

Chapter 1

INTRODUCTION TO CRIMINAL PROCEDURE

§ 1.01 THE RELATIONSHIP OF “CRIMINAL LAW” TO “CRIMINAL PROCEDURE”

At one level, the relationship of criminal procedure to criminal law is straightforward. Criminal procedural law (“criminal procedure,” for short) is composed of the rules that regulate the inquiry into whether a violation of a criminal law (“substantive” criminal law, to distinguish it from “procedural” criminal law) has occurred, and whether the person accused of the crime committed it.

Logically, substance is anterior to procedure.¹ The substantive criminal code defines the conduct that society wishes to deter and to punish. Procedural law functions as the means by which society implements its substantive goals. For example, assume the criminal law makes it a crime to possess cocaine. Criminal procedure sets the rules for discovering and adjudicating violations of that criminal statute — for example, police may not subject suspects to unreasonable searches and seizures, or coerce confessions. If the police violate these or other procedural rules, various procedural consequences may arise, such as exclusion of evidence at trial or dismissal of the charge.

Yet, the interrelationship of procedure and substance is more complicated than the simple description in the preceding paragraph suggests. First, procedural rules can frustrate the implementation of a community’s substantive goals. For example, if the rules are unduly lax, the accused may not receive competent representation during the adjudication process, enhancing the likelihood of unjust convictions and punishment. On the other hand, if the rules unduly hinder the police and prosecutors in their pursuit of law violators, some persons who deserve to be punished are apt to avoid criminal sanction, and the deterrent value of the criminal law is likely to be undermined.

Second, the existence of some procedural rules may affect legislative decisions about the substantive criminal law. In particular, to the extent criminal procedure rules make it harder for the government to investigate and prosecute crime, the legislature may enact more criminal statutes or greater penalties to offset the effect of the procedural rules.² For example, Supreme Court rulings mandating a jury role in certain sentencing systems (a change in the criminal procedure law) led to legislative proposals to raise the minimum sentence for

¹ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 3 (1964).

² See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 4 (1997).

certain crimes (a change in the substantive criminal law). Such “spillover” effects may also be seen in procedural rules governing criminal investigations, as when the existence of minor crimes such as traffic offenses or certain possession offenses may be used to expand police authority to investigate more serious crimes that procedural requirements of probable cause and reasonable suspicion otherwise restrict.³

Third, some legal doctrines involve a mixture of procedure and substance. Consider the constitutional rule that the government must prove beyond a reasonable doubt “every fact necessary to constitute the crime . . . charged.”⁴ This is a procedural rule, but it cannot properly be enforced unless the term “crime,” a substantive criminal law concept, is defined. For example, does the “crime” of murder include as an ingredient the “absence of a legitimate claim of self-defense” — that is, is “murder” a killing that occurs in the absence of self-defense — or is self-defense an affirmative defense to the “crime” of murder? In short, the answer to the procedural question — who has the burden of proof regarding the matter of self-defense? — depends on the definition of murder, a substantive criminal law concept.

§ 1.02 SOURCES OF PROCEDURAL LAW

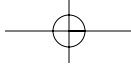
[A] Formal Sources

Various layers of laws and regulations govern the conduct of the participants in the criminal justice system. First, starting at the highest level, various provisions of the United States Constitution, in particular those found in the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, restrict the power of law enforcement officers in their relations to persons suspected of criminal activity and also govern the adjudication of criminal cases. The United States Supreme Court and lower federal and state courts frequently are called upon to interpret these federal constitutional provisions. As a result of substantial constitutional litigation, the study of some aspects of criminal procedure — in particular, police practices — is principally a study of constitutional law.

Second, at the state level, state constitutions are an increasingly important source of procedural law. In the past few decades, as the United States Supreme Court and lower federal courts have become less sympathetic to the *federal* constitutional claims of individual petitioners, a body of *state* constitutional jurisprudence has developed, in which some state courts, interpreting their own constitutions, have granted relief to their residents that would be unavail-

³ See 1 Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure* §§ 8.02[F], 17.03[B][5] (4th ed. 2006).

⁴ *In re Winship*, 397 U.S. 358, 364 (1970). See § 13.01, *infra*.



able under the federal Constitution.⁵ This trend is significant because a state supreme court is the final arbiter of the meaning of its own constitution.⁶

Third, legislatures have enacted statutes and courts have adopted written rules of criminal procedure governing many aspects of the state and federal criminal justice systems. For example, at the federal level, Congress has enacted laws governing such matters as electronic surveillance of private conversations,⁷ pretrial detention of dangerous persons,⁸ and the qualifications for jury service.⁹ Also, Congress has granted authority to the Supreme Court to prom-

⁵ See Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 *Judicature* 190 (1991) (providing a list, by state, of the number of cases in which each state's highest court has rejected or adopted United States Supreme Court's criminal procedure decisions, from the late 1960s through 1989); Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship,* 87 *Mich. L. Rev.* 189, 217 (1988) (reporting that, in their research, state courts in at least 450 cases recognized rights not available under the federal constitution); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication,* 72 *Notre Dame L. Rev.* 1015 (1997). This treatise provides non-exhaustive citations to state constitutional law decisions.

Not all state courts have the authority to interpret their constitutions differently from the United States Constitution. *E.g.*, Calif. Const. art. I, § 24 (in which the state constitution was amended by the initiative process to provide that in criminal cases various enumerated constitutional rights of the defendant "shall be construed by the courts of this state in a manner consistent with the Constitution of the United States"); Fla. Const. art. I, § 12 (in which the state charter was amended by initiative to provide that it "shall be construed in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court").

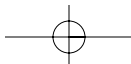
It should be noted that a state court may interpret its own constitutional charter *less* protectively than its federal constitutional counterpart, but if it does so, then the state court "must go on to decide the claim under federal law, assuming it has been raised." Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts,* 18 *Ga. L. Rev.* 165, 179 (1984). If a state court interprets the state law *more* protectively to the individual, however, it need not turn to federal law — the state petitioner wins her claim.

⁶ The importance of state constitutional law cannot easily be overstated, in terms of its potential impact on litigation in the early decades of the twenty-first century. For thoughtful discussion of so-called "judicial federalism" generally, or of its application in criminal cases, see generally Barry Latzer, *State Constitutional Criminal Law* (1995); Barry Latzer, *State Constitutions and Criminal Justice* (1991); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law,* 63 *Tex. L. Rev.* 1141 (1985); Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges,* 25 *Tex. Tech. L. Rev.* 75 (1993); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 *Harv. L. Rev.* 489 (1977); Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example,* 1993 *Utah L. Rev.* 751; George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights,* 68 *Tex. L. Rev.* 1369 (1990); James A. Gardner, *The Failed Discourse of State Constitutionalism,* 90 *Mich. L. Rev.* 761 (1992); Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions,* 20 *Ariz. St. L.J.* 151 (1988); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative,* 63 *Tex. L. Rev.* 1081 (1985); Special Project, *State Constitutions and Criminal Procedure: A Primer for the 21st Century,* 67 *Or. L. Rev.* 689 (Ken Gormley ed., 1988).

⁷ 18 U.S.C. §§ 2510-2522 (2005).

⁸ 18 U.S.C. §§ 3141-3156 (2005).

⁹ 28 U.S.C. § 1865 (2005).



ulgate written rules to govern proceedings in the federal courts, which the Court has done in the form of the Federal Rules of Criminal Procedure. In turn, Federal Rule 57 authorizes District Courts (trial courts) to make rules governing local practice.

Fourth, some law enforcement agencies promulgate written regulations that their employees are required to follow. For example, police departments frequently have rules governing, among other matters, the use of deadly force to effectuate arrests, the techniques to be followed in conducting lineups, and the procedures to be used in inspecting the contents of automobiles taken into police custody. Prosecutors' offices, in turn, often have internal guidelines governing such matters as charging decisions and plea bargains.¹⁰ Although these regulations do not have the force of law, their violation may result in internal sanctions.

Fifth, on occasion the Supreme Court invokes its so-called "supervisory authority" over the administration of criminal justice in the federal courts to announce rules that apply throughout the federal judicial system. Similarly, some federal circuit courts have developed rules that apply to the district courts within their jurisdiction. These rules based on federal supervisory authority, which do not apply in the state courts, are subject to revision by Congress. State courts also develop common-law rules governing some procedures in state prosecutions.

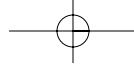
[B] Informal Sources: A Taste of Reality

Although criminal procedural rules are primarily promulgated "from on high" — by the United States Supreme Court, state supreme courts, and federal and state legislatures — the law that is enforced daily on the streets often looks considerably different. As Professor Anthony Amsterdam once observed about United States Supreme Court case law: "[o]nce uttered, these pronouncements will be interpreted by arrays of lower appellate courts, trial judges, magistrates, commissioners and police officials. *Their* interpretation . . . , for all practical purposes, will become the word of God."¹¹ Put more bluntly, the law at the end of a billy club or police firearm may look very different than the law handed down by nine justices of the United States Supreme Court or by a legislative body.¹²

¹⁰ See, e.g., Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 Fed. Sent. Rep. 310 (1994) (summarizing and assessing federal prosecutorial charging and bargaining policies issued by the Attorney General).

¹¹ Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 786 (1970).

¹² Gregory Howard Williams, *Police Discretion: The Institutional Dilemma — Who Is In Charge?*, 68 Iowa L. Rev. 431, 437 (1983) ("There is little assurance that policy established by the Supreme Court will be implemented by patrol officers.").



This dichotomy between formal and informal law is inevitable. The United States Supreme Court, and each state's highest court, lack daily supervisory control over the actions of the police. Judicial authority is limited to litigated cases, and most of what occurs on the street between police officers and the citizenry is legally invisible. Even among cases that enter the criminal justice system, their vast number — over 13.6 million arrests in 2003¹³ — restricts the ability of high courts, with their limited dockets (the U.S. Supreme Court heard 33 criminal law related cases that year)¹⁴ to govern the day-to-day world of criminal proceedings.

§ 1.03 STAGES OF A CRIMINAL PROSECUTION

[A] In General

Analytically and in law school curricula, “criminal procedure” is often divided into two parts, the investigatory and the adjudicatory stages. In the investigatory phase, the primary actors in the “drama” are police officers and those whom they suspect of criminal activity. This is the “cops and (alleged) robbers” stage of the process.

The adjudicatory phase begins when the government commits itself to bringing a suspect to trial for her alleged criminal conduct. In this stage, the focus of attention turns to the legal profession — the prosecutors, defense lawyers, and judges — who participate in the adversarial judicial system. This is the “bail to (maybe) jail” phase of the process.

In studying criminal procedure, it is important to understand the context in which the legal rules apply. What follows, therefore, is a very brief overview of the stages of a typical criminal prosecution. Because adjudicatory procedures differ by state and depend on whether the defendant is charged with a felony or a misdemeanor, primary emphasis in this summary is on *felony* prosecutions in the *federal* system.

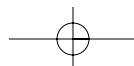
[B] Investigatory Stage¹⁵

A criminal investigation commonly begins when a police officer, on the basis of her own observations and/or those of an informant, comes to believe that criminal activity may be afoot or has already occurred. Because there are no formal stages of a criminal investigation, most Criminal Procedure courses survey

¹³ Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States 2003* 268 (2003).

¹⁴ *The Supreme Court, 2003 Term — The Statistics*, 118 Harv. L. Rev. 497, 509 (2004).

¹⁵ Of course, the investigatory portion of criminal procedure constitutes a course of study unto itself, and those rules are covered thoroughly in the first volume of this Text.



the constitutional law pertaining to the most common police investigative practices.

[1] Search and Seizure

Police officers usually search and seize persons and property during the investigatory stage. Searches and seizures occur in an almost infinite variety of ways: for example, by stopping (“seizing”) a suspect on the street and frisking her (“searching”) for weapons or evidence; by entering a house in order to look for a suspect or evidence of a crime; by opening containers found in an automobile stopped on the highway; and by wiretapping in order to monitor the conversations of suspects.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. At one time, most especially in the late 1950s through the early-to-mid 1970s, this proscription was interpreted to mean that, except in limited circumstances, police officers were not allowed to search or seize property without a search warrant, supported by probable cause, issued by a judge (or “magistrate”). This warrant requirement (or, at least, warrant presumption) came to be honored primarily in the breach and is of limited value today in determining the lawfulness of police conduct. Not only do police officers today rarely seek a warrant, but many searches and seizures can be conducted on less than probable cause.¹⁶

[2] Interrogation

The police also interrogate suspects and witnesses during criminal investigations. Some interrogations occur in a police-dominated atmosphere, such as in a police station. In other circumstances, questioning occurs in a less coercive environment, such as in a person’s home, automobile, or on the street, sometimes in the presence of family or friends. An interrogation may trigger various constitutional questions, including: (1) Is the suspect entitled to be represented by counsel during the questioning?; and (2) Was any ensuing confession obtained voluntarily? In particular, the Fifth Amendment privilege against compulsory self-incrimination, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Sixth Amendment guarantee of assistance of counsel during criminal prosecutions, are potentially implicated during police interrogations.¹⁷

[3] Identification Procedures

The police also conduct lineups, show witnesses photographs of potential suspects, take handwriting and voice exemplars, and conduct other identifica-

¹⁶ See generally 1 Dressler & Michaels, Note 3, *supra*, at chapters 17-18.

¹⁷ See generally *id.* at chapters 21-25.

tion procedures. The police may conduct many of these activities without prior judicial approval, and without intervention by defense counsel. Nonetheless, in some cases the Sixth Amendment right-to-counsel provision applies and, in all cases, the procedures must be conducted in a constitutionally reliable manner.¹⁸

[4] Arrest

Assuming that a criminal investigation results in a police determination that there is probable cause to believe that the suspect committed a crime, she may be arrested. When a routine arrest occurs in a private home, the police must ordinarily be armed with a warrant to take the suspect into custody. Arrests in public places usually can be made without an arrest warrant.¹⁹

Upon arrest, the suspect is usually searched and taken to the police station or to a jail, where she is “booked” (*i.e.*, her name is logged in an arrest book or on a computer), photographed, fingerprinted, and more fully searched. Typically, any personal belongings found in her possession at the station or jail are inventoried and placed in custody for safekeeping.

[C] Adjudicatory Stage

[1] Issuance of a Complaint

After a suspect is arrested and booked, a complaint is prepared by the police or a prosecutor and is filed with the court. A “complaint” is “a written statement of the essential facts constituting the offense charged.”²⁰ It serves as the official charging document until either an “information” or an “indictment,” each of which is discussed below,²¹ is issued.

[2] Probable Cause (*Gerstein*) Hearing

The police may not constitutionally arrest a person unless they have probable cause to believe that a crime has occurred and that the suspect committed it. In order to implement the Fourth Amendment bar on unreasonable seizures of persons, the Supreme Court has held that, whenever practicable, a probable cause determination should be made by a neutral and detached magistrate, rather than by a police officer.²²

¹⁸ See generally *id.* at chapter 26.

¹⁹ See generally *id.* at chapter 9.

²⁰ Fed. R. Crim. P. 3.

²¹ See § 1.03[C][4], *infra*.

²² See *Johnson v. United States*, 333 U.S. 10 (1948).

If the police apply for an arrest warrant, the requisite judicial oversight occurs. However, when the police arrest a suspect without an arrest warrant — the vast majority of cases — a prior judicial determination of probable cause is lacking. Therefore, the Supreme Court ruled in *Gerstein v. Pugh*²³ that, following a *warrantless* arrest, the Fourth Amendment requires that a prompt judicial determination of probable cause be made as a precondition to any extended restraint of the arrestee's liberty.

Because a so-called "*Gerstein* hearing" serves as a post-arrest equivalent of a pre-arrest warrant-application hearing,²⁴ the proceeding may be conducted in the same manner as a warrant hearing — in the defendant's absence, and the probable cause determination based on hearsay testimony. If the arrestee is permitted to be present during the hearing, she is not constitutionally entitled to representation by counsel or to the full panoply of adversarial safeguards available at trial. In many jurisdictions, the probable cause hearing is conducted in the suspect's presence at her first appearance before a judicial officer, a proceeding which is discussed immediately below.²⁵

[3] First Appearance Before the Magistrate

An arrested person must be taken "without unnecessary delay,"²⁶ usually within twenty-four hours except on weekends, before a judicial officer, for a hearing variously called the "initial arraignment," "arraignment on a warrant," "arraignment on a complaint," or, simply the "first" or "initial" "appearance."

At the hearing, the arrestee receives formal notice of the charges against her, her constitutional rights in the impending prosecution are explained to her, and a date is set for a preliminary hearing. If the suspect is indigent and not presently represented by counsel, a lawyer may be appointed for her at this time. If the suspect was arrested without a warrant, a probable cause determination (a *Gerstein* hearing) is usually made at the first appearance. Finally, and perhaps most significantly, the magistrate determines at this time whether the arrestee should be set free on her own recognizance, released on bail, or detained pending further proceedings.²⁷

²³ 420 U.S. 103 (1975).

²⁴ See 1 Dressler & Michaels, Note 3, *supra*, at § 10.02.

²⁵ How promptly must the *Gerstein* hearing be held? In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court stated that the Constitution "permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system." Therefore, if a state wishes to combine the probable cause hearing with other pretrial proceedings, such as the first appearance before the magistrate, it may do so as long as the hearing occurs, as a general matter, within forty-eight hours from the time of arrest. However, a delay "for delay's sake," out of ill-will toward the suspect, or in order to secure evidence that will justify the arrest, is constitutionally unreasonable, even if it falls within the presumptive 48-hour period.

²⁶ Fed. R. Crim. P. 5(a)(1)(A).

²⁷ See generally § 5.01, *infra*.

[4] Preliminary Hearings and Grand Jury Proceedings²⁸

In most jurisdictions, a preliminary hearing (or “preliminary examination”) is held within two weeks after the arrestee’s initial appearance before the magistrate, unless the defendant waives the hearing.²⁹ The primary purpose of a preliminary hearing is to determine whether there is probable cause to believe that a criminal offense has occurred and that the arrestee committed it.³⁰

The significance of the preliminary hearing in the criminal process depends on whether the state is an “information jurisdiction” (*i.e.*, a state in which an indictment by a grand jury is not required) or an “indictment jurisdiction” (*i.e.*, a state in which the defendant ordinarily cannot be brought to trial unless she is indicted by a grand jury).

In *information* jurisdictions, once the magistrate determines that there is sufficient evidence to “bind over” the defendant for trial, the prosecutor files an “information” with the trial court. The “information” is a document stating the charges against the defendant and the essential facts relating to them. The information replaces the complaint as the formal charging document. In the alternative, if the magistrate in an information jurisdiction does *not* find sufficient evidence to bind over the defendant, the complaint is dismissed and the defendant is discharged.

In *indictment* jurisdictions, by contrast, the preliminary hearing has diminished importance because the magistrate’s probable cause determination may be superseded by the actions of the grand jury, *i.e.*, if the grand jury does not indict the defendant, she must be released, even if the preliminary hearing magistrate previously determined that there was probable cause to believe that the arrestee committed an offense. Indeed, in many indictment jurisdictions, including the federal system, the preliminary examination is not held if the defendant is indicted before the date set for the preliminary hearing.³¹

In indictment jurisdictions, a person may not be brought to trial for a serious offense unless she is indicted by a grand jury or waives her right to a grand jury hearing. The Fifth Amendment to the United States Constitution provides that in federal prosecutions, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a[n] . . . indictment of a Grand Jury . . .” The constitutional term “infamous crime” encompasses all felony prosecutions. This provision does not apply to the states,³² however, so that the prevalence of grand jury proceedings varies across jurisdictions.

²⁸ See generally §§ 6.05-6.06, *infra*.

²⁹ In the federal system, the hearing must be held no later than ten days following the initial appearance, if the arrestee is in custody, or within twenty days if she is not. Fed. R. Crim. P. 5.1(c).

³⁰ See Fed. R. Crim. P. 5.1(e).

³¹ See, *e.g.*, Fed. R. Crim. P. 5.1(a).

³² *Hurtado v. California*, 110 U.S. 516 (1884).

In a grand jury proceeding, the prosecutor makes an *ex parte* presentation to the grand jurors, who then formally decide whether sufficient evidence was introduced.³³ If the grand jury so finds, the jury (through the prosecutor) issues an “indictment,” a document that states the charges and the relevant facts relating to them. If the jury does not vote to indict the defendant, the complaint issued against the defendant is dismissed, and she is discharged.

[5] Arraignment

If an indictment or information is filed, the defendant is arraigned in open court. At the arraignment, at which the Sixth Amendment right to counsel attaches,³⁴ the accused is provided with a copy of the indictment or information, after which she enters a plea to the offenses charged in it. She may plead “not guilty,” “guilty,” “*nolo contendere*,”³⁵ or (in some states) “not guilty by reason of insanity.”

[6] Pretrial Motions

After arraignment, the defendant may make various pretrial motions. Among the defenses, objections, and requests that often are raised prior to trial are: (1) that the indictment or information is defective, in that it fails to allege an essential element of the crime charged, or that it fails to give the defendant sufficient notice of the facts relating to the charge against her;³⁶ (2) that the venue of the prosecution is improper or inconvenient;³⁷ (3) that the indictment or information joins offenses or parties in an improper or prejudicial manner;³⁸ (4) that evidence in the possession of one of the parties should be disclosed to the opposing party;³⁹ (5) that evidence should be suppressed because it was obtained in an unconstitutional manner; and (6) that the prosecution is constitutionally barred, such as by the Double Jeopardy and/or Speedy Trial Clauses of the Constitution.⁴⁰

³³ Most jurisdictions, including the federal courts (*see* *United States v. Calandra*, 414 U.S. 338, 343 (1974)), apply a probable cause standard, similar to that employed in preliminary hearings. Some states use a higher, “directed verdict,” standard, *i.e.*, whether there is evidence which, if unexplained, would warrant a conviction at trial.

³⁴ *See* *Michigan v. Jackson*, 475 U.S. 625, 630 n.3 (1986).

³⁵ Literally, the plea means “I will not contest it [the charge].” For most purposes in a criminal proceeding, the plea is treated the same as a guilty plea.

³⁶ *See, e.g.*, Fed. R. Crim. P. 12(b)(3).

³⁷ *See, e.g.*, Fed. R. Crim. P. 18, 21(a).

³⁸ *See, e.g.*, Fed. R. Crim. P. 8, 14. *See generally* §§ 6.07-6.08, *infra*.

³⁹ *See, e.g.*, Fed. R. Crim. P. 16. *See generally* chapter 7, *infra*.

⁴⁰ U.S. Const. amend. V (“ . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . .”). *See generally* chapter 14 (double jeopardy), chapter 8 (speedy trial), *infra*.

In some circumstances, if a defendant's pretrial motions are successful, the judge will dismiss the charges on her own or on the prosecutor's motion.⁴¹ For example, if the prosecution is barred by the Double Jeopardy Clause, dismissal is obligatory. Or, if the judge grants the defendant's motion to suppress key evidence, the prosecutor might determine that continuation of the proceedings would be futile and, therefore, request dismissal of the charges.

[7] Trial

If a defendant does not plead guilty and the charges are not dismissed, a trial is held. The Sixth Amendment entitles a defendant to trial by jury in the prosecution of any serious, *i.e.*, non-petty, offense.⁴² In other cases, and sometimes even in serious cases when the defendant waives her jury right, the trial may be to a judge, rather than a jury — a “bench trial.”⁴³

Whether the trial is to judge or jury, the defendant has a number of significant rights at trial. First, the defendant is constitutionally entitled to employ counsel at trial, and an indigent is entitled to the appointment of counsel in all felony prosecutions, as well as at any misdemeanor trial in which she will be incarcerated if convicted.⁴⁴ The defendant may also call witnesses on her own behalf, and confront and cross-examine the witnesses who testify against her.⁴⁵ The defendant is not required to testify and she “must pay no court-imposed price for the exercise of [her Fifth Amendment] constitutional privilege not to testify.”⁴⁶

[8] Sentencing and Post-Trial Proceedings

[a] Sentencing⁴⁷

If the defendant is convicted after a trial, or if the defendant pleads guilty, the judge must impose a sentence. In most jurisdictions, particularly for serious crimes, there will be an additional proceeding beyond the trial to provide the judge or jury with further information that might be relevant to sentencing. At

⁴¹ See, *e.g.*, Fed. R. Crim. P. 48.

⁴² See generally § 10.02, *infra*.

⁴³ See generally § 10.02[C], *infra*.

⁴⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanor cases). See generally § 4.02[B], *infra*.

⁴⁵ U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall the enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor. . . .”). See generally chapter 11, *infra*.

⁴⁶ *Carter v. Kentucky*, 450 U.S. 288, 301 (1981); see also *Griffin v. California*, 380 U.S. 609 (1965). See generally chapter 12, *infra*.

⁴⁷ See generally chapter 15, *infra*.

the sentencing proceeding the defendant has some, but not all, of the constitutional protections she enjoys at trial.⁴⁸

[b] Appeal⁴⁹

If the defendant is acquitted by the jury or by the judge in a bench trial, the government is barred by the Double Jeopardy Clause from appealing the acquittal.⁵⁰ If the defendant is convicted, she has no constitutional right to appeal her conviction.⁵¹ However, all jurisdictions statutorily permit a convicted defendant (now the “appellant”) to appeal a conviction after trial. In state court systems, she may appeal to an appellate court below the state supreme court or, if there is none, directly to the state supreme court. In the federal courts, a defendant may appeal her conviction to the United States Court of Appeals for the circuit with jurisdiction over the case.

If the appellant is unsuccessful in her statutory appeal of right, she may be entitled to discretionary appeals to a higher court. For example, in a state in which an appeal of right is brought to an intermediate appellate court, the state supreme court is permitted, but usually is not required except in capital cases, to hear the appellant’s second appeal. She may also petition the United States Supreme Court to consider her case. If her appeal is ultimately successful, she ordinarily may be reprosecuted.⁵²

[c] Collateral Attack of a Conviction: Habeas Corpus⁵³

After a defendant’s appeals are exhausted — *i.e.*, once her conviction is final — she may file a petition for a writ of habeas corpus in a federal district court, if she believes that her continued incarceration is in violation of the United

⁴⁸ See generally Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771 (2003).

⁴⁹ See generally, chapter 16, *infra*.

⁵⁰ See generally § 14.03[A], *infra*.

⁵¹ See *McKane v. Durston*, 153 U.S. 684, 687 (1894) (dictum); *Jones v. Barnes*, 463 U.S. 745 (1983) (dictum).

⁵² See § 14.05[A], *infra*.

⁵³ See generally Graham Hughes, *The Decline of Habeas Corpus* (Occasional Papers from the Center for Research in Crime and Justice, N.Y.U. School of Law, No. VIII, 1990); Joseph L. Hoffmann, *The Supreme Court’s New Vision of Federal Habeas Corpus for State Prisoners*, 1989 Sup. Ct. Rev. 165; Kathleen Patchel, *The New Habeas*, 42 Hastings L.J. 939 (1991); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 Geo. Wash. L. Rev. 362 (1991); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. Crim. L. & Criminology 9 (1990); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 Harv. L. Rev. 1578 (1998).

States Constitution or of a federal law.⁵⁴ A post-conviction habeas corpus proceeding is not part of the criminal appeal process itself. It is a civil action designed to overturn a presumptively valid criminal judgment. As such, it is considered a collateral attack on a criminal conviction, as distinguished from a direct criminal appeal. The purpose of a habeas petition is to convince the district (trial) court that it should compel the warden of the jail or prison holding the petitioner to bring her before the court so that it can determine whether she is being held in custody against the law.

Federal habeas corpus jurisprudence involves exceedingly intricate rules, and recent legislation has made it more difficult than in the past for petitioners to obtain a hearing on the merits of their federal claims. However, if the proper allegations are made, the district court may grant the petition and conduct an evidentiary hearing into the federal claim.

Because a habeas corpus petition constitutes a collateral attack on a judgment that is already final, and because federal courts are hesitant to intrude on state proceedings, the standards that a petitioner must satisfy to obtain ultimate relief in habeas are generally stricter, sometimes much stricter, than those that apply on direct appeals. For example, a state court conviction may only be disturbed on habeas review if it “involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court . . . [or if it] was based on an unreasonable determination of the facts” in light of the evidence presented in the state proceeding.⁵⁵ Moreover, with regard to factual determinations, the prisoner seeking habeas relief must prove the unreasonableness by clear and convincing evidence.⁵⁶ In addition, certain “procedural bars,” such as the prisoner’s failure to raise the claim in state court first, may also lead the federal court to deny relief.

If the prisoner overcomes these hurdles, however, and the district court determines under these heightened standards that the petitioner is being held in custody in violation of federal law or the Constitution, it may vacate the conviction. The ruling of the district court — whether to grant or deny the petition — is potentially subject to appeal by the losing party, although in many circumstances the prisoner must make a “substantial showing of the denial of a constitutional right” to the appellate court before the court can agree to hear the appeal.

⁵⁴ 28 U.S.C. §§ 2241-2244, 2253-2255, 2261-2266 (2005). Some states have their own habeas corpus procedures, which must be exhausted before a convicted person seeks *federal* habeas relief.

⁵⁵ 28 U.S.C. § 2254(d) (2005). For a discussion of the meaning of an “unreasonable” — as opposed to mistaken — application of federal law (a state court can be mistaken without being unreasonable), see Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for “Reasonably Erroneous” Applications of Federal Law*, 63 Ohio St. L.J. 731 (2002).

⁵⁶ 28 U.S.C. § 2254(e)(1) (2005).

