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Twenty years ago, on Nov. 23, 1998, 46 states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands (collectively the “Settling States”) and the four largest U.S. cigarette manufacturers entered into the national tobacco settlement known as the Master Settlement Agreement (MSA). Over the past 20 years, the MSA has had far-reaching public health implications and economic effects. This “landmark agreement” has led the way to significant reductions in cigarette smoking, particularly among youth, and contributed to a dramatic shift in societal perceptions about smoking and the tobacco industry.

The percentage of high school students currently smoking cigarettes (smoked on at least one day during the 30 days before the survey) plummeted from 36.4% in 1997 to 8.8% in 2017. In terms of frequent use (smoked 20 or more days during the 30 days before the survey), the percentage dropped from 16.7% in 1997 to 2.6% in 2017.

As evidenced by these numbers, the MSA has been extremely effective in carrying out one of its primary purposes, which is to reduce youth cigarette smoking. The MSA has not functioned in a vacuum, but rather has worked in conjunction with actions at the federal, state, and local levels to play a vital role in reducing smoking rates. There are four primary ways that the MSA has combatted youth smoking and contributed to these dramatic reductions.

First, it raises the price of cigarettes by requiring the tobacco manufacturers that are parties to the MSA to make annual payments to the Settling States based on their cigarettes sales or shipments in the United States. Under the MSA, the Settling States released the four largest cigarette manufacturers that originally signed the MSA, known as the Original Participating Manufacturers, and the tobacco manufacturers that later settled with the states under the MSA, known as Subsequent Participating Manufacturers, from past and future claims for costs incurred by the states as a result of smoking-related illnesses and death and for other equitable relief. (Original and Subsequent Participating Manufacturers are referred to collectively as Participating Manufacturers.) In exchange, the Participating Manufacturers are required to make annual payments to the Settling States for as long as they have cigarette sales in the United States. In 2018, for example, the Participating Manufacturers made almost $7.2 billion in payments to the Settling States. From the inception of the MSA through July 2018, the Participating Manufacturers have paid over $126 billion to the Settling States.

The increase in cigarette prices connected to the MSA is significant because such increases “reduce the initiation, prevalence, and intensity of smoking among youth and young adults.”

Second, Section III of the MSA imposes significant limits on the Participating Manufacturers’ marketing, advertising, and promotional practices. As a result, the MSA has dramatically changed the way that cigarettes are advertised and marketed in the United States. The MSA specifically prohibits cartoons, such as R.J. Reynolds’ infamous Joe Camel, and ads targeting youth. It limits tobacco brand name sponsorships, a tactic that was used by the tobacco industry to

**NO SMOKING**
showcase their brands on race cars and at concerts and athletic events. Also, it eliminates transit and outdoor advertising, such as the ubiquitous Marlboro Man billboards and signs in stadiums and arenas, prohibits tobacco brand name merchandise, and limits the distribution of free samples. The MSA also prohibits Participating Manufacturers from causing tobacco brand names to appear in movies, television, theatrical productions, music performances, and video games. Additionally, it prohibits Participating Manufacturers from making any material misrepresentation of fact regarding the health consequences of using tobacco products. This is a particularly important provision given the tobacco industry’s long history of denying and distorting the health consequences of smoking.

The Section III restrictions have had a substantial impact on tobacco marketing in the United States, leading to a shift in the way that Participating Manufacturers promote their products to areas that are potentially outside the constraints of the MSA, such as adult-only venues and age-verified websites. Also, technology has drastically changed since the MSA was drafted. In 1998, the Internet was not ingrained in so many aspects of daily life and social media was in its infancy. Social media influencers, Instagram posts, and YouTube videos were non-existent. Today, in contrast, it is difficult to monitor the vast array of promotion platforms and it can be difficult to determine who is behind a promotion. Despite these challenges, the Settling States continue to monitor the Participating Manufacturers’ advertising and marketing and the MSA continues to have a significant impact on cigarette marketing.

Third, through the annual payment process, the MSA provides funds to the Settling States that they may choose to use for smoking prevention and cessation efforts. As noted above, more than $126 billion has been paid to the Settling States since the inception of the MSA. Although the MSA does not dictate the use of these funds, state funding for smoking prevention and smoking efforts did occur in the early years of the MSA. However, as state legislatures dealt with budget shortfalls and competing demands on state resources, many states subsequently reduced or completely cut funding for these vital programs. For 2018, no state funded prevention and cessation programs at the levels recommended by the U.S. Centers for Disease Control and Prevention.

Finally, the MSA established and provided funding to the American Legacy Foundation, now known as...
the Truth Initiative, which launched the *truth* smoking prevention campaign in 2000. The hugely successful *truth* campaign now serves as both a “public health initiative to reduce and eventually eliminate tobacco use” and “as a social marketing brand.”

The campaign, which is focused on eliminating adolescent and young adult smoking, has evolved since its early days and “now employs product promotions” and “has a major social media voice and a renewed focus on the current youth and young adult generation—the ‘Millennials’.”

The Truth Initiative published research in 2017 finding that, over the course of a single year, the *truth* campaign prevented more than 300,000 youth and young adults from starting to smoke.

While the MSA has been dramatically effective in combating youth smoking, the landscape has changed since the execution of the agreement 20 years ago, posing fresh challenges for the states. As noted, new forms of tobacco product marketing have emerged with evolving technology, and there has been a shift in where Participating Manufacturers are spending their marketing dollars. Also, new types of tobacco and nicotine-based products continue to enter the market. Some of these products may come within the scope of the MSA while others do not. In addition, as a result of the passage of the Family Smoking Prevention and Tobacco Control Act in 2009 (the “Tobacco Control Act”), the Food and Drug Administration (FDA) is now heavily involved in regulating the tobacco industry. There are areas of overlap between the Tobacco Control Act and the MSA, such as a prohibition on or restriction of free samples, brand name sponsorship, and brand name merchandise; however, the Tobacco Control Act has a preemption provision that leaves considerable space for states and localities to act by legislation or regulation. Moreover, the MSA is not subject to preemption since it is a contract. The involvement of FDA in tobacco has provided the states with new opportunities to collaborate with the federal government on tobacco control matters.

Ultimately, the evolution of the market and regulatory framework has not diminished the relevance of the MSA and its continued importance in further reducing youth smoking. Although we have seen great success in smoking reduction, tobacco use continues to be the “largest preventable cause of death and disease in the United States.” Cigarette smoking and exposure to secondhand smoke kill at least 480,000 Americans each year. There is still work to be done. The MSA is not without flaws; however, it continues to play an important role in tobacco control and has been recognized as a potential model for other public-health-focused litigation and settlements. The MSA’s significant and ongoing impact on the public health of this nation, and its ultimate contribution to saving lives, is a testament to the tremendous efforts of the attorneys general in 1998 as well as their ongoing efforts in working collaboratively to implement and enforce this landmark agreement.
Endnotes

1 Four states, Florida, Minnesota, Mississippi, and Texas, reached separate settlements with tobacco manufacturers. As a result, these states are not parties to the MSA.


4 Id.

5 The fourth “WHEREAS” clause of the MSA provides that the parties to the agreement “are committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products.” Nat’l Ass’n of Attorneys Gen., Master Settlement Agreement (MSA), http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf (last visited Dec. 6, 2018). These reductions in Youth smoking rates will ultimately accelerate the reduction of smoking prevalence in the overall population.

6 “Cigarette” is defined under the MSA to include roll-your-own tobacco. See MSA § II(m).

7 The Original Participating Manufacturers are Philip Morris Incorporated (now known as Philip Morris USA Inc.) (“Philip Morris”), R.J. Reynolds Tobacco Company (“R.J. Reynolds”), Brown & Williamson Tobacco Corporation (“Brown & Williamson”), and Lorillard Tobacco Company (“Lorillard”). As a result of mergers and acquisitions, R.J. Reynolds is the successor in interest to Brown & Williamson and Lorillard, leaving two remaining Original Participating Manufacturers.

8 See MSA §§ II(nn), (oo), (pp); § XII.

9 See MSA § IX.


11 See id. This number does not include money that the Participating Manufacturers continue to withhold or have paid into escrow pending resolution of certain payment disputes between the Participating Manufacturers and Settling States.


13 See MSA § III. The Section III restrictions are broader than other provisions in the MSA in that they apply not only to a Participating Manufacturer’s cigarettes but also to its smokeless tobacco products.

14 MSA § III(a), (b).

15 MSA § III(c).

16 MSA § III(d), (f), (g).

17 MSA § III(e).

18 MSA § III(r).

19 As Judge Kessler stated in her 1600-plus page decision in the RICO case brought by the United States against major tobacco manufacturers, the defendant tobacco manufacturers “have publicly denied, distorted, and minimized the hazards of smoking for decades. The scientific and medical community’s knowledge of the relationship of smoking and disease evolved through the 1950s and achieved consensus in 1964. However, even after 1964, Defendants continued to deny both the existence of such consensus and the overwhelming evidence on which it was based.” United States v. Philip Morris USA, Inc., et al., 449 F. Supp. 2d 1, 146 (D.D.C. 2006).


21 Id.


23 Id. at 7.


25 21 U.S.C. § 387a-1, 21 C.F.R. §§ 1140.16(d), 1140.34(a), (c).


Ethics Corner

This is a regular ethics column covering various topics in the quarterly NAGTRI Journal.

The Nation’s Prosecutors Uphold Their Sworn Oaths

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More than 30 years of law review articles insist that overzealous prosecutors, intentionally or negligently exceeding the scope of their legitimate authority, present a systemic threat to the very foundation of our criminal justice system: “Prosecutorial suppression and falsification of evidence strikes [sic] at the very heart of our criminal justice system” (1987);| prosecutorial misconduct [poses] a far more pernicious threat to the future of adversarial justice and individual rights” (1992);| “[o]ur system of justice . . . is compromised [by prosecutorial misconduct] even when the defendant actually committed the offense for which he is tried” (1997);| prosecutorial misconduct “illuminate[s] one of the most fundamental issues in criminal justice and the very notion of government under law” (1998);| intentional prosecutorial misconduct “presents a threat to the integrity of the criminal justice system” (1999);| prosecutorial misconduct “may still threaten to undermine public confidence in the fairness of the proceeding as a whole and the general integrity of the criminal justice system” (2005);| “[t]here is an obvious need for an effective check on prosecutorial misconduct” (2011);| “[p]rosecutorial discretion poses an increasing threat to justice” (2013);| there is an “ongoing threat of prosecutorial misconduct” (2017).

In reality, there is virtually no empirical support for these propositions. On the contrary, the available evidence supports the conclusion that prosecutorial misconduct occurs with admirable infrequency and the nation’s federal, state, and local prosecutors perform their daily tasks with an impressive fidelity to their constitutional and ethical responsibilities. The vitriol with which they are attacked is unwarranted.

The “Evidence”

I surveyed hundreds of law review articles, magazine essays, newspaper editorials, and mass media publications that address prosecutorial misconduct. Most of this literature, to the extent it attempts to justify its position empirically relies upon four sources: (1) a 2003 report by the Center for Public Integrity; (2) a 2000 study by the Innocence Project, updated through 2005, which identified 154 people who served time for crimes they did not commit; (3) a 2000 study by a Columbia Law School professor that reviewed 4,578 state capital cases and concluded that “sixty-eight percent contained serious error warranting reversal;” and (4) a 1999 Chicago Tribune study that identified 381 homicide convictions reversed for “serious prosecutorial misconduct.” Subject to some minor exceptions, these four studies are all that substantiate the many law reviews articles, newspaper editorials, and magazine pieces lamenting the putative scourge of prosecutorial misconduct. Let’s take a closer look.

Study by the Center for Public Integrity

The Center for Public Integrity study, conducted more than 15 years ago, found “over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals.” Stated otherwise, the study found that, on average, there were approximately sixty instances of “proven” prosecutorial misconduct per year (between 1970 and 2003) in the entire United States. These examples include cases in which the

TIMOTHY C. HARKER
only form of misconduct was “improper opening or closing arguments.”

To put the numbers in perspective, there were 2,249,159 total felony convictions in the United States in 2007, consisting of 72,436 federal felony convictions and 2,176,723 state felony convictions.

Thus, sixty instances of prosecutorial misconduct constitute a negligible fraction of the total annual felony prosecutions. If the frequency of prosecutorial misconduct were actually one hundred times greater than implied by the Center for Public Integrity, approximately 99.73% of all felony convictions in 2007 would have been untarnished by such conduct.

Study by the Innocence Project

Next, many authors rely upon data compiled by the Innocence Project, and summarized in Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Accused. But, Actual Innocence is about wrongful convictions per se, with a focus on the role of DNA testing in exoneration. It’s not about prosecutorial misconduct any more than it’s about any of the other factors that its authors believe led to wrongful convictions, such as DNA inclusions, other forensic inclusions, false confessions, biased informants, false witness testimony, bad defense lawyering, microscopic hair comparison, defective or fraudulent science, police misconduct, serology inclusion, and mistaken identification. There were 248 instances of mistakes or misconduct in the 62 wrongful convictions reported by the Innocence Project, approximately 10% of which were attributed to prosecutorial misconduct. It is illuminating that some of the strongest evidence marched by the anti-prosecutor cohort is pulled from a source concerned primarily with a different issue.

Study by Professor Liebman

Other voices decrying prosecutorial misconduct rely on a study conducted by Columbia Law Professor James Liebman. For example, one author believes Liebman’s study shows “one can no longer indulge in the comforting but false fantasy that our criminal justice system sufficiently protects the innocent from prosecutorial misconduct.” To reach that conclusion, however, required some selective reading of Professor Liebman’s findings. His study addressed all types of error, not only prosecutorial misconduct. In Professor Liebman’s own words, “the overall error-rate in our capital punishment system was 68%.” And, “the most common errors . . . are [] egregiously incompetent defense lawyering (accounting for 37% of . . . reversals).” Prosecutorial misconduct “account[ed] for another 16%.” Thus, of the 4,578 cases reviewed by Professor Liebman, 3,113 had some form of error. Of those, the errors in 16% (or 498 cases) were attributable to prosecutorial misconduct. That’s roughly 22 cases per year from 1973 through 1995. Using Professor Liebman’s numbers, only 7% of these cases resulted in a defendant being “cleared of the capital offense.” This means that Professor Liebman’s study supports only the following narrow conclusion vis-à-vis prosecutorial misconduct: during each year from 1973 through
1995, an average of 1.5 innocent defendants were convicted of a capital offense due to either intentional or unintentional prosecutorial misconduct.

**Study by the Chicago Tribune**

Lastly, too many commentators rely on a 1999 *Chicago Tribune* study that found “since 1963, 381 homicide convictions have been reversed for serious prosecutorial misconduct, including using false evidence or suppressing exculpatory evidence.” The anecdotes relayed by the Tribune involve prosecutors hiding exculpatory evidence (an alibi for the defendant), framing innocent men (trying a black man when the victim’s brother said the killer was white), knowingly mischaracterizing evidence (depicting red paint as human blood), and other forms of appalling prosecutorial misconduct. The problem is, assuming all the allegations made by the Tribune are true and portrayed in context, a review of the five-part article reveals that nearly every salacious story involved prosecutorial misconduct that occurred prior to the early 1980s. The point is not to defend the misconduct that tainted these convictions or to dispute whether prosecutorial misconduct was a problem between 1963 and the early 1980s. (Johns introduced the Tribune study with the phrase “since 1963”; she should have written “between 1963 and about 1985.”) Rather, the point is that a dated compilation of anecdotes cannot substitute for the lack of timely empirical evidence. In this respect, the sheer multitude of scholarly articles relying on the Tribune study is itself cause for concern. There ain’t much meat on those bones, but you wouldn’t know it from the literature.

**Taking Another Look**

The results of the above analysis are consistent with other indirect methods of approximating the frequency of prosecutorial misconduct. For example, analyzing the percentage of felony convictions in California that were the subject of any type of prosecutorial misconduct from 1997 through 2006 is helpful. California courts reported that during those ten years there were 444 instances of prosecutorial misconduct in California. But there were also 2,107,067 felony convictions in California during the same time period. Here again, if the frequency of prosecutorial misconduct were actually one hundred times greater than reported, almost 98% of all felony cases in California during that time would have been completely free from any form of prosecutorial misconduct. Although many authors suggest that the problem of prosecutorial misconduct is larger than indicated by the relevant data, none appears to believe that the problem is one hundred times larger.

A similar conclusion may be reached in a different fashion. Not only does prosecutorial misconduct occur in a tiny fraction of all cases resulting in felony convictions, allegations of prosecutorial misconduct are also a tiny fraction of all allegations of attorney misconduct generally. As depicted in the following chart, both substantiated and unsubstantiated allegations of prosecutorial misconduct constitute a negligible fraction of all attorney misconduct allegations in Illinois from 2010 through 2016.

<table>
<thead>
<tr>
<th>Year</th>
<th>Allegations (All)</th>
<th>Allegations (Prosecutorial)</th>
<th>% of Allegations (Prosecutorial)</th>
<th>Sanctions (All)</th>
<th>Sanctions (Prosecutorial)</th>
<th>% of Sanctions (Prosecutorial)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016</td>
<td>7,076</td>
<td>175</td>
<td>2.47%</td>
<td>108</td>
<td>1</td>
<td>0.90%</td>
</tr>
<tr>
<td>2015</td>
<td>7,234</td>
<td>126</td>
<td>1.74%</td>
<td>129</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2014</td>
<td>7,174</td>
<td>99</td>
<td>1.39%</td>
<td>116</td>
<td>2</td>
<td>1.72%</td>
</tr>
<tr>
<td>2013</td>
<td>7,284</td>
<td>117</td>
<td>1.54%</td>
<td>132</td>
<td>1</td>
<td>0.64%</td>
</tr>
<tr>
<td>2012</td>
<td>8,290</td>
<td>71</td>
<td>0.85%</td>
<td>106</td>
<td>1</td>
<td>0.94%</td>
</tr>
<tr>
<td>2011</td>
<td>7,775</td>
<td>64</td>
<td>0.85%</td>
<td>166</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2010</td>
<td>7,014</td>
<td>99</td>
<td>1.41%</td>
<td>155</td>
<td>1</td>
<td>0.64%</td>
</tr>
<tr>
<td>Total</td>
<td>58,142</td>
<td>751</td>
<td>1.44%</td>
<td>925</td>
<td>6</td>
<td>0.642% (avg.)</td>
</tr>
</tbody>
</table>

In short, there is virtually no evidence supporting the claim that prosecutors around the nation systematically disregard their sworn oaths and ethical responsibilities; indeed, the evidence is to the contrary. But, the view persists and is plagued by an incoherence I can address only briefly in this essay. For example, virtually all articles addressing putative prosecutorial misconduct fail to define the term. This allows them to include unintentional mistakes and harmless error in their calculations and to attribute other hot-button issues (e.g., police misconduct, incarceration rates, mandatory minimum sentences, the use or non-use of grand juries, and plea bargaining, to name a few) to the putatively nefarious machinations of prosecutors. To take one example, an article by one commentatorexplained and excused the blatant misconduct of Mike Nifong, the prosecutor in the notorious Duke lacrosse case. The author claimed that historically “prosecutors never charged white men who raped African American women.” Of this proposition, “Nifong was undoubtedly mindful.” Plausible, no doubt; but the author concluded that “[i]f Nifong had failed to pursue the prosecution of wealthy white college students accused of raping a poor black woman, he would have been justifiably criticized.” The author’s outrageous conclusion: we would be justified in criticizing Nifong, she believes, if he had not prosecuted innocent people. One can only blanch at this.
Conclusion

Prosecutorial misconduct is a real problem only in the sense that when it occurs it may result in tragic and unjust outcomes. These lamentable outcomes are widely known. But, they are widely known because they are so lamentable. Of the millions of annual felony prosecutions in the United States, a reassuringly-negligible percentage are tainted by prosecutorial misconduct. This professional and ethical competence is not newsworthy, which is why it is not in the news.

I am happy to report that the dearth of empirical evidence for prosecutorial misconduct nationwide confirms my personal experience at the Office of the Attorney General in New Jersey and at the United States Attorney’s Office for the Eastern District of Tennessee. During my years with both offices, I have interacted with hundreds of Assistant United States Attorneys, Deputy Attorneys General, Assistant Attorneys General, Assistant Prosecutors, District Attorneys, and Assistant District Attorneys, virtually all of whom take their professional, legal, and ethical obligations seriously. The Constitution binds them by oath or affirmation to do so, and all of the empirical evidence supports the happy conclusion that they satisfy this oath.

Endnotes

1  Timothy C. Harker is the Criminal Health Care Fraud Coordinator for the United States Attorney’s Office in the Eastern District of Tennessee. The views expressed herein are his own. A version of this article appeared in the University of Tennessee Law Review. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206643
12 Keenan et al., supra note 8, at 209–10.
13 The study may also have counted as “prosecutorial misconduct” errors committed by police and other government actors involved in the investigative process. See George A. Weiss, Prosecutorial Accountability After Connick v. Thompson, 60 Drake L. Rev. 199, 218–219 (2011).
17 Barry Scheck, Peter Neufeld & Jim Dwyer, Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted XIV (2000); See, also, Johns, supra, note 18, at 61 n.51.
18 Scheck et al., supra note 24, at app. 2 at 263.
19 Id.
20 Johns, supra note 18, at 60 (emphasis added).
22 Id.
23 Id.
24 Johns, supra note 18, at 61.
29 Davis, Failure to Discipline, supra note 16, at 297.
30 Davis, Failure to Discipline, supra note 16, at 297–98.
36 Davis, Failure to Discipline, supra note 16, at 297.
37 Davis, Failure to Discipline, supra note 16, at 297–98.
During the Supreme Court’s 2017 term, the Court released six opinions addressing lower court decisions in federal habeas cases. This signals that federal habeas law continues to be of significant interest to the Court and, indeed, the lower federal courts.

The most significant of these opinions is Wilson v. Sellers, 138 S. Ct. 1118 (2018). The majority, in an opinion authored by Justice Breyer, held that when a state appellate court (meaning in most cases the state supreme court) issues a summary order denying a prisoner’s state appeal, affirms the decision of a lower court, or otherwise issues an order that is not accompanied by reasons, a federal habeas court should “look through” such “unexplained order[s]” until it finds “the last related state-court decision that does provide a relevant rationale.” Then the court should “presume that that the unexplained affirmance adopted the same reasoning.” The majority emphasized that this is only a presumption and that “the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court’s decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.”

At first glance, the majority opinion appears to backtrack from the Court’s holding in Harrington v. Richter, 562 U.S. 86 (2011), which held that orders of the type discussed here are presumed to be adjudications on the merits and that, in order to obtain habeas relief, a prisoner must show that there are no reasonable arguments or theories which could have supported the state court’s decision. But the majority suggests that if a federal habeas court looks through to a reasoned state court decision and that decision is unreasonable, then the presumption that a state supreme court’s affirmance of a lower court may be overcome and the decision more likely rests upon convincing alternative grounds for affirmance presented in either the briefing in the state supreme court or in the federal court in response to the habeas petition. In other words, the majority seems to be signaling that, if a lower state court decision turns out to be unreasonable, then a federal habeas court should determine whether there are no reasonable arguments or theories which could have supported the state supreme court’s affirmance or denial of relief, precisely what Richter instructs federal courts to do. As Justice Gorsuch points out in his dissenting opinion, this new look through presumption brings a federal court back to “[e]xactly what a federal court applying the [habeas] statute and Richter has had to do.”

The Supreme Court subsequently addressed a related situation in Sexton v. Beaudreaux, 138 S. Ct. 2555 (2018), a per curiam opinion. However, unlike Wilson, there was no reasoned decision from any of the state courts addressing the prisoner’s claim that his counsel was ineffective for failing to file a motion to suppress the identification testimony of a witness. Rather, the California Court of Appeals summarily denied the state habeas petition and the California Supreme Court denied review. While there was no dispute that, per Richter, there was an adjudication on the merits (presumably the summary order from the California Court of Appeals), the Ninth Circuit reversed on federal habeas review issuing an opinion that, as the Court noted, “essentially evaluated the merits de novo, only tacking on a perfunctory statement at the end of its analysis asserting that the state court’s decision was unreasonable.” As such, the Court found that the Ninth Circuit’s analysis, which should have had deference to the state court decision “near its apex,” was fundamentally flawed. The Court also found that the Ninth Circuit “effectively inverted the rule established in Richter.” In other words, “[i]nstead of considering the arguments or theories [that] could have supported the state court’s summary decision, . . . the Ninth Circuit considered arguments against the state court’s decision that [the prisoner] never even made in his state habeas petition.” Justice Breyer dissented.

The Supreme Court emphasized basic federal habeas tenets in its per curiam opinion in Kernan v. Cuero, 138 S. Ct. 4 (2017). Here, the Court reversed the Ninth Circuit which had ordered specific performance of a plea agreement that the state prosecutor had
originally offered the prisoner prior to discovering an error that actually meant that the prisoner was exposed to a significantly higher sentence. The state prosecutor amended the complaint the day before the sentencing to reflect this discovery. The trial court gave the prisoner the opportunity to withdraw from the agreement, which he did. Subsequently, however, the prisoner decided to plead to the charges in the amended complaint and was sentenced to a term higher than that referenced in the original plea agreement. The Court found that none of its holdings clearly established that, under the circumstances presented, the state trial court was required to impose the lower sentence that the parties originally expected. The Court found that the Ninth Circuit had mistakenly relied on a concurring opinion in its decision in Santobello v. New York, 404 U.S. 257 (1971), as well as federal circuit precedent, neither of which constitute clearly established federal law for habeas purposes.

Likewise, the Supreme Court's per curiam opinion in Dunn v. Madison, 138 S. Ct. 9 (2017), issued on the same day as Kernan, reiterates basic tenets of federal habeas law. In this death penalty case arising from the murder of a police officer, the state trial court conducted a hearing on whether the prisoner, due to several strokes suffered during his incarceration, understood that he was being executed for crime. The state court, after hearing testimony from psychologists from both sides, found that the prisoner understood both that he had been tried and imprisoned for murder and that the State of Alabama was going to execute him for that crime, notwithstanding his loss of memory about the murder itself. On habeas review, the Eleventh Circuit reversed, relying on the fact that the prisoner no longer had any memory of the murder he committed. The Court reversed, holding that, under its applicable precedent (Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007)), the state court's decision was not unreasonable nor did the court unreasonably apply the evidence before it. Justices Ginsburg and Breyer wrote concurring opinions.

Two other opinions of the Supreme Court addressed procedural aspects of federal habeas practice. In Tharpe v. Sellers, 138 S. Ct. 545 (2018), the Court, in another per curiam opinion, reversed the Eleventh Circuit's denial of a certificate of appealability from the district court's denial of a motion filed under Federal Rule of Civil Procedure 60(b) and remanded the case to the Eleventh Circuit “for further consideration of the question whether Tharpe is entitled to a COA.” The opinion seems largely limited to its “unusual facts” and does not otherwise break new ground or give further guidance to the federal courts of appeals on the standard for determining whether they should grant certificates of appealability to prisoners who were denied habeas relief. Justice Thomas, joined by Justices Alito and Gorsuch, dissented. In Ayestas v. Davis, 138 S. Ct. 1080 (2018), the Court reversed the lower federal court decisions denying the prisoner’s request for $20,016 in funding in this case arising from a conviction for capital murder and a subsequent jury determination that the prisoner should be executed. The funding would have been used to investigate whether the prisoner’s trial counsel and his state habeas counsel were ineffective for not conducting an adequate search for mitigation evidence that would have persuaded the jury not to impose the death penalty.” In an opinion by Justice Alito, the Court first rejected the State of Texas’ argument that the denial of funding was an administrative function that, unlike a judicial decision, would not be subject to appellate review. Second, the Court held that that, in order to obtain funding under 18 U.S.C. § 3599, the prisoner was required to show that a reasonable attorney would find the services sought to be “reasonably necessary” rather than the Fifth Circuit’s stricter standard of “substantially needed.” Finally, the Court addressed the impact of the underlying ineffective assistance of counsel claim being procedurally defaulted. Citing its holdings in Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413 (2013), the Supreme Court held that “[i]n those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding.” Justice Sotomayor concurred in an opinion joined by Justice Ginsburg.
In 2017 Hurricanes Harvey and Irma struck the United States, forcing federal, state, and local officials to scramble to respond. The reactions of the state courts of last resort in Florida (in response to Irma) and Texas (in response to Harvey) reflect a change in the focus on disaster planning in the last decade that puts greater focus and responsibility on courts of last resort and their chief justices. In Florida, the Supreme Court, through its chief justice, was able to order the closure of courts before the hurricane made landfall, independent of the governor's disaster declaration. Moreover, the chief justice over the next several weeks was able to suspend various procedural deadlines both statewide and on a county-by-county basis as needed. In contrast, Texas's Supreme Court, jointly with the Court of Criminal Appeals, had to wait until a declaration of disaster was made by the governor before issuing orders closing and moving courts and suspending deadlines. Those orders were limited to a maximum of 30 days at a time, and were later renewed by the courts. The responses in both states reflect the different statutory and constitutional confines in which the judiciary operates during a disaster.

September 11 and Hurricane Katrina: Confusing Roles and Replicabilities

Historically, state courts in the United States have operated in a decentralized and localized fashion. This has meant relatively little administrative and managerial authority in the hands of the court of last resort and its chief justice. With respect to disaster planning and recovery, that began to shift noticeably after the events of September 11, when it was New York's governor who directed the closure of certain courts and the suspension of some procedural and statutory court deadlines. Executive branch authority to order courts closed leads to two questions: should the executive have such power and, in the alternative, would that power not be better exercised by the courts themselves as a separate branch of government? These questions re-emerged in the aftermath of Hurricane Katrina in Louisiana. There the Louisiana State Bar Association, the Louisiana Trial Lawyers Association, and the Louisiana Association of Defense Counsel...
jointly asked the governor to suspend legal deadlines, which she did via executive order. Shortly thereafter, however, a second executive order was issued that continued to extend the deadlines but acknowledged the Louisiana Supreme Court’s power to shorten or lift the suspensions. Eventually, the legislature came into session to effectively ratify the governor’s actions, but the ambiguity remained.

Codifying and clarifying

After Katrina, state legislatures began to enact statutes that codified and clarified the power of the high courts in this area. These laws focused on three key areas: moving locations, moving judges, and moving deadlines.

Relocating Courts: Many state statutes require that a court sit at a particular place, building, or more broadly the “county seat.” Statutes and court rules adopted in the last decade allow for the temporary relocation of the court outside its normal geographic boundaries. An example of this was Ohio’s 2014 law, which allows for the administrative judge of a court (Municipal, County, divisions of Common Pleas, and Court of Appeals) to allow the court “to operate at a temporary location inside or outside the territorial jurisdiction of the court.” In 2009, Delaware placed similar authority in the chief justice to move court locations to areas outside their normal geographic jurisdiction.

Relocating Judges: While most states have enabled their chief justice or the state court of last resort to move judges from their location, the focus of state statutes was to provide temporary relief to handle congested dockets or to cover a situation where the resident judge(s) were all recused from a case. Several states allowed local judges to make arrangements for relocation among themselves but had no explicit provision allowing the chief justice or court of last resort to make any such transfers. Moreover, several states require the local/resident judge to request and/or consent to the temporary transfer into their court of another judge. After disasters, when communications are down for prolonged periods of time, states with such consent requirements found their hands tied.

Suspending deadlines: As noted, one of the legal questions arising from September 11 and Hurricane Katrina was whether it was either constitutional or a best practice to have the executive able to suspend court procedural deadlines. Governors in the various states have cited laws allowing them to suspend “rules” during a disaster, but do such “rules” include court rules established by the judiciary, often based on their own constitutionally established rulemaking authority? Moreover, even in those states with no specific language in the state constitution regarding the rulemaking power of the judiciary in general, or the court of last resort in particular, could the high court be given the power to suspend the deadlines? As seen in the Texas example noted above, the Texas legislature’s 2009 enactment allowed that state’s high courts to suspend deadlines but only for a limited time (30 days).

Reliance on executive action/declaration

While states have sought to clarify the power of chief justices amid disaster, they remain divided on whether or not that power may be exercised in the absence of an executive declaration.

The chief justices of Hawaii and New Hampshire must rely on a declaration of disaster or emergency by the governor before they can act. Contrast this with Florida, where the chief justice was able to act independently of the governor since the state’s constitution vested in the Florida Supreme Court the power to adopt rules for practice and procedure in all courts and granted the high court “administrative supervision of all courts.” Additionally, the Florida Chief Justice is the chief administrative officer of the judicial system. Under these provisions, the Florida Supreme Court adopted a rule granting the Chief Justice the power to close courts and to suspend, toll, or otherwise grant relief from time deadlines. Other
states have similarly granted their chief justices/courts of last resort the power to act without having to rely on executive action. Since 2009, Delaware’s chief justice has been able to declare judicial emergencies. Also since 2009, North Carolina’s chief justice is able to determine if “catastrophic conditions” (as defined by statute) exist in a county, separate from the governor’s determinations of whether a particular county has been declared a disaster area. A 2013 North Dakota law grants a similar power to the supreme court (not to the chief justice alone). Virginia’s Chief Justice is able to declare a judicial emergency sua sponte or on request of the governor under a 2010 statute.

State courts, like other branches of state government, have become more aware of disaster recovery, and state statutes have increased their authority during the past decade. It is likely this trend will continue.

**Endnotes**


8 77 Del. Laws ch. 30 (2009).

9 See, eg., Ga. Const. Art VI, Sec 1, Para III (“Provided the judge is otherwise qualified, a judge may exercise judicial power in any court upon the request and with the consent of the judges of that court and of the judge’s own court under rules prescribed by law.”)(emphasis added).

10 See Dillon, supra n.4.


14 Fla. Const. Art. V, Sec. 2.

15 Id.


17 77 Del. Laws ch. 30 (2009).


19 2013 N.D. Laws ch. 239.

Arizona—Attorney General Intervention in Class Action Suit. A class action suit was filed against the makers of a pressure cooker, alleging that the cookers were defective and could injure users. The case was filed in 2016 and after motions practice and the first day of trial, the parties reached a settlement under which class members received a $72 credit toward the purchase of the defendant’s products, and a one-year warranty extension. The settlement also allowed class counsel to apply for attorneys’ fees in an amount that was both no higher than the “lodestar” amount typically used to calculate class counsel fees and no higher than an amount agreed to by defendants. Pursuant to the settlement, the court would determine how much class counsel could recover in fees. No class members objected. The U.S. Department of Justice and the Arizona attorney general’s office argued at the fairness hearing that the settlement disproportionately benefited class counsel, at the expense of the class members. The court approved the settlement and gave class counsel slightly less than the amount they requested.

The state of Arizona and the Arizona attorney general (state parties) sought to intervene as of right in the action to appeal the court’s approval of the settlement under FRCP 24(a). In the alternative, the state and the attorney general asked to be considered formal objectors. The court denied both motions. According to the court, Supreme Court precedent requires that an intervenor as of right in the action to appeal the court’s approval of the settlement under FRCP 24(a). In the alternative, the state and the attorney general asked to be considered formal objectors. The court denied both motions. According to the court, Supreme Court precedent requires that an intervenor as of right in the action to appeal the court’s approval of the settlement under FRCP 24(a).

The state plaintiffs argued that they have standing as parens patriae to remedy a quasi-sovereign injury to the economic wellbeing of Arizona’s citizens. The court held that the state parties’ injuries were not separate from the injuries of the individual class members, so the state parties did not demonstrate parens patriae standing. The state parties also argued that the attorney general has standing to appeal the district court’s decision pursuant to section 1715 of the Class Action Fairness Act (CAFA), because CAFA confers on the attorney general a protectable legal interest in class action settlements. The court held that CAFA explicitly states that it should not be construed to “expand the authority of . . . State officials.” The court held that CAFA only requires that the attorney general receive notice of the settlement and that the settlement be approved not less than 90 days after notice has been received by the state. Because the attorney general is not alleging that either of these provisions was not followed in this case, the court found that CAFA was not a basis for standing to appeal.

The court next turned to the question of permissive intervention. Noting that the law is unclear, the court held that parties seeking permissive intervention under FRCP 24(b) must still have Article III standing. Finally, the court held that allowing the state parties to intervene would delay or prejudice the distribution of relief to the 13,000 class members, and would therefore run afoul of FRCP 23(b)(3).

California—Attorney General Jurisdiction over Indian Tobacco Sales. The attorney general of California filed an enforcement action in state court against a tribal member who was the owner of a smokeshop located on an Indian reservation, alleging violations of the state’s unfair competition law (UCL). The state also alleged violations of the Directory Act, under which it is illegal to sell cigarettes from manufacturers who have not certified their compliance with the tobacco Master Settlement Agreement. Finally, the state alleged violations of the Fire Safety Act, under which it is illegal to sell cigarettes that do not meet specified testing and packaging standards designed to minimize fire hazards caused by cigarettes. After the trial court entered a permanent injunction against the tribal member, she appealed, alleging the state court had no jurisdiction.
because it involved on-reservation activities of a tribal member. The court of appeals reversed in part and affirmed in part.

The court of appeals first summarized Public Law 280, which granted six states, including California, plenary criminal jurisdiction over “offenses committed by or against Indians” within Indian country, and limited civil jurisdiction to “causes of action between Indians or which Indians are parties” in cases arising in Indian country. Based on Supreme Court cases interpreting this provision, the court concluded that it gave the state civil jurisdiction only in “private disputes,” not one in which “the Attorney General sues with the manifest purpose of law enforcement on behalf of the public at large.” Thus, the court had no subject matter jurisdiction over the claims under the civil provision.

The court next addressed whether it had subject matter jurisdiction over the claims under the criminal jurisdiction of Public Law 280. Supreme Court precedent establishes that state “criminal/prohibitory” actions are authorized, but state “civil/regulatory” actions are not. The question, according to the court, is whether “the intent of a state law is generally to prohibit certain conduct,” in which case it is criminal, or whether it “generally permits the conduct at issue, subject to regulation,” in which case it is civil. In this case, the court concluded that the Directory Act claim and the Fire Safety Act claim were criminal/prohibitory in nature and may be enforced under Public Law 280. The court likened these statutes to laws against cigarette sales to minors or underage drinking, both of which have been found to be criminal in nature. The UCL claims, on the other hand, are civil/regulatory because “the UCL applies to business competition generally, which is not only permitted but promoted in California, and outlaws only specific practices comprising a subset of competition.”

After determining that state enforcement was not preempted here, the court reversed summary judgment for the state on the UCL claim, but retained the remainder of the injunction entered by the trial court. People ex rel. Becerra v. Huber, 27 Cal. App. 5th 642 (2018).

Maine—Attorney General Control of State Litigation. The attorney general of Maine joined a lawsuit, filed in federal court in California, challenging the federal government’s decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. The governor objected to the attorney general entering into litigation in another state on behalf of Maine without the authorization of the governor or the legislature, and characterized the attorney general’s action as ultra vires. When the attorney general declined to dismiss the suit, the governor filed suit in state court seeking a court order that the attorney general may not participate in litigation outside the state of Maine without being requested to do so by the governor or the legislature. The governor cited 5 M.R.S. 191(3), which provides, in part,
The Attorney General or a deputy, assistant or staff attorney shall appear for the State, the head of any state department, the head of any state institution and agencies of the State in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of the officers are called into question, in all the courts of the State and in those actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either House of the Legislature.

The court treated the governor’s suit as an appeal of an agency decision and applied an “abuse of discretion” standard to determine whether the attorney general’s actions were appropriate. The court noted that although the language of the statute appears reasonably clear, past decisions of the state’s highest court have interpreted the powers of the attorney general broadly, allowing her to “institute, conduct, and maintain all such actions and proceedings as [s]he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.” The court stated its belief that “it must be the [state supreme court] that decides if the holding . . . should be overturned or modified as it might deem appropriate.” The governor’s case was dismissed. LePage v. Mills, No. CV-17-185 (Kennebec Super. Ct. Oct. 12, 2018)

Missouri—Attorney General Jurisdiction Over Misdemeanor Appeals. A defendant who was sentenced to prison on several felony theft charges appealed his sentences based on a recent Missouri supreme court case. In the course of his appeal, the defendant argued that the attorney general was not authorized to prosecute misdemeanor appeals. The defendant cited Mo. Rev. Stat. §27.050, which provides “the attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party other than misdemeanors... . “ The court held that this statute did not bar the attorney general from representing the state in misdemeanor appeals, but described the cases that the attorney general must handle. The court stated, “Although section 27.050 does not require the attorney general to handle misdemeanor appeals, as the “chief legal officer of the State,” he may handle such appeals if he chooses.” State v. Rall, 2018 Mo. App. LEXIS 878 (Mo. Ct. App. Aug. 14, 2018)

Montana—Federal Question Jurisdiction in Opioid Case. Montana, like many other jurisdictions and governmental entities, sued Purdue Pharma, the manufacturer of prescription opioid drugs that the state alleges are liable for the costs Montana “has incurred, and will continue to incur, in addressing the opioid public health crisis.” Montana filed suit in state court, alleging five state law
Purdue removed the case to federal court based on federal question jurisdiction. Purdue argued that the state’s requested relief “attempts to supplant” the FDA’s “complex regulatory determinations” and tries to use state law to require that Purdue convey “different information about the safety and efficacy of its opioid medications” than what the FDA requires. Citing Grabel & Sons Metal Prods., Inc. v. Darue Engg and Mfg. 545 U.S. 308 (2005), the federal district court described a four-part test for the very limited circumstances when state claims give rise to federal jurisdiction: 1) the federal issue is necessarily raised; 2) actually disputed; 3) substantial, and 4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

Purdue argued that the relief sought by Montana is attempting to “usurp the FDA’s authority to regulate the information provided to physicians and patients about the safety and efficacy of Purdue’s opioid medications.” Montana argued that it has not asked the court to stop Purdue from using, or change the content of, any FDA-approved drug labels. Instead, the state is seeking to change Purdue’s promotional and educational activities, which were not reviewed or approved by the FDA. The court agreed, and held that if Montana’s preliminary injunction motion was granted, there would be no change required in the labeling. The court remanded the case to state court. State of Montana v. Purdue Pharma, No. 1:18-OP-45604 (N.D. Ohio Aug. 23, 2018).

New Mexico—State May Pursue Claims After Qui Tam Dismissal. A relator brought a federal action alleging violations of both the federal False Claims Act (FCA) and the New Mexico Medicaid False Claims Act (MFCA) by Bristol-Myers Squibb, the manufacturers of the pharmaceutical Plavix. The relator sent the complaint and relevant information to the state, which declined to intervene. Relator filed several amended complaints, the last of which was dismissed in 2017, and relator did not appeal or seek to amend the complaint after 2017.

Shortly before the last complaint was dismissed, the New Mexico attorney general filed suit against Bristol-Myers Squibb, alleging violations of the New Mexico Unfair Practices Act, the New Mexico Medicaid claims and a claim for violation of an earlier consent judgment. Montana sought a preliminary injunction to require Purdue to disclose certain things about its opioid drugs when undertaking promotional or educational activities with prescribers or consumers.

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- Legal Writing for OAG-NJ: Trenton, N.J. January 10, 2019
- Advanced Trial Techniques and Investigative Skills for OAG-NH: Concord, N.H. January 29 - 31, 2019
Fraud Act and other statutory and common law claims. The state's complaint did not allege violations of the MFCA. Upon dismissal of the relator’s complaint, the defendants sought to dismiss the state’s complaint, alleging that claim preclusion barred the state’s complaint. The district court dismissed some claims, allowed some to be refiled, and upheld the others. The court held that claim preclusion did not apply because the causes of action were not the same in the two suits. Defendants appealed.

The court of appeals first outlined the test for claim preclusion: 1) final judgment on the merits in the earlier action; 2) identity of parties; and 3) identity of the cause of action. Addressing the first element of claim preclusion, the court of appeals reviewed a number of cases and determined that “claim preclusion in the qui tam context could operate adverse to the public interest” because relators could file poorly written or improperly pleaded actions in order to induce the government to intervene to protect any future claims against the defendant. Courts also have dismissed complaints without prejudice to the government where the relator failed to prosecute or acted improperly in the litigation. The court concluded that although the lower court had in fact issued a final judgment as to the relator’s claims, that order was without prejudice to the government, and the dismissal was not a “final judgment on the merits” for claim preclusion purposes. *State of New Mexico ex rel. Balderas v. Bristol-Myers Squibb Company*, No. A-1-CA-36906 (N.M. Ct. App. Oct. 24, 2018).

The attorney general’s office moved to dismiss the claims on the grounds of Eleventh Amendment immunity. Plaintiffs argued that the OAG waived its sovereign immunity because it filed a Proof of Claim in the bankruptcy proceedings. The court held that the waiver applied only to the bankruptcy proceedings themselves, which are now over. Turning to the question of absolute immunity for the assistant attorneys general, the court held that absolute immunity applied to their actions in preparing or presenting the case to the grand jury, but that “absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation.” The court noted that the question of immunity could again be raised after development of a factual record. Finally, the court dismissed the claims against Attorney General Shapiro, who had taken office long after the search and seizure had taken place. The court held that the complaint “did not permit the court to infer more than the mere possibility of misconduct,” on the part of Attorney General Shapiro. *Bolus v. Carnicella*, 2018 U.S. Dist. LEXIS 156887 (M.D.Pa. Sept. 14, 2018).

**Pennsylvania—Attorney General Office Immunity from Suit.** A number of searches, authorized by warrants from a state grand jury investigation directed by the attorney general’s office, were conducted on the property of Minuteman Spill Response, an environmental services company. Numerous felony charges were brought, but all were eventually dismissed and the defendants entered into the state’s Accelerated Rehabilitative Disposition program on two misdemeanor charges. The defendant filed for bankruptcy. In the bankruptcy court, defendant brought claims against the attorney general’s office (OAG), assistant attorneys general, law enforcement officers and the attorney general, claiming that the seizures were a violation of its constitutional rights. After the bankruptcy estate was closed, the company filed an amended complaint which included Pennsylvania’s current attorney general as a defendant.

A number of searches, authorized by war-
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