

Terms 3 The American Criminal Justice Process

The procedures used when processing suspects and defendants can be divided into three stages: before trial, during trial, and after trial.

Before Trial

Before trial, the procedure follows this sequence: investigative activities, filing of the complaint, arrest, booking, initial appearance before a magistrate, setting of bail, preliminary examination, decision by the prosecutor to charge, grand jury indictment or the filing of an information by the prosecutor, arraignment, and plea by the defendant.

1. **Investigation: Search.** Exploration or examination of an individual's home, premises, or person to discover things or items that may be used by the government as evidence in a criminal prosecution.

2. **Investigation: Seizure.** (1) Action of police in taking possession or control of property or persons. (2) Exercise of dominion or control by the government over a person or thing because of a violation of law.

3. **Investigation: Search Incident to a Lawful Arrest.** Search of a person placed under arrest and the area within the arrestee's grasp or control.

4. **Investigation: Stop-and-Frisk.** (1) An encounter between a police officer and a suspect during which the latter is temporarily detained and subjected to a pat-down search for weapons. (2) A police practice that allows an officer, based on reasonable suspicion rather than probable cause, to stop a person in a public place and ask questions to determine if that person has committed or is about to commit an offense and to "frisk" (pat down) the person for weapons if the officer has reasonable concern for his/her own personal safety.

5. **Investigation: Arrest.** To take someone into custody or otherwise deprive that person of freedom of movement.

6. **Investigation: Interrogation.** Questioning of a suspect by police or questioning of a witness by counsel.

7. **Investigation: Self-Incrimination.** Making statements or producing evidence which tends to prove that one is guilty of a crime. The 5th Amendment, U.S. Constitution, guarantees that one cannot "be compelled in any criminal case to be a witness against himself ..." and the 14th Amendment applies that guarantee to state cases.

8. **Miranda Warning.** Based on the U.S. Supreme Court's decision in Miranda v. AZ (1966), this warning is given by police to individuals who are taken into custody before they are interrogated. The warning informs persons in custody that they have the right to

remain silent and to have a lawyer present during questioning, and that anything they say can and will be used against them in a court of law.

9. **Investigation: Warrant.** A judicial writ or order directed to a law enforcement officer authorizing the doing of a specified act, such as an arrest or a search.

10. **Investigation: Search Warrant.** A written order issued by a magistrate or judge directing a peace officer to search for property connected with a crime and bring it before the court.

11. **Investigation: Arrest Warrant.** A document issued by a magistrate or judge directing that a named person be taken into custody for allegedly having committed an offense.

12. **Investigation: Warrantless Searches/Arrests.** Arrests/searches made by police who do not possess an arrest or search warrant.

13. **Formal Charging with an Offense** may be accomplished by (1) the filing of a complaint, (2) a grand jury indictment, or (3) an information prepared by the prosecuting attorney.

14. **Complaint.** A charge made before a proper law enforcement officer or judicial officer alleging the commission of a criminal offense. It may be filed by the offended party or by a police officer who has obtained information about or witnessed the criminal act. The complaint serves as the basis for issuing an arrest warrant. Once a proper complaint is filed, the sequence of steps includes: (1) the arrest (with or without a warrant); (2) issuance of a citation or summons instead of an arrest for less serious offenses; (3) booking at the police station (in cases of arrest); (4) initial appearance before a magistrate after the arrest; (5) the setting of bail; (6) a preliminary hearing (in cases of felony charges); and (7) the decision by the prosecutor to charge.

15. **Booking.** Making of an entry in the police blotter or arrest book, indicating the suspect's name, time of arrest, and the offense involved. If the crime is serious, the suspect may also be photographed or fingerprinted.

16. **Initial Appearance (Presentment of an Arrestee).** After arrest, the first appearance of the accused before a judge or magistrate. Once before a magistrate, the arrestee is informed of his/her rights (including Miranda warnings).

17. **Setting of Bail.** Conditional release of a person charged with a crime.

18. **Preliminary Hearing.** An accused charged with a felony is usually entitled to a preliminary examination before a magistrate within a reasonably short time after arrest. Preliminary hearings are held for three main purposes: (1) determine whether probable cause exists to support the charges against the accused; (2) discovery; and (3) decide whether to "bind over" the accused to a grand jury. The preliminary hearing is the first

chance for the defense to discover what evidence the prosecution has and the strength of the case against the accused.

19. **Decision by the Prosecutor to Charge.** The police usually have discretion to charge or not charge a suspect with an offense. The more serious the offense is, the less discretion the police have. In most cases, the prosecutor has the final say about whether a suspect will be prosecuted.

20. **Grand Jury Indictment vs. Information.** A criminal prosecution formally commences when the government files an indictment or information.

21. **Grand Jury.** A jury, usually composed of 12-23 members, that determines whether sufficient evidence (probable cause) exists to warrant charging a person with an offense. A grand jury indictment is required in some states only for serious offenses.

22. **Indictment.** Formal document issued by a grand jury accusing one or more persons of the commission of a crime or crimes.

23. **Information.** Document prepared and filed by a prosecutor under oath in the name of the state charging one or more persons with commission of a crime, without referring the case to a grand jury. In most states, prosecutors have the option to use an information in all cases instead of a grand jury indictment.

24. **Arraignment.** Appearance before a court of law after the filing of the indictment or information. At the arraignment, the accused is informed of the charges, presented a copy of the indictment, and asked to plead.

25. **Plea.** An accuser's response in court to an indictment or information that is read in court. Possible pleas include: (1) guilty; (2) not guilty; and, in some cases, (3) nolo contendere (no contest). A guilty plea waives the right to a jury trial. A no contest plea has the same effect as a guilty plea.

26. **Plea Bargain.** Agreement between a defendant and a prosecutor whereby defendant agrees to plead guilty in exchange for some concession (such as reduction in the number or the severity of the charges, or a more lenient sentencing recommendation by the prosecutor).

During Trial

The procedure during trial starts with the selection of jurors, followed by opening statements of counsel, the presentation of evidence for the prosecution and the defense, rebuttal evidence, closing arguments of counsel for both sides, defense motions prior to the verdict, the judge's instructions to the jury, jury deliberation, and a verdict of guilty or not guilty.

1. **Motions.** Requests made orally or in writing by a party, asking the trial judge for a legal ruling on a matter related to the case. Motions may occur prior to the actual commencement of trial, such as motions for discovery, suppression of evidence, or a change of venue; during trial, such as a motion for a mistrial; or after trial, such as a motion for a new trial.

2. **Trial by Jury.** In most jurisdictions influenced historically by the English common law, such as the United States, the jury is responsible for finding the facts of a criminal case, while the trial judge determines the applicable law. These “peers of the accused” are responsible for listening to the evidence presented by the prosecution and the defense, evaluating that evidence, deciding what the facts are, and making a decision in accordance with the rules of law and their jury instructions as presented to them by the trial judge.

3. **Jury.** Group of citizens called to hear a trial of a criminal prosecution and decide the factual question of guilt or innocence. Once selected, the jury is sworn to give an honest and fair decision. The common number of jurors is 12. Guilt or innocence in a criminal trial requires a unanimous decision of the jury, except in OR and LA (10 is sufficient in those states).

4. **Jury Selection.** Begins with the calling of a **venire**, a group of prospective jurors assembled according to procedures established in state law. Each side examines these prospective jurors by asking questions (known as **voir dire**) and may exercise **challenges for cause** (dismissal of a prospective juror for causes specified by law), and **peremptory challenges** (discretionary challenges of a prospective juror for reasons that generally do not need to be stated). The trial judge rules finally on all challenges. Peremptory challenges based on race or gender are unconstitutional.

5. **Trial Judge’s Instructions to the Jury.** An explanation of the law governing a case which the trial judge gives orally to the jury after the attorneys have presented all the evidence and have made final arguments, but before the jury begins deliberations.

6. **Jury Deliberations.** The act of considering, discussing, and, hopefully, reaching a conclusion, such as a trial jury’s discussions, voting, and decision-making.

7. **Jury Verdict.** The decision of a jury after a trial.

8. **Hung Jury.** Slang for a hopelessly deadlocked jury in a criminal case in which neither side is able to prevail. If the jury is hung, the trial judge will declare a mistrial. A new trial from scratch, with a new jury, is then required, if the case is re-tried.

9. **Mistrial.** Termination of a trial before its normal conclusion because of a procedural error, statements of a witness, judge, or attorney which prejudice a jury, or a deadlock by a jury without reaching a verdict after lengthy deliberation (hung jury).

After Trial

The two main procedures after trial are sentencing and appeal.

1. **Sentencing.** Formal pronouncement of the judgment by the court or trial judge on defendant after conviction in a criminal prosecution, imposing the punishment to be inflicted. Sentences may include confinement, a fine, probation, community service, or death. Most states give the sentencing power to the trial judge, even when the case is tried before a jury. The trial judge usually directs preparation of a **pre-sentencing report** to assist his decision on sentencing.

2. **Appeal.** After punishment is imposed, a defendant may petition a higher appellate court for review of the conviction and sentence. There is no constitutional right to an appeal, but all states grant defendants that right by law or court procedure. An appellate court may affirm (approve) the conviction and/or sentence in whole or in part, reverse (disapprove) the conviction and/or sentence in whole or in part, and/or remand (send back) the case to the lower court for further action (such as a new trial).

3. **Appeal of Right.** Appeal that a defendant is entitled to make as a matter of law.

4. **Habeas Corpus.** An appellate court may issue a **writ of habeas corpus** upon petition by a defendant directing an official who “has the defendant’s body” to justify the legality or constitutionality of the defendant’s confinement. A defendant may use a petition for a writ of habeas corpus once his legal appeals are exhausted.

5. **Certiorari.** A **writ of certiorari** is an order issued by an appellate court to grant discretionary review of a case decided by a lower court. For example, the U.S. Supreme Court typically issues a grant of certiorari when it accepts petitions for appeal.

Terms 4 Additional Terms

The Pretrial Process

1. **Identification Procedures.** Includes those procedures in which victims and witnesses are asked to identify perpetrators, such as **lineups, showups, and photo packs**. They also encompass scientific techniques comparing **forensic evidence** taken from a suspect with that found at a crime scene, such as **handwriting and voice exemplars**.

2. **Forensic methods** involve the application of scientific principles to legal issues, such as **identification**. In the context of police work, forensic methods commonly include **fingerprint identification, comparison of blood samples, matching of clothing fibers, head and body hair comparisons, identification of semen, and DNA**. When these methods are conducted by qualified persons, the results are usually admissible in evidence.

3. **Federal Rules of Criminal Procedure.** Uniform rules of criminal procedure applicable in all **US District Courts**. These rules are promulgated by the US Supreme Court. Congress retains the power to reject or modify a proposed rule, but it rarely does so, although it has frequently enacted additional rules on its own.

4. **Petty Offenses.** Minor misdemeanors. In such cases, due process may require no more than the opportunity for the accused to contest the charge before a magistrate in a single, summary proceeding. For more serious offenses (treason, **felonies, major misdemeanors**), the federal and state constitutions impose more elaborate procedural requirements.

5. **Indigent.** A person without sufficient income to afford a lawyer in a criminal case. If the court finds a person is an indigent, the court must appoint a public defender or other attorney to represent him. In 1963 the US Supreme Court ruled in Gideon v. Wainwright that the Fourteenth Amendment of the US Constitution requires states to provide free counsel to indigent defendants in all felony cases.

6. **Right to Self-Representation.** In 1975 the US Supreme Court ruled that a person has a constitutional right to represent himself in a criminal prosecution. However, a defendant who waives the right to counsel and represents himself must do so “knowingly and intelligently” (Faretta v. CA).

7. **Release on Personal Recognizance.** In bail proceedings, a recognizance is a person’s promise to appear in court as required, without posting bond.

8. **Joinder and Severance of Charges or Parties.** In cases of **multiple offenses and/or multiple parties that are connected**, the prosecutor may elect to try these offenses/parties together in a single trial. Upon motion, a trial judge may grant a severance of offenses or parties if a joint trial might result in an unfair trial.

9. **Pretrial Discovery.** A pretrial process that mandates the disclosure of evidence by the prosecution and the defense. Using appropriate pretrial motions, the prosecution and the defense can gain access to the evidence possessed by the opposing party. Thus, pretrial discovery not only enhances the fairness of the criminal process but also militates against surprises at trial.

10. **Speedy Trial Act of 1974.** Congress enacted this statute in response to the US Supreme Court's decision in Barker v. Wingo (1972). The Act provides specific time limits for pretrial and trial procedures in the **federal courts**.

The Criminal Trial

11. **Federal Rules of Evidence.** Govern the admission of evidence **in federal civil and criminal trials** by which parties prove their cases. The main purpose of the rules is to regulate the evidence that the jury may use to reach a verdict.

12. **Bench Trial.** A criminal trial conducted before a judge alone, without a jury. The Sixth Amendment guarantees an accused the right to a jury trial in criminal cases where a penalty of more than six months' imprisonment can be imposed. However, a defendant may waive the right to a jury trial. Many persons who plead not guilty to misdemeanor charges elect a bench trial.

13. **Power of Contempt.** The authority of a court of law to punish someone who insults the court or flouts its authority, such as an unruly or disruptive defendant.

14. **Judicial Notice.** The act of a court recognizing, without proof, the existence of certain facts that are commonly known.

15. **Proof Beyond A Reasonable Doubt.** The standard of proof in a criminal trial or a juvenile delinquency hearing. The standard is often described as proof whereby the fact finder has "an abiding conviction, to a moral certainty, of the truth of the charge."

16. **Forensic Evidence.** Evidence obtained through scientific techniques of analyzing physical evidence.

17. **Scientific Evidence.** Evidence obtained through scientific and technological innovations. The basic issue faced by the courts is always whether the expert scientific evidence is reliable.

18. In Daubert v. Merrill Dow Pharmaceuticals, Inc. (1993) the US Supreme Court ruled that the **Federal Rules of Evidence** govern the admissibility of scientific evidence in the federal courts. This approach causes admissibility of such evidence to hinge on such factors as whether the evidence can be tested and whether it has been subjected to peer review. State courts are still divided on whether to apply this new standard in their own

jurisdictions.

19. **Forensics Expert.** Person qualified in the application of scientific knowledge to legal principles, usually applied to those who participate in discourse or who testify in court.

20. **Hearsay Evidence.** Refers to an oral or written statement by a person other than the one testifying in court. The general rule is often stated as follows: a witness may not testify as to a statement made by another if that statement is offered as proof of the matter asserted. Thus, a witness who testifies, “I know the defendant was home on the night of the offense because my sister told me so” would be giving hearsay testimony.

21. **Right of Confrontation (Confrontation Clause).** The right to face one’s accusers in a criminal case, guaranteed by the Sixth Amendment to the US Constitution.

22. **Cross-Examination.** The right to confront witnesses who offer evidence against the defendant includes the **right to question or cross-examine** those witnesses. The right of cross-examination is available to the prosecution as well as the defense.

23. **Leading Question.** A question put to a witness by counsel that suggests the answer the counsel wants to elicit. In most instances, leading questions are objectionable when asked on direct examination. However, on cross-examination such questions generally are permitted.

24. **Child Shield Statutes.** Laws that allow a screen to be placed between a child victim of sexual abuse and a defendant while the child testifies in court. At the very least, in order to avoid the constitutional requirements of the Confrontation Clause, the prosecution must show and the trial judge must make particularized findings that a child victim of sexual abuse would suffer unreasonable and unnecessary mental or emotional harm if the child were to testify in the presence of the defendant.

25. **Jury Nullification (aka Jury Pardon).** Action by a jury that disregards the evidence and the judge’s instructions on the law and acquits the defendant.

Terms 9

Additional Terms

Sentencing and Punishment

1. **Capital Crime.** A crime for which death is a permissible punishment.
2. **Death Penalty.** Capital punishment. A sentence to death for the commission of a crime.
3. **Federal Death Penalty Act.** This 1994 congressional statute dramatically increased the number of federal crimes eligible for the death penalty, including such non-homicidal crimes as treason and large-scale drug trafficking. The statute lists the mitigating and aggravating factors affecting a decision of whether to impose the death penalty. It also provides for a special hearing to determine whether a sentence to death is justified in a particular case.
4. **Presentence Report.** A report containing the results of a presentence investigation, designed to assist the sentencing authority. In federal jurisdictions, a report is required when the convicted party is a first offender or is under a certain age. Some state statutes, court rules, or court interpretations mandate that courts release a presentence report to the defendant or defendant's counsel.
5. **Suspended Sentence.** Trial court's decision to place a defendant on probation or under community control instead of imposing an announced sentence, on the condition that the original sentence may be imposed if the defendant violates the conditions of the suspension.
6. **Probation.** Conditional release of a convicted criminal in lieu of incarceration.
7. **Concurrent Sentencing.** The practice in which a trial court imposes separate sentences to be served at the same time.
8. **Consecutive Sentencing.** The practice in which a trial court imposes a sentence or sentences to be served following completion of a prior sentence or sentences.
9. **Parole.** Conditional release from jail or prison of a person who has served part of his sentence.

Appeals and Post-Conviction Relief

10. **Federal Rules of Appellate Procedure.** Rules governing the practice of law in the US Courts of Appeals.

11. **Trial de novo.** A new trial. Trial de novo occurs when a trial court of general jurisdiction reviews a conviction by a court of limited jurisdiction. In this instance the higher trial court conducts a new trial instead of merely reviewing the record of the initial trial.

12. **Writ of Habeas Corpus.** A judicial writ (order) that permits a court of competent jurisdiction to review the legality of a prisoner's confinement.

13. **Appellant/Appellee.** A party who appeals his conviction to a higher court as a matter of right, that is, because the law grants him a right of appeal, is the **appellant**; the party against whom the appeal is taken, for example, the State of MS, is the **appellee**.

14. **Petitioner/Respondent.** A party who brings a petition before a court of law after appeals of right are exhausted, for example, by submitting a petition for a writ of certiorari, is a **petitioner**; the other party is the **respondent**.

15. **Decisions of an Appellate Court** include four basic options: (1) **dismissal**; (2) **affirm** (approve or uphold) the judgment of the lower court; (3) **reverse** (disapprove) the judgment of the lower court; (4) **remand** (send back) the case to the lower court for further proceedings consistent with the higher court's opinion.

16. **Court Opinions: Per Curiam Opinion.** An opinion that represents the appellate court as a whole. It is not attributed to any individual judge or group of judges on the court.

17. **Court Opinions: Opinion of the Court.** An opinion authored by one judge and joined by other judges constituting a majority that announces the decision or final judgment of the appellate court.

18. **Court Opinions: Dissenting Opinion.** An opinion authored by a judge who disagrees with the Opinion of the Court.

19. **Court Opinions: Concurring Opinion.** An opinion authored by a judge who agrees with the court's basic decision but wants to address or emphasize certain arguments.

20. **Court Opinions: Concurring in the Judgment.** An opinion that supports the basic decision of the court but for reasons other than those articulated in the court's opinion.

Terms 6
Constitutional Rights of the Accused in a Criminal Trial (1)

1. **Ten Constitutional Rights.** There are ten basic rights given to an accused during a criminal trial:

- A. right to trial by jury
- B. right to counsel
- C. right to due process of law
- D. right against self-incrimination
- E. right to protection against double jeopardy
- F. right to confront adverse witnesses
- G. right to compulsory process (subpoena) to obtain witnesses
- H. right to a speedy and public trial
- I. right to a fair and impartial trial
- J. right to proof of guilt beyond a reasonable doubt

2. **Where are these rights applicable?** Each one of these basic rights is applicable in both federal and state criminal proceedings.

3. **Right to Trial by Jury.**

A. **Source.** Article III and the Sixth Amendment, US Constitution

B. **Size of the jury.** Constitutionally, the jury may number from six to twelve jurors. There is no constitutional right to a twelve-member jury in a criminal trial, but the federal government and most states provide for twelve-member juries in criminal trials by statute or by provision in the state constitution. The US Supreme Court ruled in Ballew v. Georgia (1978) that juries of fewer than six members are unconstitutional. The issue of whether a jury of fewer than twelve can decide a death penalty case has not been addressed by the Court, but the Court probably would not approve a jury of less than twelve jurors in such cases.

C. **Verdicts: Must all verdicts be unanimous in criminal cases?** The US Constitution does not require a unanimous guilty verdict in criminal cases. However, federal statutory law requires a unanimous jury verdict in all federal criminal trials. In some state trials a non-unanimous verdict suffices. Currently, 45 states require unanimity in their state criminal trials. In Mississippi, by law, jury verdicts in a criminal trial must be unanimous. The US Supreme Court has prohibited a finding of guilty by less than a six-member majority. Consequently, in a criminal trial with only six jurors, a finding of guilty must always be unanimous. By statutory law, the federal government and all states require a unanimous verdict in capital cases.

D. **“Hung” Jury.** A “hung” jury is a jury that cannot come to a unanimous agreement (in jurisdictions where unanimity is required) to convict or to acquit. When this happens, the defendant can be tried again at the discretion of the prosecutor. There is

no constitutional limitation to the number of retrials that can occur after a “hung” jury.

E. When is a jury trial required? The US Supreme Court ruled in Baldwin v. NY (1970) that the Constitution guarantees a jury trial only when a “serious offense” is charged. The Court defined a “serious offense” as one for which more than six months imprisonment is authorized. Thus, an offense whose maximum penalty is six months imprisonment or less is a “petty offense” for which there is no constitutional right to a jury trial. In a case of multiple charges, the maximum punishment for the single most serious offense, not the total maximum punishment for all the offenses together, determines whether a defendant is entitled to a jury trial.

F. Composition of the Jury: What is a jury of one’s “peers?” A “jury of peers” means that jury service cannot be consciously restricted to a particular group. The Supreme Court has ruled that the Constitution requires that juries in both federal and state criminal trials must be selected from “a representative cross-section of the community.” For example, this interpretation means that a male defendant is not constitutionally entitled to an all-male jury.

G. Composition of the Jury: What is unconstitutional in jury selection? Disqualification of potential jurors because of their race, gender, creed, color, national origin, and other prohibited categories is constitutionally prohibited. (Batson v. KY, US Supreme Court, 1986; race). In death-penalty cases, potential jurors cannot be excluded from a jury simply because they oppose the death penalty. But the Constitution does permit the removal of potential jurors whose opposition to the death penalty is so great as to substantially impair their performance as jurors at the sentencing phase of the trial (for example, where a potential juror states that he/she could not vote for the death penalty under any circumstances). (Lockhart v. McCree, US Supreme Court, 1986).

H. Can a criminal defendant waive his constitutional right to a jury trial? Yes. The right to trial by jury can be waived, but the waiver must be “express” and “intelligent.” However, waiver is not a constitutional right, and the prosecutor can demand a jury trial. For example, in a state where the death penalty can be imposed only by a jury, the prosecutor’s demand takes precedence over an accuser’s waiver.

4. Right to Counsel.

A. Source. Sixth Amendment.

B. Policy. The constitutional right to counsel is needed to protect the defendant’s fundamental right to a fair trial.

C. When does this right apply? A defendant has the right to be represented by counsel at “every critical stage” of a criminal proceeding.

D. The right to counsel is **constitutionally required in the following proceedings:**

- (1) custodial interrogations (Miranda warnings required)
- (2) lineups, if formal charges have been filed
- (3) preliminary examination/hearings
- (4) arraignments
- (5) trials
- (6) sentencing
- (7) appeal from a conviction, if available to others

E. The right to counsel is **not constitutionally required** in the following proceedings but may be mandated by federal or state statutory law:

- (1) criminal investigations
- (2) arrests, unless the suspect is interrogated
- (3) grand jury proceedings
- (4) habeas corpus proceedings
- (5) probation or parole revocations

F. **Trial: Applicability.** With respect to federal and state criminal trials, the right to counsel applies in all cases involving “serious offenses,” as well as serious misdemeanors for which the defendant faces a possible jail sentence.

G. **Two Types of Counsel.** The right to counsel refers either to **retained counsel** (an attorney chosen and paid by the defendant) or **court-appointed counsel** (an attorney appointed by the judge and paid by the county or state to represent an “indigent” defendant at a “critical stage” in the criminal proceedings). In general, a defendant is **indigent** if he/she is too poor to hire a lawyer. The trial judge has wide discretion in determining indigency. Factors considered include unemployment; not having a car or a home; not having posted bail.

H. **Effective Assistance of Counsel.** A criminal defendant is entitled to “reasonably effective assistance of counsel” under the Sixth and Fourteenth Amendments, according to the US Supreme Court. This constitutional right is infringed by government acts that interfere with a defense counsel’s defense efforts, and also by a defense counsel failing to render “adequate legal assistance” on behalf of the defendant. Under Strickland v. WA (US Supreme Court, 1984), to establish ineffective assistance of counsel, a criminal defendant must show:

- (1) that the defense counsel’s performance was deficient, and
- (2) that the defense counsel’s deficient performance prejudiced the defendant.

This constitutional claim is frequently raised but is difficult to prove and so seldom succeeds.

I. **Self-Representation.** The right to act as one’s own counsel is allowed in a

criminal trial, but only if:

- (1) the accused is aware of his/her right to counsel
- (2) there is an express waiver of the right to an attorney, and
- (3) the accused is competent.

If the defendant is ignorant or too inexperienced, the trial judge is likely to deny the request. A defendant who represents himself/herself cannot later claim ineffective assistance of counsel.

Terms 7
Constitutional Rights of the Accused in a Criminal Trial (2)

1. Right to Due Process.

A. **Source.** Fifth Amendment, Fourteenth Amendment.

B. **“Due process”** means “fundamental fairness,” but it has no fixed meaning. Examples of the denial of constitutional due process in a criminal trial include:

- (1) the presentation by prosecutors in court of testimony known to be perjured
- (2) suppression by the prosecutor of evidence favorable to an accused (exculpatory evidence).

2. Right Against Self-Incrimination.

A. **Source.** Fifth Amendment.

B. **Policy.** This guarantee is designed to restrain the government from using force, coercion, or other such methods to obtain any statement, admission, or confession that might be used by the police to take the place of other evidence.

C. **Scope of the Right.** The right applies only to **testimonial (communicative, that is, verbal or oral) self-incrimination**. It does not apply to **physical self-incrimination**. Consequently, an accused can be forced to submit to reasonable physical or psychiatric examinations, and the prosecution may introduce the evidence obtained, such as fingerprints, footprints, blood or urine samples, voice identifications, DNA comparisons, handwriting samples.

D. **Criminal Defendant.** A criminal defendant has the privilege at trial not to take the witness stand and testify. The prosecutor cannot comment on a defendant’s assertion of the right not to testify. However, once a defendant takes the stand, he/she can no longer invoke the privilege.

E. **Witness.** Any witness on the witness stand, other than the defendant, has a witness privilege to refuse to disclose any information that may “tend to incriminate” him/her. However, a witness can be forced to testify by the court, for example, where the government grants immunity to a witness or co-defendant in exchange for that person’s testimony.

3. Right to Protection Against Double Jeopardy.

A. **Source.** Sixth Amendment.

B. **Definition.** Successive prosecutions of a defendant for the same offense by the

same jurisdiction, and/or, being punished more than once for the same offense.

C. Attachment of the Right. In a jury trial, double jeopardy attaches (takes effect) when a competent jury is sworn. In a trial before a judge alone (a “bench trial”), the protection attaches when the first witness is called to testify and sworn.

4. Right to Confront Adverse Witnesses.

A. Source. Sixth Amendment.

B. Scope. The right to confrontation includes the following rights:

- (1) to cross-examine opposing witnesses
- (2) to be physically present in the courtroom whenever testimony against him/her is offered
- (3) to physically face witnesses at trial
- (4) to know the identity of prosecution witnesses

C. Voluntary Absence of the Accused. If an accused is present at the start of trial but later voluntarily absents himself/herself, the Supreme Court has held that the trial can continue because the accused is considered to have waived his/her right to be present.

D. Disorderly Conduct in the Courtroom During Trial. An accused who persists in disorderly or disrespectful conduct in the courtroom during trial can be held to have waived his/her right to be present and be excluded from the trial. In dealing with disruptive behavior, the trial judge may:

- (1) hold the defendant in contempt
- (2) bind and gag the defendant in the courtroom
- (3) remove the defendant from the courtroom until he/she promises to behave properly

E. Face-to-Face Confrontation. Allowing a witness to testify via closed-circuit TV from a different room may violate the defendant’s constitutional rights to confrontation, but not in all circumstances.

F. Identity of Prosecution Witnesses. Any witness who testifies against a defendant must reveal his/her true name and address.

5. Right to Compulsory Process to Obtain Witnesses.

A. Source. Sixth Amendment.

B. Scope. This constitutional right includes:

(1) the power to require the appearance of witnesses
(2) the right to present a defense, which includes the right to present his/her own witnesses and his/her own version of the facts.

6. Right to a Speedy and Public Trial.

A. **Source.** Sixth Amendment.

B. **Speedy Trial.** A **speedy trial** is a trial free from unnecessary and unwarranted delay.

C. **Delay by the Accused.** If the pretrial delay is due to willful delay tactics by the accused, the accused will be deemed to have waived his/her right to a speedy trial.

D. **Constitutional Timetable for Prosecution?** The Supreme Court has not established any specific constitutional time limits as a test for whether the prosecution has acted with due dispatch in accordance with the requirements of the Sixth Amendment. However, the **Federal Speedy Trial Act of 1974** seeks to bring all federal criminal cases to trial within 100 days following arrest. Many states also have similar speedy trial statutes that set forth specific timetables for the prosecution. For example, by statute Mississippi requires that unless good cause is shown and a continuance duly granted by the court, “all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.”

E. **Public Trial.** A **public trial** is one that can be seen and heard by persons interested in ensuring that the proceedings are fair and just. Legal issues concerning the public nature of a criminal proceeding usually center around the exclusion of some or all spectators from the proceeding based on “good cause.”

7. Right to a Fair and Impartial Trial.

A. **Source.** Due Process Clauses of the Fifth and Fourteenth Amendments.

B. **Policy.** The circumstances surrounding all criminal proceedings, and particularly the trial itself, must not unduly influence the participants, especially the judge or jury.

C. **Undue Influences.** Undue influence usually takes the form of **prejudicial pretrial publicity**. The legal standard requires that a person must be convicted by an impartial tribunal based solely on evidence properly admitted at the trial concerning the charge. Prejudicial pretrial publicity creates a risk that the jury will consider information other than the evidence submitted in court to reach its verdict.

D. **Controlling Undue Influences.** Measures used to control prejudicial publicity and other undue influences include:

- (1) change of venue
- (2) sequestration of the jury
- (3) continuance (postponement) of the trial
- (4) issuance of a “gag order” to trial participants by the trial judge
- (5) control of the news media, particularly within the courtroom.

8. Right to Proof of Guilt Beyond A Reasonable Doubt.

A. Source. Inferred from the Due Process Clause of the Fifth Amendment.

B. Policy. The Bill of Rights contains no specific provisions on the degree of certainty needed for conviction in a criminal trial, but the assumption is that it would be fundamentally unfair to convict anyone if there was any reasonable doubt that he/she had committed the crime charged.

C. Elements of the Standard. In every criminal case the prosecution must prove the following beyond a reasonable doubt:

- (1) the question of guilt
- (2) every essential element of the offense charged.

Other legal issues, such as the admissibility of particular evidence, need only be proved by a preponderance of the evidence.

D. Reasonable Doubt. The Supreme Court has never said specifically what the term “reasonable doubt” really means. The Court has said that no specific definition is constitutionally required as long as “taken as a whole, the [trial judge’s instructions to the jury] correctly convey the concept of reasonable doubt.” Some authorities say that the reasonable doubt standard means that a juror must have “an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt.”

Terms 8

Sentencing and Punishment in the Criminal Trial Process

1. Constitutional Limitations.

A. Fourteenth Amendment. The 14A requires equality in sentencing and mandates that all individuals receive procedural due process.

(1) **Due process** is the constitutional principle (14A) that a person cannot be deprived of life, liberty, or property without lawful procedures.

(2) **Equal protection of the laws** is the constitutional principle (14A) that all persons are entitled to the same treatment under the law regardless of their race, creed, religion, or sex. For example, a court may not sentence or punish individuals who are convicted of the same or similar crimes in distinctly different ways based solely upon their sex or race. Lower court decisions and state statutes that imposed different sentences on males and females have been overturned as a denial of the Equal Protection Clause of the 14A.

B. Eighth Amendment. The 8A prevents excessive punishment as well as any form of punishment that may be deemed “cruel and unusual.” Traditionally, cruel and unusual punishment claims have been raised in death penalty cases.

2. Sentencing Alternatives. The three main types of sentences for criminal offenses are indeterminate, determinate, and presumptive. Other procedures that affect sentencing include plea bargaining, concurrent sentencing, and consecutive sentencing.

A. Indeterminate Sentencing. Type of sentencing that sets a minimum and maximum term that the defendant may serve. Known as “indeterminate” because the offender’s actual jail time is not known or determined at the time of sentencing.

B. Determinate Sentencing. Type of sentencing that establishes a specific time that the offender will serve in prison.

C. Presumptive Sentencing. Form of sentencing that establishes a minimum and maximum sentence and a fixed point within that range that is the usual or presumed sentence for a certain class of crimes.

D. Plea Bargain. An agreement between the prosecution and the defendant to allow the accused to plead guilty to certain charges (such as a lesser included offense to the offense charged) in exchange for certain other actions favorable to the accused that may include dismissal of certain charges and limitation of the sentence. The effect of a plea bargain is to guarantee to the defendant that he/she will receive a lesser sentence than if he/she had been convicted of all the crimes or the most serious crime charged. The prosecution benefits by saving the time and expense of a fully contested case.

E. Concurrent Sentencing. Sentencing practice in which a trial court imposes sentences for two or more offenses that are to be served at the same time.

F. Consecutive Sentencing. Sentencing practice in which a trial court imposes a sentence or sentences to be served following the completion of a prior sentence or sentences.

G. Suspended Sentence. Trial court's decision to place a defendant on probation or under community control instead of imposing an announced sentence, on the condition that the original sentence may be imposed if the defendant violates the conditions of the suspension. In most instances where the defendant is convicted of a non-capital crime, the court is authorized to suspend the imposition of the sentence and place the defendant on probation or under community control for some determinate period. A suspended sentence is most often used for first offenders or nonviolent offenders.

H. Probation. Conditional release of a convicted criminal in lieu of incarceration.

I. Community Control (House Arrest). A sentence imposed on a person found guilty of a crime that requires that the offender be placed in an individualized program of noninstitutional confinement. An alternative to incarceration.

J. Community Service. Refers to sentences whereby offenders are required to perform a specified number of hours of service to the community doing specified tasks. Often, community service is required as one of several conditions of probation. An alternative to incarceration.

3. Sentencing Procedures Following Conviction.

A. Every jurisdiction requires that criminal sentences for adults be imposed in open court. In misdemeanor cases, sentencing usually occurs immediately on conviction. In felony cases, where penalties are greater, sentencing may be postponed to allow the court to conduct a **presentence investigation**.

B. Presentence Investigation Report. A report, generally ordered at the discretion of the trial judge, designed to assist the court in determining a sentence by providing information regarding the circumstances of the offense and the character of the accused.

C. After the presentence report is completed, a **sentencing hearing** is held. At this hearing the court considers:

- (1) the evidence received at trial
- (2) relevant provisions of the law
- (3) the presentencing report, if any
- (4) evidence offered by the prosecution and the defense in aggravation or mitigation

- (5) any statement the defendant wishes to make
- (6) arguments concerning sentencing by counsel for both sides

D. Counsel. Sentencing is a “critical stage” of the criminal process, and counsel must be supplied to indigent defendants.

E. Pronouncement of Sentence. After the completion of the sentencing hearing, the stage when the trial court imposes a penalty on a defendant for the offense of which the defendant has been adjudged guilty. Sentences are usually pronounced by the judge who presided at the defendant’s trial.

F. Credit for Time Served. When the trial court sentences a defendant to incarceration, it generally allows the defendant credit against any term of incarceration for all time spent in custody as a result of the charge for which the sentence is imposed.

G. Victim Impact Statements. In some instances, prosecutors may use **victim impact evidence** to counter emotional pleas on the defendant’s behalf. This evidence takes the form of testimony addressing the impact of the crime on the victim and the victim’s family, including the physical, economic, and the psychological effects of the crime. Legal issues have arisen concerning this type of evidence, especially in capital cases, because it is claimed that such evidence injects too much emotionalism into the judge or the jury’s deliberations.

4. Other Statutory Approaches to Incarceration.

A. Mandatory Minimum Sentencing. Under this type of sentencing, judges have no option to place offenders on probation. Mandatory sentences are required most often for violent crimes, especially those involving the use of firearms.

B. Habitual Offender Statutes. Many state laws require automatic increased penalties for persons convicted of repeated felonies. A variation on the habitual offender law is known as the “**Three Strikes and You’re Out Law.**” The constitutionality of these laws is often challenged under the 8A.

C. Pretrial Diversion Programs. Some states, including Mississippi, authorize pretrial diversion of cases involving nonviolent offenders who are required to perform certain conditions during a specified period. Performance of these conditions is monitored and may include: restitution, community service, a fine, treatment for substance abuse, and probation. Upon successful completion of the program, the charges against the offender are dismissed and his/her criminal record for those offenses is expunged. In Mississippi, the program is available to offenders in all criminal cases except those involving crimes against the person. Also ineligible are persons previously in the program, with a prior felony conviction, or those offenders charged with drug offenses other than possession.

5. Sentencing in Death-Penalty Cases. In death-penalty cases, a bifurcated trial

procedure is employed. This means that the first phase of the trial determines the question of guilt, and upon conviction, a second separate trial phase considers an appropriate sentence. After conviction of a defendant for a capital crime, the jury hears testimony in aggravation or mitigation of the sentence. To justify imposition of the death sentence, the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. The aggravating factors are specified by law. (Gregg v. GA, US Supreme Court, 1976). In Mississippi, the jury decides whether the death penalty is imposed. In some state jurisdictions, the jury makes a recommendation to impose the death penalty but the trial judge makes the final decision.