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CRIMINAL PROCEDURES

Cases, Statutes,
and Executive Materials

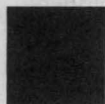
*Fourth
Edition*



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Law & Business

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CRIMINAL PROCEDURES

**Cases, Statutes, and
Executive Materials**

Fourth Edition

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Law & Business

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Published by Wolters Kluwer Law & Business in New York.

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Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-0720-3

Library of Congress Cataloging-in-Publication Data

Miller, Marc (Marc Louis)

Criminal procedures : cases, statutes, and executive materials / Marc L.

Miller and Ronald F. Wright. — 4th ed.

p. cm. — (Aspen casebook series)

Includes bibliographical references and index.

ISBN 978-0-7355-0720-3

I. Criminal procedure — United States — Cases. I. Wright, Ronald F., 1959-II. Title.

KF9618.M52 2011

345.73'05 — dc22

2011018125



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Preface

The American criminal justice system is huge, complex, and varied. Federal, state, and local governments together spend over \$200 billion each year on policing, prosecution, trial, and punishment. Well over 2.3 million persons are incarcerated in federal and state prisons, and state and local jails, in the United States at any one time. Another 5 million are on probation or parole.

There are almost 18,000 separate police agencies in the United States, with around 800,000 sworn officers. There are even more “private police” and security agents. In an average year, these officers and agents make more than 14 million arrests.

Criminal cases are prosecuted by more than 2,400 prosecutors’ offices, employing about 35,000 attorneys and more than 50,000 additional staff. They obtain about 1 million felony convictions every year, and even more misdemeanor convictions. Thousands of attorneys work as public defenders or as defense counsel in private practice. Thousands of judges hear cases in trial and appellate courts. Lawyers often find their first jobs in the criminal justice system. Some stay for life.

Criminal procedure is the body of law governing this collection of systems. The law of criminal procedure directs — or at least attempts to direct — the actions of police officers, prosecutors, defense attorneys, judges, and other government officials. Criminal procedure limits the way the government may interact with citizens, suspects, defendants, convicted offenders, and victims.

The federal government, every state government, and many local governments operate criminal justice systems. They all spend time, effort, and money each year running and reshaping their respective systems. Although the federal system is one of the largest systems standing alone, the state and local systems collectively are much larger. Virtually all misdemeanors are processed in state courts, along with almost 95 percent of all felony convictions. Criminal justice in the United States is overwhelmingly a state and local function.

There is no one criminal procedure: Each system follows its own set of rules, controlled to different degrees by outside authorities. Procedural rules come from many sources, including constitutions, legislatures, courts, and executive branch agencies. Because the issues of criminal procedure are common and accessible — unlike, say, antitrust law — a wealth of less formal constraints, including community views and the media, also shape procedure. We have titled this casebook “Criminal Procedures” to reflect these multiple layers and sources of law.

The Approach in This Casebook

A criminal procedure casebook must impose some order on the morass of cases, rules, and practices that characterize criminal justice systems. One accepted way to make this material accessible for newcomers is to focus on the role of one important institution, the United States Supreme Court, and on one important source of law, the United States Constitution.

Since the days of the Warren Court, starting in 1953, the Supreme Court has influenced criminal justice systems in profound ways. It made the Bill of Rights in the federal Constitution a shaping force for every criminal justice system. The Warren Court made the story of criminal procedure, told from the point of view of the Supreme Court, compelling. The main topics of controversy were police practices: stops, searches, and interrogations. Other decisions of the Court created a basic framework for providing defendants with counsel and for conducting criminal trials. For years, the focus on the Supreme Court’s constitutional rulings guided students through the questions that most concerned judges and lawyers.

But the story of this one institution offers less explanatory power as time passes. Traditional issues on the Court’s constitutional criminal procedure docket now occupy less of the attention of judges, attorneys, defendants, victims, and others concerned with criminal justice. Most criminal defendants do not go to trial. Many have no complaints about illegal searches or coerced confessions. These defendants and their lawyers care about pretrial detention, the charges filed, the plea agreements they can reach with the prosecutor, and their sentences.

The central questions have shifted in light of changes in the workload, politics, funding, and structure of criminal justice institutions. For example, the question of *whether* indigent defendants will get counsel has become a question of what counsel they will get. New crime-fighting strategies — such as community policing and curfews — advances in technology, and changes in the political and social order raise new questions and place old questions in a new light. For judges, sentencing questions in particular have attained higher priority: Determining the proper sentence in some systems now requires more time from court personnel than resolution of guilt or innocence.

The U.S. Supreme Court leaves important dimensions of most procedural issues unresolved and thus leaves other institutions free to innovate; they have done so. The issues of current importance in criminal procedure are being shaped in multiple institutions, including state courts, legislatures, and executive branch agencies.

This book adopts a panoramic view of criminal procedure, emphasizing the interaction among, and variety within, criminal justice systems. In our opinion, students in an upper-level course such as criminal procedure can and should move

beyond the skills of case synthesis and beyond the ability to appreciate the role of only one institution. Our materials emphasize the following themes and objectives:

- *Procedural variety.* In each area we present competing rules from the federal and state systems. We also occasionally examine procedures from earlier times or from non-U.S. systems. Reviewing different possible procedural rules encourages critical analysis and helps identify the assumptions held and judgments made in the design of each criminal system.
- *Materials from multiple institutions.* In addition to leading U.S. Supreme Court cases, we make extensive use of state high court cases, statutes, rules of procedure, and police and prosecutorial policies, and we encourage readers to consider the interactions among multiple institutions. Examining the efforts of different institutions to achieve similar goals highlights the reality of procedural innovation and reform.
- *Real-world perspective.* We focus on procedures and issues of current importance to defendants, lawyers, courts, legislators, and the public. We devote the most attention to the issues arising in the largest number of cases.
- *Street-level federalism.* Federal law, typically in the form of constitutional decisions by the U.S. Supreme Court, still plays an important role in guiding the investigation and prosecution of high-volume street crimes. The interactions of police with citizens and suspects form the workaday setting for issues of criminal justice. The impact of abstract constitutional doctrine on these daily interactions raises important theoretical questions about federal-state relations and interactions among jurisdictions and governmental institutions.
- *Political context.* Materials trace the political environment surrounding different institutions and issues. We explore the impact of public concerns such as terrorism, drug trafficking, domestic abuse, and treatment of crime victims on procedural rules. Funding decisions with regard to criminal justice systems also offer a window into the political setting.
- *Impact of procedures.* We consider the effects that different procedures have on law enforcers, lawyers, courts, communities, defendants, and victims. We emphasize primary materials but include social science studies as well, especially when they have been the basis for procedural reform. This perspective keeps in mind the managerial needs of criminal justice: Any legal rule must apply to multitudes of defendants in overcrowded systems.

By studying the various ways in which state and local systems have answered crucial procedural questions, students become aware of a broader range of policy alternatives. They form a more complete picture of the complex and interactive workings of the criminal justice system. Our goal in emphasizing the variety within criminal procedure is to produce lawyers who know both the current law and the way to shape better law down the road.

Conceptual Anchors

Our emphasis on variety does not mean that we will survey the practices of all 50 states on each issue; this casebook is not a treatise. Rather, the materials highlight the majority and minority views on each topic, as well as the federal view. The major positions on a topic are usually summarized in the first note following the

principal materials. Truly distinctive answers to problems are mentioned occasionally as a point of comparison with the leading approach, but the uniqueness of the position is always highlighted.

The book addresses a wide range of U.S. Supreme Court precedents, including the recognized core of essential cases and many of the most recent important decisions. State supreme court decisions summarizing and critiquing a U.S. Supreme Court decision, or a line of cases, represent effective teaching tools since the state cases tend to highlight the competing doctrinal positions. State supreme court opinions by and large show less interest in the positions of individual justices than do U.S. Supreme Court decisions and devote less attention to questions about consistency with past decisions. State supreme court opinions often provide provocative settings that show how principles operate in practice. They tend to present succinctly the textual and institutional arguments favoring a procedural requirement, the values furthered by the rules, and their likely effects on police, suspects, and communities.

Studying a variety of possible answers to important procedural questions has an unexpected effect: through criticism and contrast it provides students with a firmer grasp of the federal approach, including current federal constitutional criminal procedure, than does presentation of federal law alone. Students become better equipped to understand what is truly important about the current norms. Short “problems” throughout the book also enable readers to apply and integrate basic concepts.

The state cases appearing in this book take every conceivable position with respect to Supreme Court precedent, ranging from total agreement to complete rejection, and encompassing subtle variations in interpretation and emphasis. For a large number of state cases that focus on state constitutional or statutory questions, the position of the U.S. Supreme Court is simply irrelevant. The case selection does not favor decisions merely because they reject the U.S. Supreme Court view — the “new federalism” approach. These materials are not a battle cry for state court independence; they simply reflect the vibrancy of state supreme courts and state law.

The Fourth Edition

The fourth edition of this book is a response to changes in the field, incorporating emerging themes and major issues. Such themes and issues — the turning points in the law — result at least as often from dramatic events outside the courtroom as from blockbuster judicial decisions. Such dramatic and unexpected “drivers” of change in criminal procedure over the years since the first edition of this book appeared include increasing attention to issues of race, especially the so-called DWB (driving while black) stops on American highways and the “innocence” projects that have revealed strings of wrongful convictions. The fourth edition continues to explore the legal echoes within domestic criminal procedure of the attacks on September 11, 2001, and the ongoing war on terrorism.

We have made changes in every chapter. Some of those changes reflect actual shifts in doctrine, while others are the result of suggestions by teachers and students about cases and materials that worked well in the classroom, and others that might be improved.

Our attention to developments in the states provides a large pool of new cases, statutes, and rules to draw from, keeping the discussion anchored to current reality in criminal justice. For example, many of the cases in this book were decided after 2000. Recent federal developments also find their place in these pages. Significant U.S. Supreme Court cases added to this edition include *Arizona v. Gant*, *Berghuis v. Thompson*, *Herring v. United States*, *Maryland v. Shatzer*, *Padilla v. Kentucky*, and *Rothgery v. Gillespie County*.

The overall goal of these changes has been to produce a book that remains fresh and engaging.

Criminal Procedure Courses

This book covers the full spectrum of procedure, from casual police-citizen interactions to appeals. Part One examines police activities, including stops, investigations, searches, arrests, interrogations, and identifications. This coverage is the heart of the basic criminal procedure course, often labeled the police practices course. It is typically taught in three or four classroom hours.

Most law schools now offer a second procedure course — often called the bail-to-jail course — that focuses on the regulation of prosecutors, defense counsel, and courts before and during trial. Part Two examines procedural issues before trial, including the provision of defense counsel, and Part Three explores adjudication of guilt through both the most common method (the plea bargain) and the most prominent one (the trial). Some survey or advanced courses include an introduction to the new law of sentencing and the procedures governing appeals and collateral review of convictions. Part Four provides a relatively brief introduction to sentencing and post-conviction review.

The materials throughout this volume address interrelated themes; criminal procedure is a relatively coherent field. It is not necessary, however, to study the materials on police practices before those on adjudication, for example. Within each course, the teacher can approach topics from a variety of perspectives and using a number of different doctrinal starting points. Students should not be surprised if their professor presents the chapters in an order different from the one we have used or adds chapters, cases, or other materials to the course.

Procedure, Politics, and Reform

This book reminds readers regularly about the political environment shaping the work of every institutional actor in criminal justice. The materials consider the changing political priorities that make enforcement especially urgent for certain criminal laws — those punishing drug trafficking, environmental crimes, and sexual assault, to name a few. Such high-priority enforcement efforts influence criminal procedure more generally. Terrorism is the newest and most tragic law enforcement priority, and we consider the potential impact of new approaches and doctrines aimed at terrorists on domestic criminal procedure and the implications for more typical crimes.

The theme of jurisdictional and institutional variation draws critical attention to the role of states, whose systems handle 94 percent of the felonies prosecuted in the United States. But while the federal and state systems are the most appropriate

levels at which to consider constitutional and statutory constraints, the local level is the true locus of criminal justice power. It is also the place where criminal justice systems in the United States engage most citizens. There are roughly 3,000 counties in the United States, including 254 in Texas and 168 in Georgia.

The local foundations of discretionary power in U.S. criminal justice systems are reflected in the funding for those systems. Just over half of all criminal justice funding comes from the local level, just over 30 percent from the state level, and just under 20 percent from the federal level. But funding is not spread evenly across system components. Police services are primarily funded at the local level, prisons are funded at the state level, and the costs of prosecution and adjudication are funded primarily at both the local and state levels. There has been much legal and public debate over the 30-year expansion in the federal prosecution of what traditionally would have been local drug offenses; today, immigration and drug crimes dominate the federal criminal docket, although the federal courts do continue to handle traditional areas of federal interest such as bank robbery and large-scale fraud.

Students who appreciate the handful of basic political struggles that time and again shape procedural debates will be better able to direct changes in the system and to influence decisions in close cases. The struggles center on questions such as these: What are the purposes of the criminal justice system? In particular, what is the relevance of criminal law and procedure to the social goals of crime control and prevention? How does the theory and practice of federalism inform criminal justice theory and practice? Can we trust the police? How vital is the adversary system and the role of defense counsel to the success of that system? Are we comfortable with the broad discretion exercised on a daily basis by police and prosecutors? How important is it to treat suspects similarly? Should we explicitly consider the costs of procedures?

The priorities inherent in this textbook suggest a return to the study of criminal procedure as a genuine procedure course, not a course in constitutional adjudication. The constitutional component remains an indispensable part of the course but is not the sum total of criminal procedure.

The return to a fuller conception of criminal procedure offers enormous opportunities to those who study the system and to those who will soon participate in its operation and evolution. When many institutions are able to shape a legal system, there are many opportunities for change. We hope each student will leave this course with a sense of the drama and the special challenges of each case and of the entire process. We hope each student will finish school ready to create procedures more sound than those that exist today.

Marc Miller
Ron Wright

Tucson, Arizona
Winston-Salem, North Carolina
February 2011



Acknowledgments

Creating a new edition of this book powerfully reminded us of how communities make work more fun and make final products better. Our debts extend to our friends and colleagues, our institutions, our students, our teachers, and our families.

Some of the teachers who use this book contact us on occasion to suggest improvements for future editions. They include Laura Appleman, Doug Berman, Stephanos Bibas, Frank Bowman, Irus Braverman, Darryl Brown, Jenny Carroll, Steve Chanenson, Jack Chin, Jennifer Collins, Steve Easton, Nancy Gertner, Aya Gruber, Thaddeus Hoffmeister, Jim Jacobs, Sam Kamin, Elizabeth Ludwin King, Tamara Lave, Kay Levine, Dan Markel, Tracey Meares, Alan Michaels, Tommy Miller, Kenneth Nunn, Jenny Roberts, Kami Simmons, Jonathan Simon, Shandrea Solomon, Kate Stith, Paul Stokstad, Andrew Taslitz, Sandra Guerra Thompson, Robert Wagner, Jonathan Witmer-Rich, David Yellen, and Tung Yin. It is a great joy for us as editors to learn from them what is happening in classrooms all over the world.

Scholars who provided wise counsel on earlier editions, which is still very evident in the revised volume, include Albert Alschuler, Akhil Amar, Barbara Babcock, Adolph Dean, Nora Demleitner, George Fisher, Dan Freed, Mark Hall, Mark Harris, Lenese Herbert, Andrew Kull, Gerard Lynch, William Mayton, David Orentlicher, Leonard Orland, Alan Palmiter, Anne Poulin, Aaron Rappaport, Sadiq Reza, Natsu Saito, Stephen Schulhofer, Charles Shanor, Rick Singer, Michael Smith, Charles Weisselberg, Bert Westbrook, and Deborah Young. We have also learned from two extensive published reviews of this book. See Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 *Buff. L. Rev.* 909 (2001), and Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 *J. Crim. L. & Criminology* 789 (2003).

We have both been graced with great teachers, all of whom became friends. We can trace in these pages the influence of Norval Morris, Frank Zimring, Edward Levi, Richard Epstein, Philip Kurland, David Currie, James Boyd White, Owen Fiss, Robert Burt, Peter Schuck, Steven Duke, and Judges Frank Johnson and John Godbold.

Over the years we have worked on this project with many fine students whose energy renewed our own. They include Liz Asplund, Amber Byers, Ryan Carter, Pablo Clarke, Perry Coumas, Don Donelson, Ben Durie, Joseph Ezzo, Heather Gaw, Jennifer Gibbons, Kaitlyn Girard, Elizabeth Goodwin, Whitney Hendrix, Antoine Marshall, Emily Parish, Russ Rotondi, and Rebecca Stahl. Exceptional research help on earlier editions came from Roger Abramson, Nathan Adams, Wes Camden, Sean Monaghan, Tyronia Morrison, Alice Shanlever, and Daniel Turner.

We have made heavy demands on our libraries and technology experts, and owe thanks to Marcia Baker, Terry Gordon, Sarah Gotschall, Will Haines, Deborah Keene, Lori Levy, William Morse, Stuart Myerberg, Holliday Osborne, John Perkins, and Erika Wayne. Steve Turner, the former director of the Wilsonville, Oregon, public library, helped us achieve greater clarity throughout the book. Kristie Gallardo, Barbara Lopez, Beverly Marshall, Radine Robinson, and Marissa White provided timely administrative support for this edition and earlier ones: It is a miracle they did not ask to work with faculty other than us.

We also have debts to many of the hard-working and visionary lawyers and judges in the criminal justice system. A few who provided special assistance are Harry Connick and Tim McElroy of the District Attorney's office in New Orleans; Numa Bertel of the Orleans Indigent Defender Program; Judge Camille Buras of the District Court in New Orleans; Lawson Lamar and William Vose of the State Attorney's office in Orange County, Florida; Russell Hauge of the Kitsap County Prosecutor's Office in Washington; Peter Gilchrist of the District Attorney's Office in Mecklenburg County, North Carolina; Patricia Jessamy of the State's Attorney's office in Baltimore, Maryland; and Chief Judge James Carr of the U.S. District Court for the Northern District of Ohio. We appreciate the willingness of police departments and prosecutorial and defender's offices to give us copies of their policies and manuals. We have also gained insight from our conversations with skilled reporters and criminal justice reformers, including Kevin Corcoran.

Family debts for so consuming a project are hard to recognize in print, and even harder to repay in life. Joanna Wright, ever the curious one, shows an interest in everything from exclusionary rules to font sizes. Andrew Wright keeps reminding us that justice for real people must be the bottom line for any legal procedure. Owen Miller (age 8) is full of questions about everything, starting with the basics: "What is a bad guy?" and "Why do police officers carry guns?" Evelyn Miller (4) wants to know why this book has so many words and so few pictures. Wyatt Miller (2) is still focused on questions of even a more fundamental nature. Conversations with our brothers Travis Wright, who is a police officer, and Craig Miller, who for years worked on justice reform projects and now teaches inner-city high school students history and government, helped us remember that criminal procedure rules guide the behavior of people in very different settings. Other family members (especially Alex Miller, Renata Miller, Katy Miller, Denis Wright, Kyung Ah Wright, and the Ohlingers and Mannings) read parts of the manuscript and forgave us for the piles of papers and disks at every family gathering.

Our parents have been our teachers, our friends, and our models. Ron's father, Ronald F. Wright, Sr., died when Ron was a law student, but his energy and optimism pervade this book. Marc's father, Howard, for many years a law professor, provided steady advice from beginning to end. Our mothers, Marian and Shirley, showed a confidence that helped us keep our destination in mind when work seemed nothing but roads.

This book sits between covers only because of the daily encouragement and advice of Amy Wright and Christina Cutshaw. Putting up with writing projects is not part of the wedding vows; perhaps it should be.

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