Rules 1.1, 5.1, 5.3, and 8.4(a) prosecutors must take appropriate steps to make reasonably sure that the work of their subordinates and agents is compatible with their professional obligations. Under Model Rule 3.8(b) prosecutors must make reasonable efforts to assure that unrepresented accused persons are informed of the right to counsel and the process for securing counsel, and must avoid conduct that interferes with that process. After an unrepresented accused has been informed of the right to counsel and is deciding whether to invoke that right or is in the process of attempting to secure counsel, a prosecutor may not, under Model Rules 3.8(b) and (c), pressure, advise, or induce acceptance of a plea or waiver of the right to counsel. Finally, irrespective of whether an unrepresented accused has invoked the right to counsel, a prosecutor must, under Model Rules 4.1, 4.3 and 8.4(c) and (d), avoid offering, negotiating, and entering pleas on terms that knowingly misrepresent the consequences of acceptance, or otherwise improperly pressure, advise, or induce acceptance on the part of the unrepresented accused.”

See the full opinion at: www.americanbar.org/content/dam/aba/images/news/2019/05/aba_formal_opinion_486.pdf.
gal team seeking clemency from the governor of California. “The availability of state appointment of clemency counsel is irrelevant to federally appointed counsel’s ongoing representation of a death-row client in state clemency proceedings,” the Ninth Circuit said, citing the U.S. Supreme Court’s 2009 decision in *Harbison v. Bell.*

The Sixth Circuit takes the opposite view, ruling in 2011 that federally appointed counsel for a Tennessee death-row inmate couldn’t get federal funding to represent the inmate in state proceedings, because state law provided for counsel in those cases. The Ninth Circuit called this case “unpersuasive,” saying it overlooked the benefit of “continuity of counsel” and couldn’t be squared with *Harbison.* The case is *Samayoa v. Davis,* 9th Cir., No. 18-56047, 7/3/19.

**Gorsuch Sides with Liberals in Child Porn Sentencing Case**

- Justice Neil Gorsuch rules for criminal defendant again
- Justice Stephen Breyer writes narrow concurrence

Justice Neil Gorsuch again joined his liberal U.S. Supreme Court colleagues when he wrote an opinion siding with a man convicted of child pornography offenses who faced more prison time for violating supervised release. Though a more reliably conservative vote in other areas—and in criminal cases involving death row prisoners, in particular—it’s the latest instance of Gorsuch applying a limited government mentality to help convicts on appeal. Just this week, he cast the tie-breaking vote for the defense in another criminal case, and earlier this term provided the liberals with a fifth vote in decisions favoring American Indian rights.

In this latest decision on June 26, Gorsuch ruled for Andre Haymond, who was thrown back in prison by a judge for violating supervised release in a child pornography case. “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty,” Gorsuch wrote. “Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt,” he wrote. “As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.”

That part of Gorsuch’s opinion was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Justice Stephen Breyer joined in the judgment, writing a concurrence which, notably, began by saying that he agreed with much of Justice Samuel Alito’s dissent.

Though Breyer agreed with Gorsuch’s plurality opinion that the provision is unconstitutional, he said that, “in light of the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context.” That’s a reference to *Apprendi v. New Jersey,* a 2000 case where the high court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Gorsuch’s plurality opinion embraced the *Apprendi* rationale in the supervised-release context.

Alito’s dissent, joined by Chief Justice John Roberts and Justices Clarence Thomas and Brett Kavanaugh, said there’s no “constitutional basis” for the court’s holding, which Alito said is set out in Breyer’s narrower opinion. Alito said Gorsuch’s opinion “appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of much broader scope.” If the court goes further down this road, Alito said, “the consequences will be far reaching and unfortunate.” The reach of the decision for now may depend on whether Alito is correct that Breyer’s narrower opinion is the law of the land. The Supreme Court has grappled with how to interpret split opinions like today’s.

“Many litigants are sure to seek to argue for application of the plurality opinion,” said Douglas Berman, who teaches criminal law and sentencing at The Ohio State University Moritz College of Law.

The government appealed Haymond’s case to the high court after an appeals court struck down as unconstitutional a provision of the 2006 Adam Walsh Child Protection and Safety Act. The law allowed the judge to put Haymond back behind bars after finding—without a jury and with less proof than beyond a reasonable doubt—that he violated release conditions.

Haymond’s original sentence on his child pornography convictions was 38 months, followed by supervised release. After a probation officer alleged he violated release conditions—by possessing more child pornography and other violations—the judge agreed. Under the Walsh act, the judge was required to put Haymond back in prison for at least five years. The judge imposed the minimum, though, under the law, Haymond could’ve been back in prison for life.

The government argued the law is an important one for protecting public safety and that full-blown trial proceedings aren’t required. The Supreme Court sent the case back to the appeals court, for further review of what remedy Haymond is entitled to, now that the high court has ruled in his favor. The case is United States v. Haymond, U.S., 17-1672, vacated and remanded. 6/26/19.
New Books

**Trial Tactics, Fourth Edition**

By Stephen A. Saltzburg

This book is a road map for the discovery and avoidance of the many pitfalls and obstacles that must be avoided to achieve ultimate success at trial.

The Fourth Edition includes chapters not available in previous editions.

**The State of Criminal Justice 2019**

Edited by Mark E. Wojcik

This publication examines and reports on the major issues, trends and significant changes in the criminal justice system, on topics ranging from white collar crime to international law to juvenile justice. The 2019 volume contains chapters focusing on specific aspects of the criminal justice field, with summaries of all of the adopted official ABA policies passed in 2018-2019 that address criminal justice issues.