

Criminal Procedure: The Post-Investigative Process

Criminal Procedure

The Post-Investigative Process

SIXTH EDITION

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To my Grandkids: Leroy, Bruce, Anna, Nick, and Dava
S.E.A.

To Ren, Rhys, Charlie, and Amelia
L.W.A.

To Mom and Renato
T.R.M.

For Brooke and Elise
M.B.

To my clinic students past and present
D.L.H.

To the memory of Neil, our enduring guiding light
S.E.A., L.W.A., T.R.M., M.B., D.L.H.

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Preface to the Sixth Edition

Welcome to the Sixth Edition of *Criminal Procedure: The Post-Investigative Process*, begun in 1995 by the late distinguished professors Neil Philip Cohen (Tennessee) and Donald J. Hall (Vanderbilt). Their vision, pioneering at the time, was for a practice-oriented book for students and practitioners that thoroughly examines the adjudicatory stages (so called “bail-to-jail”) of criminal prosecutions, as well as black-letter doctrinal law. Although our team of authors has inevitably changed over time, we have tried to keep this book fresh and faithful to Neil and Don’s adventurous spirit. Thirty years later, our goal remains to maintain their comprehensive approach to criminal procedure, adding an even greater emphasis on the real-life problem solving and ethical issues that prosecutors, defenders, and judges face every day. We believe that this book, continuing our original authors’ inspiration, has stood the test of time.

Historically, the course that most law schools call “Criminal Procedure” focused on vital Fourth, Fifth, and Sixth Amendment issues, but paid scant attention to the subject matter of this book — the equally vital aspects, both practical and theoretical, of the criminal adjudication process. Happily, in recent years, law schools have added a separate course on criminal adjudication, and placed it on a co-equal footing with the traditional “Crim. Pro.” course. Bar examiners now test for proficiency in bail-to-jail law and practice, which the authors of this book regard as “the real criminal procedure.” In this new edition we have given added attention to essential issues such as litigation strategy, motion practice, the form and content of indictments and other pleadings, and the impact of various parts of the system on the guilty plea process.

Until the last couple of years, criminal adjudication was one of the most rapidly developing areas of the law, accounting for approximately twenty percent of the U.S. Supreme Court’s decisions in recent years. Most recently, however, the Court’s docket has notably pivoted away from criminal procedure issues and it remains to be seen whether this trend will continue. This book has stayed abreast of the sometimes sweeping changes in Supreme Court jurisprudence in the first two decades of this century, most notably in sentencing, plea bargaining, and post-conviction constitutional doctrine. We have not shied away from criticisms, from various quarters, of recent changes in case law, but have set out to do so in a fair and balanced way, leaving it to students to come to their own conclusions.

Certain, sometimes rancorous, battles in our area of the law appear to be over, or at least to have subsided. The so-called “*Apprendi* wave” in sentencing jurisprudence, especially as it applies to sentencing guideline systems (see Chapter 16) and the turmoil in habeas corpus jurisprudence (see Chapter 17) have largely settled down. The *Apprendi* line of cases from the early 2000’s reestablished the Constitutional primacy of jury fact-finding required when sentences are to be enhanced. Habeas is now acknowledged to be a severely restricted extraordinary remedy, to correct only clear and egregious errors in conviction and sentencing. The next major battleground in criminal adjudication procedure may well be (and perhaps already is) in the area of pretrial detention and release (see Chapter 5), especially concerning the setting of bail in amounts that defendants of modest means cannot afford to pay. We have also (Chapter 14) reprinted and analyzed the Supreme Court’s recent landmark decision in *Ramos v. Louisiana*, 590 U.S. 80 (2020) (Constitution requires that jury guilty verdicts be unanimous, overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality decision)).

This new Sixth Edition covers criminal adjudication decisions through the close of the Supreme Court’s October 2024 Term in June 2025. As always, we will include coverage of later significant decisions and other noteworthy developments in our area of the law in our cumulative annual supplements (available on-line at the Carolina Academic Press website, cap-press.com), to keep our users continually up to date.

As mentioned above, our authorship team has changed over the years, but our commitment to maintaining the standard of excellence of our original authors has not. We thank Professors Michael O’Hear (Marquette) and Wayne A. Logan (Florida State) for their extraordinary assistance, stepping in to help write the Fifth Edition in the wake of Professor Cohen’s sudden passing, and wish them the best as they return to their other scholarly pursuits. Professors Adelman (Oklahoma City) and Abramson (Louisville) have retired from law teaching and this edition will be their final contribution to the continuing success of this book.

With this new edition, we have added three mid-career co-authors, Dean Tiffany Murphy (Arkansas) and Professors Matt Bender (Washburn) and D’lorah Hughes (Kentucky), who will chart our book’s future course. As written and sung by American troubadour James Taylor, “the secret of life is enjoying the passage of time.” It has been a labor of love for all of us, and we hope that our joy in this sometimes-laborious process somehow reaches across the pages to our readers.

Stanley E. Adelman

Leslie W. Abramson

Tiffany Murphy

Matt Bender

D’lorah L. Hughes

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