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An Overview of the Criminal Justice Process in the United States

1.1 The Pretrial Process

1.1.1 Investigation

After a crime has been committed or alleged, the first step in the criminal justice process is an investigation by a law enforcement agency. In both the military and civilian criminal justice systems, the investigation may begin before and continue after the suspect is arrested and may implicate a wide range of procedural issues. In general, the police use the investigation process to determine whether and how the alleged crime took place, to identify suspects, to support the arrests of suspects, and to facilitate a determinative plea bargain or conviction at trial.

Comment

From the perspectives of both the prosecution and the defense, a crucial purpose of a proper investigation is preservation of evidence. Ensure that the scene was properly secured—no one was allowed in to disturb it, and no one was allowed to remove anything without a proper inventory. If scientific samples were taken (blood, fingerprints, trace evidence, etc.), check for contamination. Especially in circumstantial evidence cases, the wrong conclusion can be reached if the investigation was botched.

Before arrest, an investigation may include informal questioning of the suspect. Police also interview witnesses, examine the crime scene, and collect physical evidence. In an effort to discover incriminating evidence, police officers often conduct searches of personal and real property. They may also perform electronic surveillance in some cases, or rely on the keen sense of smell of their canine companions to obtain an adequate legal basis for a more intrusive investigation. Claims may arise that such searches and seizures violate the Fourth Amendment, which prohibits unreasonable searches and seizures and sometimes requires prior judicial approval.[1]

After arrest, the police investigation may include asking witnesses to identify suspects, obtaining biological evidence from a suspect, taking physical evidence from the scene of the crime, and questioning the suspect. These tactics may entail due process considerations and implicate the suspect's Fifth Amendment privilege against compelled self-incrimination,[2] the Sixth Amendment right to counsel,[3] or the requirements established by the Supreme Court in *Miranda v. Arizona*.[4]

1. *See infra* Chapter 3.
2. *See infra* Chapter 4.
3. *See infra* Chapter 6.
4. 384 U.S. 436 (1966).

1.1.2 Arrest

The arrest usually involves physically taking the suspect into custody for the purpose of charging a crime, although for some misdemeanors a police officer simply issues a citation with a notice requiring the suspect to appear in court. An arrest should take place only when officers determine that they have sufficient evidence (a fair probability) that the suspect committed the crime. The Fourth Amendment prohibition of unreasonable seizures requires that all arrests be supported by "probable cause."[5] Although all arrests require probable cause, most occur without a judge issuing an arrest warrant. In such cases, a magistrate at a later hearing determines the presence or absence of probable cause at the time of arrest. The suspect is routinely searched upon arrest, and the scope of this search may also raise Fourth Amendment issues.

Comment

Noting the moment of arrest can be significant. Once a person has been taken into custody by a law enforcement officer, certain constitutional rights are triggered. Determining this change of status can be critical, because it can affect the admissibility of physical evidence or oral or written statements.[6]

1.1.3 Initial Appearance

The law generally requires that an arrestee be brought before a magistrate judge without unnecessary delay. Depending on the jurisdiction, the delay should not last more than 24 or 48 hours. At this initial appearance, the magistrate judge ensures that the arrestee is the person named in the criminal complaint, notifies her of the pending

5. *See infra* Chapter 3.
6. *See infra* Chapter 2.

charges and her rights, and sets or denies bail. For indigent clients, the magistrate judge also initiates the process of appointing counsel.

In general, the initial appearance is a brief proceeding. If the suspect is arrested without a warrant or grand jury indictment, the magistrate usually conducts a probable cause hearing during this initial appearance to determine whether the government has sufficient evidence to pursue the charges.[7] Misdemeanor suspects may not be entitled to a preliminary hearing or a grand jury. The initial appearance, therefore, serves as their arraignment.

1.1.4 Preliminary Hearing

The preliminary hearing is the first adversarial hearing in the criminal process, and it is usually held within two weeks of the initial appearance. The function of the hearing is for a magistrate to determine whether there is probable cause to believe that the suspect committed the crime charged. Both the prosecution and the defense are entitled to present evidence and testimony. Often the defense exercises his right to cross-examine government witnesses without presenting evidence.

1.1.5 Grand Jury

In the federal system and in many states, a grand jury indictment is required for a felony trial, unless the defendant waives the right. The grand jury is a secret proceeding in which the prosecutor presents evidence to the grand jurors without a judge present. The target of the grand jury proceeding also is not allowed to be present, except when called as a witness. The Fifth Amendment privilege against compelled self-incrimination applies to all grand jury witnesses. In most jurisdictions, grand jury witnesses do not have the right to have counsel present, but attorneys may wait outside the grand jury room and consult during breaks in the testimony. In most cases, the

7. *See* Gerstein v. Pugh, 420 U.S. 103, 118–19 (1975) (holding that a prosecutor's assessment of probable cause is constitutionally insufficient under the Fourth Amendment to justify restraint of liberty pending trial).

prosecution initiates the grand jury proceeding and decides what evidence to present.

A grand jury is usually composed of 12 to 23 private citizens called to duty for a set period of time. To return an indictment (or "true bill"), a grand jury must determine, usually by a majority, that there is sufficient evidence for the case against the suspect to proceed to trial. The decision of a grand jury will supersede the findings of a magistrate at the preliminary hearing. Therefore, if no indictment is returned ("no bill"), the case against the defendant is dismissed, but a grand jury usually finds sufficient evidence to return an indictment.

Strategy

In most cases, a defense attorney should recommend that the client decline to testify before the grand jury. No judge is present to control the questioning, and rules of evidence are not used. Most importantly, defense counsel generally cannot be inside the room. The usual result is that the accused ("the target") will make statements, often without even understanding the questions, that are recorded verbatim. These statements can then be used at trial against the defendant, because by answering, the accused waived his or her right to remain silent.

Tactic

If a client has a clear defense such that it should be presented to avoid an indictment, counsel should prepare a written presentation for the grand jury. Federal practice prohibits counsel to have direct contact with the grand jury. Even if state rules permit such contact, it is better to submit the package to either a state or federal grand jury via the prosecutor. If the defensive issue relies on a particular scientific theory (e.g., DNA) or legal defense (e.g., defense of a third party), it should be presented succinctly, and the prosecutor as well as each grand juror should be given a copy.

Comment

In the military justice system, the rough equivalent of the grand jury is the "Article 32 Investigation" (from that article in the Uniform Code of Military Justice, Title 10 of the United States Code). The purpose is the same—the determination of whether probable cause exists to formally charge an accused. There are major differences. The proceeding in the military system is open, the accused and counsel are present, there is a right to cross-examine government witnesses, and there is a right to present defense evidence. The investigating officer then prepares a report, and the senior officer with authority to formally charge a person (the "convening authority") either refers the charges (indictment), dismisses the case, or decides to handle the matter through administrative procedures. At this writing, several bills have been introduced to change the nature and scope of the Article 32 hearing. The reader should research any new amendment to the Uniform Code of Military Justice in 2014.

1.1.6 Arraignment

After an indictment is filed, the defendant is arraigned on the charges in the indictment. During this court proceeding, the defendant receives a copy of the charges and is asked to enter a plea. The defendant then enters a plea of not guilty, guilty, nolo contendere (when permitted), or not guilty by reason of insanity.

1.1.7 Motions

For cases that do not result in a plea agreement after arraignment, the next step is pretrial motions. Criminal defense attorneys commonly file pretrial motions challenging the sufficiency of the indictment or information, the trial venue, or the joinder of offenses or defendants. Additionally, defense attorneys often seek orders directing discovery of the prosecution's evidence and the suppression of evidence or statements, alleging that they were unconstitutionally obtained or obtained in violation of a state or federal statute. In some cases, a successful pretrial motion (suppressing the drugs in a drug case, for

example) will result in dismissal of the charges. Conversely, an unsuccessful pretrial motion may result in a plea agreement. Otherwise, the judge enters rulings on the motions and the case proceeds to trial.

Checklist

In most cases, the following motions are filed in addition to case-specific motions where necessary, such as to quash an indictment, to suppress evidence or statements, or to dismiss.

(1) Waiver of Trial Limits

(2) Motion to Produce Arrangements Made or Extended to Prosecution Witnesses

(3) Motion in Limine to Prohibit Prosecution from Mentioning Any Extrinsic Crimes, Wrongs, or Acts of Misconduct Not Charged in the Indictment and Request for Pretrial Discovery of Intent to Introduce Such Evidence

(4) Motion for Production of List of Prosecution Witnesses

(5) Motion for Production of Evidence Favorable to the Accused

(6) Motion for Production, Discovery, and Inspection of Evidence and Information in the Possession, Custody, or Control of the Prosecution

(7) Motion to Disqualify Case Agent as a Witness

(8) Motion for a Bill of Particulars

(9) Motion for Leave of Court to File Supplemental Motions

Comment

Some courts, especially in misdemeanor cases, will not rule on pretrial motions before trial. This practice is known as "carrying the motion with trial" and is often done with a motion to suppress evidence. The court does this so that the witnesses testify only once. If the judge denies the motion, the trial proceeds, and time is saved. If the motion is granted, the case is often dismissed or an acquittal is entered because the evidence has been suppressed. In cases where this occurs, the motion is dispositive. Counsel must know the local procedure for the court if a motion is dispositive. It is preferable to know before trial whether to prepare a jury panel for a confession or incriminating evidence if it is going to be admitted. At a

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minimum, counsel must obtain a ruling on a motion in limine to prevent the mentioning of the object of a motion to suppress during jury selection or opening statement if the court has not yet ruled on a motion to suppress pretrial.

1.2 The Trial

If the defendant does not plead guilty and the charges are not dismissed, the Sixth Amendment guarantees a public trial. The Sixth Amendment also entitles the defendant to a jury trial for any nonpetty offense.[8] Nevertheless, the defendant may waive the right to a jury trial and be tried by the judge in a bench trial. Criminal juries usually contain 12 members, but they may constitutionally contain as few as six.[9] Most jurisdictions require unanimous votes to acquit or convict, but state schemes for nonunanimous verdicts have been upheld as constitutional.[10]

Comment

Learn the rules in your jurisdiction. In the federal system, and in some states, the prosecution can demand a jury trial, especially in felony cases.

The Sixth Amendment guarantees representation of counsel at trial. An indigent defendant is therefore entitled to appointed counsel in

8. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 (1989); Duncan v. Louisiana, 391 U.S. 145, 154 (1968).
9. *See* Williams v. Florida, 399 U.S. 78, 86 (1970).
10. *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding state criminal procedure provision under which a less-than-unanimous juror vote is sufficient to convict a defendant).

all felony trials[11] and in misdemeanor trials in which incarceration is actually imposed.[12] The defendant is also entitled to call witnesses as well as to confront and cross-examine witnesses pursuant to the Sixth Amendment. In addition, the defendant has the right under the Sixth Amendment to eschew counsel and conduct her own defense.[13] The Fifth Amendment privilege against self-incrimination applies at trial, and the defendant may suffer no detriment for asserting the privilege not to testify or offer evidence.[14] Because an accused need not testify or present evidence, the prosecutor may not expressly or impliedly comment on the accused's trial silence. If the defense puts on evidence, the prosecution can argue that it lacks credibility or does not support an affirmative defense. The prosecution cannot make any reference to a lack of evidence if the defense rests without presenting evidence.[15]

Strategy

In many jurisdictions, the alternative of diversion, or pretrial intervention, is available. If a charge does not involve violence, for example, placing the defendant under some type of supervision and holding the criminal charge in abeyance for a time certain can be negotiated. If the defendant lives out the period of observation successfully, the charge is often dismissed. Counsel should research the availability of this approach in his or her jurisdiction.

11. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). For a detailed discussion of the right to counsel and the requirement of "actual imprisonment," see *infra* Chapter 6.
12. *See* Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972).
13. Faretta v. California, 422 U.S. 806, 818–19 (1975).
14. *See* Griffin v. California, 380 U.S. 609, 614 (1965).
15. *Id.* at 615. *But see* Salinas v. Texas, 133 S. Ct. 2174 (2013) (allowing prosecutor at trial to comment on defendant's pretrial, non-custodial silence).

Comment

The Uniform Code of Military Justice (UCMJ) recognizes that trials may be required during combat conditions, where the availability of jurors ("members of the court martial") may be restricted. For a felony trial (general court martial), a minimum number of five is required; often more than 12 are assigned in anticipation of challenges, and then more than 12 serve if the challenges do not occur. For a misdemeanor trial (special court martial), at least three members are required. If the accused is an enlisted service member and requests to be tried by a jury containing other enlisted personnel, at least one-third of the jury selected must be enlisted personnel. Of course, as in the civilian sector, the accused can elect to be tried by a bench trial ("judge alone trial").

Military courts require a two-thirds vote to convict. If the vote is not two-thirds for conviction, an acquittal results—there is no hung jury. Sentencing also requires a two-thirds verdict, unless the sentence exceeds ten years, which requires a three-fourths vote. In order to adjudge a death sentence, a unanimous verdict is required.

In some situations, particular motions may be most appropriately made during the trial.

Checklist

In trial, motions filed usually include:
(1) Motion in Limine
(2) Motion for Instructed Verdict (Judgment of Acquittal) (Finding of Not Guilty) after the Prosecution Has Rested Its Case-in-Chief
(3) Motion for Instructed Verdict (Judgment of Acquittal) (Finding of Not Guilty) at the Close of All Evidence
(4) Motion to Limit Jury Argument of Prosecution
(5) Motion to Require the Court to Rule upon Objections Made during Final Argument

1.3 Post-Trial

1.3.1 Motions

Once the jury has rendered a verdict, defense counsel has the opportunity to file post-trial motions. After a judgment of acquittal by the jury, the prosecution cannot seek to overturn the decision by a motion to the judge or an appeal.[16] Upon a guilty verdict, however, the defense may file a motion for acquittal, arguing that the evidence does not support a finding of guilt beyond a reasonable doubt. The defense can also make such a motion during the trial at the close of the prosecution's evidence and at the close of all of the evidence.

1.3.2 Sentencing

Soon after a guilty plea or an undisturbed guilty verdict, the judge imposes sentence.[17] The major exception is capital cases, in which the jury normally determines whether to impose the death penalty. Between the conviction/plea and sentencing, a probation officer compiles a presentencing report on the defendant's history for the judge to consider. After a hearing, the judge imposes a sentence of financial sanctions, supervised or unsupervised release (e.g., probation), incarceration, or a combination.

Comment

In eight states and the military justice system, the defendant can elect to be sentenced by the jury. It is imperative to know the rule in your jurisdiction, because sentencing by jury will impact trial strategy, especially motion practice and voir dire.

16. *See infra* Chapter 12.
17. That is the pattern in the vast majority of states and in the federal system. In a few states, however, juries may be actively involved in the sentencing process even in non-capital cases. *See, e.g.*, Texas Code Crim. Proc. Ann. art. 37.07 (2006); Va. Code Ann. § 19.2-295.1 (2007).

Under a traditional sentencing scheme, followed by some jurisdictions, judges have wide discretion in determining the type and magnitude of punishment. In other jurisdictions, including the federal system, the legislature has imposed a process that includes guidelines and/or mandatory sentences that constrict judicial discretion in sentencing. In general, in jurisdictions using guidelines, a judge may not impose a sentence that exceeds the maximum sentence supported by facts reflected in the jury's verdict or facts admitted by the defendant.[18]

Comment

In the military justice system, the sentence may be composed of (1) reduction in grade, (2) forfeiture of future pay, (3) a fine to be paid immediately, (4) confinement, or (5) discharge or dismissal from the service. Some, all, or even none of these components can be adjudged after conviction.

1.3.3 Appeal

After sentencing, most jurisdictions give the defendant a right to have the conviction reviewed by an appellate court and a right to have counsel to present the appeal. If an appeal from a state conviction fails, the defendant may apply to the highest state court for a discretionary appeal. If there is a federal right involved, the defendant may thereafter seek discretionary review by the U.S. Supreme Court. If the defendant prevails at any stage of the appeal and the conviction is reversed, he ordinarily may be prosecuted again, unless an appellate court finds that the matter should be dismissed due to legal insufficiency.[19]

18. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000) (finding state sentencing scheme constitutionally invalid where procedure authorized judge to make factual determination based on preponderance of the evidence and impose higher punishment); United States v. Booker, 543 U.S. 220 (2005) (reaffirming *Apprendi* but in a two-part majority opinion excising parts of the federal sentencing statute to adhere to the precedent).
19. Double jeopardy issues are considered in Chapter 12.

1.3.4 Habeas Corpus

The federal government and many states provide for a collateral challenge to a conviction after direct appeals have failed. This remedy is allowed to ensure full consideration of possible fundamental defects in the process. It is limited to the most basic legal errors, such as constitutional violations. Because federal courts are hesitant to intrude on state proceedings and to disrupt final judgments, a convicted state defendant must satisfy strenuous procedural and substantive requirements to obtain habeas relief in the federal system. For example, if a state provides habeas corpus proceedings, an individual must exhaust all state options before filing a habeas petition in federal court.[20]

1.3.5 Parole

In the federal system and in a number of states, the parole process has been abolished. Thus, in these jurisdictions, persons convicted serve almost their entire sentence of incarceration. However, in other jurisdictions, a convicted defendant is sentenced to a term of years of imprisonment, and a parole board may reduce that term under set statutory guidelines. If a right to parole is created, due process then requires that the prisoner be given the opportunity to be heard and, if parole is denied, given a statement of reasons why.[21] When the government seeks to revoke a previously granted parole (or probation), the individual is given specific rights, including counsel (when necessary for a fair hearing), both preliminary and full hearings, notice of charges, and the ability to confront witnesses.[22]

1.3.6 Executive Clemency

The president of the United States and the governors of most states have the power to issue pardons or to commute sentences in extraordinary circumstances. These powers may be used to correct injustice,

20. *See* discussion *infra* Chapter 11.
21. Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 15 (1979).
22. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

to spare judicial resources, or to recognize unique circumstances that make a change in sentence appropriate.

1.3.7 Clemency and Parole in the Military Justice System

Issues of clemency and parole are jointly considered by the respective military branch's clemency and parole boards. Convicted service members may petition these boards to lessen the severity of any part of their sentence (such as suspension of a discharge) or for a conditional release from confinement.

1.4 The Role of the U.S. Supreme Court: The Incorporation Doctrine

1.4.1 The Form; Impact

The first eight amendments to the Constitution, which contain many criminal procedure provisions, originally limited the actions of the federal government only.[23] Some scholars and judges over the years argued that the Fourteenth Amendment incorporated all of the first eight amendments against the states. As the law has evolved, most rights of the first eight amendments have been incorporated into the Fourteenth Amendment's Due Process Clause and now apply to the states through the doctrine of selective incorporation. In the 1960s, the Supreme Court incorporated those rights deemed "fundamental" and applied them to the states to the same extent as they are applied to the federal government. Most criminal procedure issues in state courts are thus ultimately reviewable by the U.S. Supreme Court. State courts, therefore, must usually comply with federal precedents. Nevertheless, states can, through their own constitutions, provide additional rights and protections to their citizens beyond those provided by the federal Constitution.[24]

23. *See* Barron v. Mayor of Balt., 32 U.S. 243 (1833).
24. *See infra* Section 1.5.

1.4.2 Criminal Procedure Rights Incorporated

Selective incorporation of the Bill of Rights has occurred through a collection of Supreme Court cases. The following is a listing of the criminal procedure provisions of the first eight amendments that are applied against the states.

(a) Fourth Amendment
    1) Exclusionary rule.[25]
    2) Freedom from unreasonable searches and seizures.[26]
(b) Fifth Amendment
    1) Privilege against self-incrimination.[27]
    2) Prohibition against double jeopardy.[28]
(c) Sixth Amendment
    1) Public trial.[29]
    2) Assistance of counsel.[30]
    3) Confrontation of witnesses.[31]
    4) Speedy trial.[32]
    5) Compulsory process for obtaining witnesses.[33]
    6) Jury trial.[34]
(d) Eighth Amendment—Prohibition against cruel and unusual punishment.[35]

25. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
26. Ker v. California, 374 U.S. 23, 30–31 (1963).
27. Malloy v. Hogan, 378 U.S. 1, 6 (1964).
28. Benton v. Maryland, 395 U.S. 784, 794 (1969).
29. *In re* Oliver, 333 U.S. 257, 271–73 (1948).
30. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).
31. Pointer v. Texas, 380 U.S. 400, 403 (1965).
32. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
33. Washington v. Texas, 388 U.S. 14, 18–19 (1967).
34. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
35. Robinson v. California, 370 U.S. 660, 667 (1962).

1.4.3 Criminal Procedure Rights Not Incorporated

(a) Fifth Amendment—Requirement of prosecution by indictment of a grand jury.[36] States are free to, and several do, prosecute crimes by information.

(b) Eighth Amendment—Prohibition of excessive bail. The Supreme Court has had no occasion to apply this provision to a state case, but it has indicated that it would be incorporated.[37]

1.5 State Constitutional Law

Every state constitution has provisions for protecting the rights of individuals in criminal proceedings. State courts and legislatures remain free to impose limitations on criminal prosecutions through their own constitutional provisions beyond those required by federal guarantees. State courts sometimes find greater protection in state provisions that have language almost identical to federal constitutional provisions. This version of federalism has been especially prevalent since 1970, when the Supreme Court began to retreat from the rights-centered decisions of the Warren Court years. Some states are more inclined to offer this greater protection,[38] while others tend

36. Hurtado v. California, 110 U.S. 516, 538 (1884).

37. Schilb v. Kuebel, 404 U.S. 357, 365 (1971) ("[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.").

38. Numerous state courts, applying state constitutional law, reject major U.S. Supreme Court holdings. *See, e.g.*, State v. Harris, 98 So. 3d 903, 909 (La. Ct. App. 2012) (interpreting Louisiana constitution to protect suspects from seizures of the person beyond what the federal Constitution protects); Commonwealth v. Simon, 923 N.E.2d 58, 69 (Mass. 2010) (giving suspects more protection under state constitution than Fifth Amendment provides against self-incrimination); State v. Bauder, 924 A.2d 38 (Vt. 2007) (interpreting Vermont constitution as providing more protection against searches incident to arrest for recent car occupants than found in the federal Constitution); State v. Eckel, 888 A.2d 1266 (N.J. 2006) (interpreting New Jersey constitution to offer more protection against searches incident to arrest for recent car occupants than provided in the federal Constitution); State v. Farris, 849 N.E.2d 985 (Ohio 2006) (interpreting the Ohio constitution to provide more self-incrimination protection than the federal Constitution); State v. Knapp, 700 N.W.2d 899 (Wis. 2005) (protecting physical fruits obtained by intentional violation of *Miranda* under Wisconsin constitution); Commonwealth v. Martin, 827 N.E.2d 198 (Mass. 2005) (applying narrower rules than U.S. Supreme Court with fruit of the poisonous tree doctrine under *Miranda*); State v. Probst, 124 P.3d 1237 (Or. 2005) (right to counsel applies in all criminal cases, going beyond federal decision); State v. Sweeney, 107 P.3d 110 (Wash. Ct. App. 2005) (providing more protection for garbage placed at curb

to defer to the interpretations and decisions of the U.S. Supreme Court.

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than federal decision); State v. Brown, 156 S.W.3d 722 (Ark. 2004) (must inform individual of right to refuse consent); State v. Goss, 834 A.2d 316 (N.H. 2003) (increased expectation of privacy in one's trash, contrary to Supreme Court decision); State v. Randolph, 74 S.W.3d 330 (Tenn. 2002) (declining to adopt standard under *California v. Hodari D.*, 499 U.S. 621 (1991), for when the chasing of a suspect by an officer constitutes a "seizure").