During April 4-7, 2019, the Section hosted its Spring CLE Program, Committee and Council Meetings in Nashville, Tennessee.

The Section introduced two new related programs this year. On the 3rd, the Section hosted a panel for law students at Belmont University, College of Law, to discuss careers in criminal justice. On the 4th, the inaugural Women in Criminal Justice Symposium featured a special day of programming regarding women in criminal justice. Panels examined the challenges facing women in criminal justice, implicit bias, and talked about shattering the glass ceiling. The Symposium concluded with the White Collar Crime Townhall, “Women & Leadership: Evolution and Revolution.”

Perspectives on Criminal Justice Reform.” Panelists discussed issues such as cash bail, conviction integrity units, state reforms, innovations in criminal justice, mass incarceration and The First Step Act.

After the CLE program concluded, the Council met to discuss the following proposed resolutions.

- CJS and the Commission on Domestic and Sexual Violence are co-sponsors of a resolution to urge legislatures and court to re-define consent in sexual assault cases by removing the longstanding legal burden that a sexual assault victim must show physical and/or verbal resistance to the act in question, and by providing instead that consent to a sexual act is expressed by words and actions in the context of all the circumstances.

- CJS and the NACDL are cosponsoring a resolution to Congress and the federal government to further the goals of the First Step Act by providing sufficient funding for implementation, by developing a risk-and-needs assessment system for earned time credits, by increasing good-time credits and by retroactively applying the sentencing amelioration provisions in the Act.

- Council approved a resolution from the CJS Task Force on Marijuana, Federalism, and Separation of Powers to urge Congress to remove marijuana from Schedule 1 of the Controlled Substances Act, to enact legislation exempting marijuana from the Controlled Substances Act when that activity is in compliance with a state’s laws, and to approve research on all aspects of marijuana.

- Council voted to amend Resolution 112B, passed at the 2017 Midyear meeting of the HOD, to ensure that motions to vacate convictions are not conditioned on the entry of any type of guilty pleas, including nolo contendere pleas, Alford pleas, or their equivalents.

Finally, the Council created two new Task Forces: The First Step Act Task Force and The Risk Assessment Task Force.
National White Collar Crime Institute

The 33rd Annual National Institute on White Collar Crime took place March 6-8, 2019, in New Orleans, Louisiana. The Institute hosted 22 breakout sessions and four main plenary sessions.

The Institute began with the General Counsel Forum, featuring general counsel attorneys from AIG, BAE Systems, Finch McCranie, Fleishman Hillard, Ingersoll Rand and PayPal. The forum was followed by a special session with the directors of the SEC and CFTC Division of Enforcement and the head of the DOJ Criminal Division’s Fraud Section, who discussed their respective agency’s enforcement priorities.

Hon. Bernice Donald, U.S. Court of Appeals, Sixth Circuit delivered the E. Lawrence Barcella Memorial Address. Judge Donald encouraged the attendees to address the ongoing issue of implicit bias. Her speech was followed by a panel consisting of United States Circuit and District Court Judges who discussed current issues and challenges they face as a judge.

On Friday, U.S. Assistant Attorney General, Criminal Division, Brian A. Benczkowski addressed the conference. His remarks were followed by another plenary panel of distinguished speakers who explored the ethical and professional conduct issues and challenges arising out of the Mueller investigation for both prosecutors and defense counsel.

Diversity and Inclusion Fellowship Program

The Diversity and Inclusion Fellowship Program will soon be accepting applications for the next group of fellows. The fellowship program provides opportunities for lawyers in under-represented groups such as ethnically diverse lawyers, persons with disabilities, and lesbian, gay, bisexual and transgender persons, to actively participate within the Criminal Justice Section and prepare them to take on leadership roles within the Section.

Participation in the Fellowship will include the following:

- Appointment to and active participation in one of the Section’s substantive committee or subcommittee of choice.
- An assigned mentor(s).
- Assignment and responsibility for a committee project designed to further the goals and objectives of the Section.
- Recognition in Section publication and on website.
- Attendance at 2 CJS leadership meetings with reimbursement of round-trip airfare, hotel, ground transportation, and per diem for all meetings capped at $2,000 per year per individual.

The Program will select two participants for the next fellowship cycle and fund their expenses to attend CJS meetings for two years. Applicants must be a member of the ABA to participate in the fellowship program. The Fellowship application can be found on the CJS Diversity and Inclusion Committee webpage, within the Communication, Membership & Services Division.

The CJS Diversity and Inclusion Committee will oversee the process by which applicants are selected. Successful candidates will demonstrate a history of commitment to criminal justice, public service, and professional excellence. The Fellowship applications will be available in June 2019. The committee will select applicants in July 2019. The application deadline is July 31. Applicants will be notified no later than the end of August 2019.
CJS Podcast

The Section launched a podcast, called *The JustPod*, with the purpose of creating a new and dynamic platform to support the work of the Section, to enhance the member experience and to extend the Section’s reach of influence outside of the ABA.

The content of the podcast ranges from Section-specific content to current issues in criminal justice. Section-specific content features updates from the Chair, Delegates, Task Forces and Committees. The podcast also hosts in-depth interviews on topics of focus for the Section such as bail reform, reentry, ICE arrests at courthouses, mass incarceration, conviction integrity units, and more.

Listen to *The JustPod* on iTunes and Spotify. If you are interested in participating in the podcast, please reach out to Emily Johnson@americanbar.org.

Upcoming Events

- **Annual Meeting:** August 8-11, San Francisco, CA
- **Southeastern White Collar Crime Institute:** September 4-6, Braselton, GA
- **London White Collar Crime Institute:** October 14-15, London, UK
- **CJS Fall Institute & Meeting:** November 7-9, Washington, DC
- **ABA/ABA Financial Crimes Enforcement Conference:** December 8-10, Washington, DC

For additional event listing, please visit ambar.org/cjsevents.

Student Writing Competition

The 2019 Competition topic is: “The Use of Drones by Law Enforcement—How should drones enhance public safety, how should drones be regulated, and what role does the Fourth Amendment play?”

The William W. Greenhalgh Student Writing Competition is open to students who, on the date the entry is submitted, attend and are in good standing at an ABA-accredited law school within the United States and its possessions. Membership in the Criminal Justice Section is not a requirement. The winner will receive a $2,500 cash prize. The deadline for entries is July 1, 2019. For more guidelines, see www.americanbar.org/groups/criminal_justice/awards/writing_competition

CJS Mentorship Program

The CJS Mentorship Program is again open for participation. In an effort to maximize the personal and professional membership experience of both our young and seasoned members, the ABA Criminal Justice Section will continue its Mentorship Program. The Mentorship program aims to facilitate relationships between young lawyers and seasoned attorneys within the Criminal Justice Section to enhance practical skills, integrity and collegiality in the profession.

This program will match mentor opportunities for the ABA Annual Meeting in San Francisco, August 8-13, 2019 and beyond. Participation in the program only requires one phone call or a coffee meeting with your matched mentee. Sign up to be a mentor and get matched with a mentee online or contact the Young Lawyers Committee co-chair, Deanna Adams at deanna.adams@hotmail.com, if you have any questions.

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**With the Criminal Justice Section**

-- The Unified Voice of Criminal Justice

Via Facebook, Twitter, LinkedIn, YouTube ...

When attending Section events or discussing our initiatives on these platforms, please use the hashtag #ABACJS.
Impeachment With A Prior Inconsistent Statement

By Rick Collins

You’re in the middle of trial and a witness for the opposing party says something on direct examination that’s unfavorable to your case. But wait – you have evidence that she said something different on an earlier occasion, and it’s contained in an official report, sworn statement, deposition or similar document. The document is right in front of you. What do you do with it on cross-examination?

Impeaching a witness through a prior inconsistent statement can be a devastatingly effective moment of high drama in the courtroom … if done correctly. What is the most effective way to cross-examine a witness on a prior inconsistent statement? There are a few different variations to establish the foundation. I like to use this four-step process (acronym: CRAC):

• Commit the witness to her version on direct examination
• Rebute this version with the substance of the earlier statement
• Accredit the reliability of the earlier statement
• Confront her verbally with the earlier statement

Let’s go into the four steps in more detail. We will use a simple hypothetical. You represent one party in a criminal assault trial. A witness for the other party has just said on direct examination that she saw the knife in Jim’s hand. However, in a signed statement the day after the incident she said she saw the knife in Bill’s hand. Your goal is to impeach her credibility with the earlier statement.

COMMIT

Q: “You just told this jury a few minutes ago that the knife was in Jim’s hand, right?”
A: “Yes.”

This step requires only a single question. Keep it short and parallel the exact words of the direct testimony to minimize evasion and ensure a simple affirmative response.

REBUT

Q: “In fact, isn’t it true that the knife was in Bill’s hand?”
A: “No, it was in Jim’s hand.”

Another single question, explicitly contradicting her direct testimony. Make sure you repeat exactly what she said in the earlier document that is inconsistent. It should be a short, simple question, not a compound question with multiple components. After just committing to the opposite state of facts, her response pretty much has to be a negative answer.

ACCREDIT

Q: “You gave a statement to a police investigator the day after the incident, didn’t you?”
(Answers to all the questions that follow will be yes.)
“He came to your house, did he?”
“He knocked on the door, right?”
“You let him in?”
“He told you why he was there, correct?”
“He told you he wanted to know about the incident?”
“You agreed to tell him, yes?”
“You wanted to be honest about it, of course?”
“You wanted to be accurate about it, yes?”
“While you were talking he was writing, yes?”
“Then he handed the piece of paper to you?”
“You read it, didn’t you?”
“He asked if it was accurate, yes?”
“You told him it was?”
“You signed the statement, right?”
“You signed the statement because it was accurate, correct?”

This is the only step requiring multiple questions. The exact questions, and the number of questions, will depend on the type of document containing the prior inconsistent statement and the circumstances under which it was made. The general idea is to build up the credibility of the prior statement. Questions that show that the witness wanted to be truthful and accurate, took the time to read the document, signed it, etc., all help to bolster its credibility. In most cases, the statement will...
have been made at a time much closer to the events in question when it was fresher in the witness’s memory. The goal of this step is to convince the trier of fact that the witness was unlikely to have been mistaken or untruthful in that document.

**CONFRONT**

Q: “And in [that document] you signed, you said the knife was in Bill’s hand, didn’t you?”

This step requires a single question. At this point you will likely get a yes answer (especially if you have one hand holding the corner of a piece of paper which she likely knows says what you say it does). If the witness says yes, sit down. You’ve won! You have impeached the witness. If the witness says no, or if the witness says she doesn’t remember, you may want to take the paper in both hands and ask slowly, deliberately, “Didn’t you say the knife was in Bill’s hand?” At this point you’ve got the witness skewered on a spear. If she is smart, she will admit the inconsistency rather than be embarrassed with the physical document itself. That’s when you say no further questions and sit down. You have won. You have impeached the witness.

If the witness continues to play games by saying she doesn’t remember or if she denies making the statement, it is then and only then—that you need to show her the document itself. It shouldn’t come to that. Producing the document, having it marked and showing it to her is a last resort. Think of it as something you don’t want to do unless you absolutely have to. Too many young lawyers seem to want to have the document marked and show it to the witness before even starting the foundation. You should not be showing the document unless and until you’ve completed all four steps and the witness is refusing to admit the inconsistent content of the document.

If you follow this four-step CRAC process you will handle most prior inconsistent statements (and even omissions in prior statements). With minor adaptations you can use it for all types of past statements. Should you ever have specific questions about cross-examination techniques, feel free to call upon me or the lawyers in my firm. If you want to be a better trial lawyer, I highly recommend taking a trial advocacy course. Meanwhile, good luck in court!

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**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.

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**Articles Wanted for the CJS Newsletter**

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

Submission Deadlines:
August 15, December 15, April 15

For inquiries, contact:
Kyo Suh, Managing Editor,
kyo.suh@americanbar.org
**Show, Don’t Tell: The Power of Sentencing Mitigation Videos**

By Rebecca Brodey and Tess Lopez

In a post-

Booker

world,

most

powerful

sentencing

submissions

lay out a client's history and characteristics with a comprehensive sentencing presentation: a detailed memorandum that puts the offense into the context of the client's life, powerful objections to the presentence report, character letters from an array of individuals who know the client, and compelling arguments at the sentencing hearing. There is one new medium that has become increasingly popular amongst both public defenders and private attorneys—sentencing mitigation videos.

**What are Sentencing Mitigation Videos?**

Sentencing mitigation videos ("sentencing videos") come in many different forms and styles. The most effective sentencing videos are no-frills 7 to 20 minute compilations of interview segments from individuals who can illustrate a client's character in a powerful way that is not delivered through the letters or sentencing memorandum. The videos are not elaborate Netflix-ready documentaries about a client's life. They are also not meant to replace character letters—which are critical to any submission. Rather, they are a supplement.

Sentencing videos are impactful for several reasons. First, these videos can convey emotion in a way that leaves a lasting impression on the judge. While a letter or memo may be able to explain the impact that a client's incarceration would have on his or her family or a client's charitable works, a video brings it to life. It provides an opportunity for the judge to see the tears in the eyes of a client's spouse or sibling or to hear the gratitude in the voice of an employee the client has helped. Interviews can also be filmed at a client's home or place of work, further elucidating aspects of a client's life other than the offense. On some occasions, they also contain limited photos from a client's life or images of the client's home or place of work. The visual aspect of sentencing videos is a stark and moving contrast to the images and charts of the offense that are usually put before the court through evidence or exhibits to the government's pleadings.

Second, unlike letters, sentencing videos cannot be skimmed. When presenting the court with voluminous material, it is impossible to ensure that a meaningful anecdote in one of the letters doesn't get glossed over. In a short video, it is highly unlikely that any part is missed.

Finally, videos are helpful tools for individuals who struggle with crafting a letter, especially due to old age or language barriers, or for individuals who are unable to support the client in person by attending the sentencing proceeding.

Although every video is different, the purpose of producing a video is simple: to highlight the most meaningful stories that attest to the client's true character. It is a collaborative effort between the client, the defense attorney, and the video "producer" to identify the strongest mitigating factors and decide who is best suited to explain, provide examples, and verify these factors.

**What Goes Into a Video?**

Sentencing videos are concise—they should not run more than 20 minutes. They should include edited segments of interviews from a combination of family, friends, colleagues or employees, or individuals the client has helped. If it is helpful, there are situations where the interview can be filmed in the client's home or place of work. This is a subtle way for the court to get a glimpse of the client's impoverished circumstances or, in some white collar cases, modest lifestyle despite significant wealth. A sample list of video participants may include a client's wife, an adult child or child in-law (minors only in exceptional situations), an elderly neighbor, an employee, and a reputable member of the client's community who can attest to the client's acts of kindness and generosity.

The individuals who are interviewed for the video may have also submitted letters but the content should not be the same. A video should not leave the judge feeling as though his or her time is being wasted with redundant material.

In addition to focusing on the client's character, there may be other important mitigating factors to highlight in the video. In one example, those interviewed commented on the client's abusive childhood and need for mental health counseling. In another example, one of the interviewees focused on the client's naiveté and likely blindness to many of the “red flags” of money laundering. This information provides insight into the circumstances that contribute to the client's involvement in the offense. While the focus of the video shall always be the client's history and characteristics, it can be effective in exploring other mitigating issues.

While some discussion of the offense can be helpful, a compelling video should focus on highlighting the client's life and not the offense. When referencing the offense, it is important to not include any material that would offend the court—especially after a trial where the judge is intimately familiar with the evidence. After a plea agreement, it is also essential that
interviewees do not make comments that suggest that a client is innocent or has failed to accept responsibility.

Lastly, the video is about the client, not from the client. Generally, any allocution from the client should be in court while he or she can look directly at the judge. In some instances, videos can be helpful to show a client’s efforts toward rehabilitation or time spent with family but this should not replace addressing the court at sentencing.

How Are Videos Received by the Court?

As a relatively new method of sentencing advocacy, it is difficult to quantify the impact these videos have had on judges. A recent poll of federal public defenders revealed that most of the AFPD’s who have used video have found them to be effective. Federal defenders in one district reported that the judge in their division has commented that videos are efficient in that they reduce the length of the sentencing hearing because potential witnesses are able to testify in video and the video enables the judge to review that testimony prior to the hearing. A 2017 survey in another district showed that 16 of 18 cases in which videos were submitted resulted in variances. In 11 of those cases, the judge departed 50% or greater. In 6 of the 11 cases, the judge departed 100% resulting in a sentence of probation. After being shown a compilation of sentencing videos at a recent ABA panel presentation, the two federal judges on the panel embraced the sentencing videos as effective advocacy in a proceeding where the judges have a very narrow window into the defendant’s lives outside of their offense conduct. Still, some judges have expressed distaste for videos, so it is essential to research your individual judge before embarking on the task of creating a sentencing video.

Anecdotally, moreover, they are impactful. Federal defenders have reported that videos “have been well received by the court as long as they are not too long, less than 10 minutes” and the AFPD’s have “found them to be very effective in achieving lower sentences than the government’s recommended sentence.” In one Louisiana case where a video was presented, a federal judge imposed probation on a defendant facing 8 years in prison under the guidelines. In a Southern District of New York case where a sentencing video was presented, the judge sentenced the defendant to 24 months where the guidelines range was 151 to 188 months. Of course, in each of the cases, the defense attorneys provided the court with complex sentencing submissions so the video by itself did not lead to a below guidelines sentence. But, the cumulative effect of a presentation that includes a sentencing mitigation video can only be helpful in securing a favorable sentence.

While there has been some criticism that these videos are unavailable to low income offenders, their growing use by public defenders suggests otherwise. In an era of modern technology, the costs for these videos is usually on par with, or even less than, most forensics experts. Moreover, the type of video presented controls the impact on the judge. Where a modest compilation of personal interviews is well received, an expensive film noir style production would certainly offend the court. Skilled editing and a seasoned video producer undoubtedly make these videos more compelling. But even the costs for expert production and editing are relatively marginal when compared to attorney time and fees for other types of experts.

How to Submit Videos?

The rules on video submission vary by judge. Generally, when filing the sentencing memorandum, the video can serve as an exhibit that is referenced in the memo. A flash drive or disc can then be sent to the clerk’s office along with a paper notice that can be entered on the docket. Assuming the judge’s rules allow for it, courtesy copies should be provided to both chambers and the government. Of course, it is imperative to check with the judge’s individual rules prior to submitting any type of electronic media. While it may seem enticing to play the video during the sentencing proceeding, there are reasons this may not be the best approach. Interviewees would be reluctant to participate in a video if they knew their private comments were going to be played in open court. Submitting the video to the judge at the same time as the sentencing memo allows him or her to view it in chambers when he or she is considering the appropriate sentence, not at the time of the sentencing hearing when many other factors are at play. Sentencing Videos are On the Rise

Sentencing videos are growing in popularity as a useful form of advocacy at sentencing. The style and submission of the video will vary based on the particular case and the judge. For instance, in a drug case, video footage of the client’s rehabilitation may be helpful whereas this could come off as too slick in a white collar case. Despite some criticism, video submissions at sentencing have continued to increase and the feedback from practitioners is that they are effective in reducing sentences. As technology continues to change the practice of law, it is also changing representation at sentencing.
ABA Clarifies When Judges Must Marry Same-Sex Couples

- Judges who have to perform marriages as part of their job can't refuse to marry same-sex couples, ABA says
- ABA committee cites state ethics opinions, Oregon Supreme Court

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility has clarified when a judge subject to the Model Code of Judicial Conduct may perform marriages of opposite-sex couples but refuse to perform marriages for same-sex couples. Judges who have a mandatory obligation to perform marriages can't refuse to marry same-sex couples because this would violate the Model Code of Judicial Conduct, a Feb. 14 opinion from the committee said. But if a judge isn't required to perform marriages, it's acceptable for the judge to refuse to perform all marriages, the committee said.

A judge who decides, however, not to perform any marriages for the public but agrees to for family and friends, can't discriminate between same-sex and opposite-sex couples in this circumstance, according to the committee. Underpinning its reasoning is the notion that the public “is entitled to expect that judges will perform their activities and duties fairly, impartially, and free from bias and prejudice” and that “while actual impartiality is necessary, it is not sufficient; the public must also perceive judges to be impartial,” the ethics opinion said.

The committee looked to several state judicial ethics opinions on judges’ obligations to perform same-sex marriages and a recent Oregon Supreme Court opinion to bolster its conclusions.

Free From Bias

Four Model Code rules—1.1, 2.2, 2.3(A), and 2.3(B)—guided the committee’s reasoning. Rule 1.1 requires judges to comply with the law. The law—as embodied in the 2015 U.S. Supreme Court opinion, Obergefell v. Hodges —says that it’s unconstitutional for state officials to engage “in discrimination and bias toward gays and lesbians in decisions related to same-sex marriage,” the committee noted. The committee then turned to the remaining three rules, which deal with impartiality and bias in judges.

Rule 2.2 not only requires judges to uphold and apply the law, the committee said, but it also directs judges to “perform all duties of judicial office fairly and impartially.” In this context, “impartiality” means “the absence of bias or prejudice in favor of, or against, particular parties or classes of parties,” it said. Rule 2.3(A) requires judges to perform their duties free from bias and prejudice and Model Rule 2.3(B) prohibits a judge who is performing judicial duties from manifesting bias or prejudice based on sex, gender, sexual orientation, or marital status. “Indeed, we are aware of no state judicial ethics opinion concluding that similar judicial code provisions permit judges who perform marriage ceremonies for opposite sex couples to refuse to perform marriage ceremonies for same-sex couples,” the committee said.

State Ethics Opinions

The committee’s opinion cited several state judicial ethics opinions that support judges performing same-sex marriages if they perform opposite-sex marriages. The Supreme Court of Ohio Board of Professional Conduct determined in 2015 that a judge who performs marriages can’t refuse to perform same-sex marriage based on religious, personal, or moral beliefs. It also found that Ohio judges can’t refuse to perform all marriages to avoid performing same-sex marriage based on religious, personal, or moral reasons because this could be seen as being biased against same-sex couples.

In Arizona, performing marriages is a discretionary function so a judge can choose to perform no marriages, the Arizona Supreme Court Judicial Ethics Advisory Committee said in 2015.

But Arizona judges can’t:
- distinguish between same-sex and opposite-sex couples when deciding whether to perform marriage ceremonies;
- decline to perform same-sex marriage ceremonies even if the judge refers would-be spouses to other courts or individuals;
- decline to perform same-sex marriages if they perform other marriages in court facilities; or
- decline to perform same-sex marriages even if they conduct all opposite-sex weddings outside of court facilities. This holds true even if the refusal is for religious reasons, the state ethics committee said.

The Nebraska Judicial Ethics Committee reached the same conclusions in 2015. Like Arizona, it also determined that judges may choose to perform marriages exclusively for close
friends and relatives, but in that case, they can’t refuse to perform same-sex marriages for close friends and relatives.

**Oregon Supreme Court Opinion**

The committee found further support for its conclusions in a 2018 Oregon Supreme Court decision. The ruling said that a judge who investigated the gender information of marriage applicants exhibited prejudice against same-sex couples based on their sexual orientation in violation of Oregon Rule 3.3(B). This rule prohibits a judge from acting with prejudice or bias while undertaking official duties.

The state high court found that even though Judge Vance Day never got around to refusing to marry same-sex couples, the directions he gave to his employees to research applicants and notify them he wasn’t available on their requested day if they were same-sex couples, were a violation of the rule. Day argued that because he never had the opportunity to deny a same-sex couple the chance to marry, he didn’t discriminate against these couples. The court disagreed. The instructions to his staff showed he intended to treat same-sex couples differently and these actions manifested prejudice, it said. The opinion is ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 485 2/14/2019.

**Ineffective Lawyer Responsible for Death Sentence Dismissal**

- Defendant’s background not properly investigated
- Pre-AEDPA test applied

A 30-year-old Arizona death sentence must be vacated because the defendant’s trial lawyer didn’t properly investigate his background, the Ninth Circuit said April 17. The court didn’t use the Antiterrorism and Effective Death Penalty Act’s highly deferential standard for analyzing whether assistance of counsel was ineffective, however. Theodore Washington filed for a writ of habeas corpus before the statute was adopted in 1996, the opinion by Judge Ronald M. Gould said. Instead, the court applied the pre-AEDPA standard, which looked at whether counsel was constitutionally deficient and then whether the defendant was prejudiced by the deficiency.

Had Washington’s lawyer reviewed his education and incarceration records, he would have discovered substantial mitigating evidence concerning Washington’s brain damage and history of substance abuse, the court said. The lawyer’s performance at the penalty phase of Washington’s state trial was therefore objectively unreasonable, it said. If the trial court were presented with the mitigating evidence, it’s reasonably probable Washington wouldn’t have been sentenced to death, the court said.

The case was remanded so Washington’s death penalty can either be modified to life in prison, or for the government to redo the penalty phase of the trial. Judge N. Randy Smith joined the opinion. Dissenting Judge Consuelo M. Callahan said Washington’s lawyer wasn’t ineffective, and the majority erroneously presumed prejudice. The case is Washington v. Ryan, 2019 BL 136255, 9th Cir., No. 05-99009, 4/17/19.

**Guantanamo Bay Judge’s Job Search Gets His Orders Vacated**

- Proceedings involved alleged mastermind of USS Cole bombing
- Judge didn’t avoid appearance of impropriety

Orders issued by the military judge overseeing the capital proceedings against the alleged mastermind of the USS Cole bombing were vacated by the D.C. Circuit April 16. The orders spanned from the time Colonel Vance Spath submitted an application with the Department of Justice to become a U.S. immigration judge, to the time he retired from the military to take that job, the opinion by Judge David S. Tatel said.

Spath was overseeing the death penalty proceedings of Abd Al-Rahim Hussein Muhammed Al-Nashiri at the U.S. Naval Base at Guantanamo Bay, Cuba, when he applied to be an immigration judge. Spath was negotiating a start date for the immigration judgeship when a dispute arose between Al-Nashiri’s lawyers and the government. Spath wouldn’t let the attorneys withdraw or provide adequate new counsel for Al-Nashiri. Right before he retired, however, he abated the proceedings and expressed frustration with Al-Nashiri’s lawyers. Al-Nashiri is entitled to a writ of mandamus because the immigration judge job was with DOJ, which has an active role in Al-Nashiri’s prosecution, and the “employment negotiations created a disqualifying appearance of bias,” the court said.

Vacating the orders also is appropriate because requiring Al-Nashiri to proceed under their long shadow would inflict an irreparable injury that couldn’t be fixed on direct review, and this is a death penalty case, the court said. Judges Judith W. Rogers and Thomas B. Griffith joined the opinion. The case is In re Al-Nashiri, 2019 BL 134830, D.C. Cir., No. 18-1279, 4/16/19.

**Public Defender Can Sue Over Assigned Client’s Sexual Harassment**

- Washington employers are liable for third-party harassment
- Revives claims by public defender alleging client harassed her

Washington employers can be liable under state anti-discrimination law when an employee is harassed by a client or similar third party, a state appeals court ruled. The worker must show the employer knew or should have known about the harass-
A lower court improperly rejected Sheila LaRose’s sexual harassment claims against King County and the Public Defender Association under Washington’s Law Against Discrimination, the appeals court said. LaRose, a former public defender, was assigned to represent a “Mr. Smith” against felony charges that he had stalked another woman. Smith then acting inappropriately toward her, including calling her home, LaRose says.

The harassment grew worse and Smith was arrested again and charged with stalking LaRose, the court said. The experience left LaRose with post-traumatic stress disorder. She was placed on leave and terminated when she couldn’t continue performing her public defender duties. She later sued both the county and association as her employers.

The court affirmed summary judgment against LaRose on her disability bias claims. But it said the lower court was wrong that LaRose sustained an “industrial injury” covered by that law and related issues, he said. In the absence of controlling state law precedent, Washington courts look to federal workplace bias case law for guidance, the judge said. Those “cases uniformly hold that a plaintiff can assert a hostile work environment claim” under Title VII of the 1964 Civil Rights Act when an employee is harassed by a customer, client, or similar third party, Maxa said. The case they pointed to included language to that effect, but the case only addressed timeliness issues, Maxa said.

The rule is consistent with the purposes of the WLAD, the appeals court said, adopting it as the law in Washington. The facts as described by LaRose would allow a jury to impute such liability to both the county and Public Defender Association, it said, reviving her claims against both entities.

It also revived her claims under state negligence law. The lower court prematurely found those claims were barred by the state’s Industrial Insurance Act, Maxa said. A hearing must be held on remand to determine whether LaRose sustained an “industrial injury” covered by that law and related issues, he said.

The court affirmed summary judgment against LaRose on her disability bias claims. But it said the lower court was wrong that any wrongdoing by the Public Defender Association could be imputed to the county. The county didn’t control the association’s performance of its contract with the county, the appeals court said.


**‘Serial’ Defendant Loses Chance at New Murder Trial**

- **Trial not prejudiced by failure to investigate alibi witness**
- **Investigative podcast elevated case to national stage**

Adnan Syed’s murder trial wasn’t so prejudiced by his attorney’s failure to contact an alibi witness that he’s entitled to a new one, the Maryland Court of Appeals ruled March 8. The 4-3 decision overturns that of the Maryland Court of Special Appeals, which ordered a re-do for Syed in March 2018. Syed’s conviction in 2000 for the murder of his then high-school classmate and girlfriend, Hae Min Lee, was the subject of the first season of the This American Life investigative podcast spinoff, Serial.

He was charged as an adult and, after his conviction, sentenced to life in prison plus 30 years. Syed argued throughout his circuitous path of post-conviction proceedings that he received ineffective assistance of counsel because his trial attorney didn’t investigate a classmate who claimed to have seen him during the estimated time of Min Lee’s disappearance.

His trial attorney’s failure to seek out the proposed alibi witness was unreasonable and undermined the adversarial process of Syed’s murder trial, Maryland’s top criminal court said March 8. But it is unlikely that the outcome of the trial would have been different, given the weight of the state’s evidence against him, the court said.

Syed’s defense team disagreed. “We just think the opposite is true. From the perspective of the defendant, there is no stronger evidence than an alibi witness,” Syed’s attorney, C. Justin Brown of Brown Law, said March 8. “The obstacles to getting a new trial are simply too great” in the U.S. criminal justice system, Brown said.

The top court also said the court below was correct in determining that Syed waived his ineffective assistance of counsel claim over his attorney’s failure to challenge certain cell-tower location evidence presented at trial. Syed didn’t timely raise the issue in prior proceedings.

Judge Clayton Greene wrote the opinion. Judge Shirley Watts concurred with a separate written opinion. Judges Mary Ellen Barberra, Michele Hotten, and Sally Adkins concurred in part and dissented in part.

The dissenters would have prejudice and affirmed the grant of a new trial. The case is State of Maryland v. Syed, Md., No. 24, 3/8/19.
Success of the Florida Bar Criminal Justice Summit

By Michelle Suskauer, President of The Florida Bar

I appreciated the opportunity to speak during the Council Meeting of the ABA Criminal Justice Section on April 7, 2019 to share the strategy and outcomes of the inaugural Florida Bar Criminal Justice Summit, held last October in Tampa, Florida. I have worked in the criminal justice system my entire career, and as the first former public defender to lead the Bar, I sought to use my platform as President of The Florida Bar to bring together people from diverse backgrounds to discuss common-sense criminal justice reform that could lead to meaningful change.

After meeting with criminal justice stakeholders from across the political spectrum, I appointed and led a steering committee comprised of practitioners, judges, elected public defenders and state attorneys, academics, legislators and community leaders. We established a framework for the event and developed a two-day program built around the expertise these leaders. The steering committee met and formalized the summit’s mission: To recognize and then address issues affecting the Florida criminal justice system, provide a forum for discussion and work with stakeholders to develop programs and solutions for the fair and effective administration of justice.

In addition, the committee discussed and debated topics that concern the criminal justice issues, examined existing research and data and identified experts as they shaped the summit’s agenda.

More than 160 summit attendees participated in two days of workshops, panel discussions and presentations addressing a wide range of topics, including sentencing reform, pre-trial release, juvenile direct file, juvenile sentencing, specialty courts, mental health, conviction integrity and offender reentry. Chief Justice Charles Canady opened the program asking the participants to keep in mind the “multi-faceted” purposes of the criminal justice system, including punishment, deterrence, restitution, and rehabilitation. “Crime control is another goal,” Chief Justice Canady said, “and you cannot ever think of crime control without thinking of due process. It has to be done in a way that is consistent with due process for the accused.”

The featured speakers included:

- Dr. Gipsy Escobar, director of research and analytics at Measures for Justice, an organization in Rochester, N.Y. that develops data-driven performance benchmarks to measure, assess and compare elements of the criminal justice process, including fiscal responsibility, fair process and public safety.

- Leonard W. Engel, director of policy and campaigns at the Crime and Justice Institute in Boston, Mass. His work is focused on policy analysis and legislative and regulatory reform.

- Nina Morrison, senior staff attorney at the Innocence Project in New York, N.Y. She represents prisoners seeking to prove their claims of innocence and counsels on issues related to prosecutorial accountability.

Hilarie Bass, immediate past president of the American Bar Association, introduced our lunch presentation led by Judge Bernice B. Donald, U.S. Court of Appeals for the 6th Circuit, and Sarah Redfield, professor emerita at the University of New Hampshire School of Law. Judge Donald and Professor Redfield delivered an interactive presentation on Implicit Bias with specific strategies to interrupt biases and foster diversity.

The summit concluded with a general session and discussion on future action, led by state Senator Jeff Brandes of St. Petersburg, and Hank Coxe, former president of The Florida Bar and chair of the summit’s steering committee.

The reaction from attendees was overwhelmingly positive, and many praised the initiative for its collaborative approach, diverse range of perspectives and insightful topics. The summit was approved for continuing legal education credit, and all sessions were recorded and broadcast on Facebook Live. Information about the Criminal Justice Summit, including CLE videos, program and agenda, news coverage and comments from attendees, is available online at floridabar.org/cjsummit.

Many of the issues discussed during the summit were the genesis for bills introduced by the Legislature for consideration – many were introduced by legislators who participated in the summit. Two of the bills – raising the grand theft amount and abolishing mandatory direct-file of juveniles – are expected to become law. Other issues, including the abolition of solitary confinement for juveniles and restricting mandatory sentences, received robust debate in several committee meetings. Many of the stakeholders who attended the summit were involved in those discussions.

The Florida Bar will continue to encourage stakeholders to facilitate conversations around criminal justice reform and to identify solutions that will move Florida’s criminal justice system in a positive direction.
New Publications

**Rehabilitation and Incarceration: In Search of Fairer and More Productive Sentencing**

By Harold Baer Jr

The United States now imprisons a higher percentage of its population than any other country in the world. Author, U.S. District Judge Harold Baer, Jr. explains this crisis of mass incarceration, how it came about, and the pressing need and means to reduce prison populations and recidivism; promote rehabilitation and re-entry into society; and protect public safety.

Please visit ambar.org/cjsbooks for book ordering information.

**Criminal Justice Online**

*Criminal Justice*, a quarterly magazine filled with practice-oriented articles, coverage of criminal law policy developments, and columns, is also available online to members of the Criminal Justice Section.

Cover stories of recent issues:

Spring 2019: *Facial Recognition Technology*

Winter 2019: *The Opioid Epidemic*

Fall 2018: *Football Fallout: The Legalities of CTE*