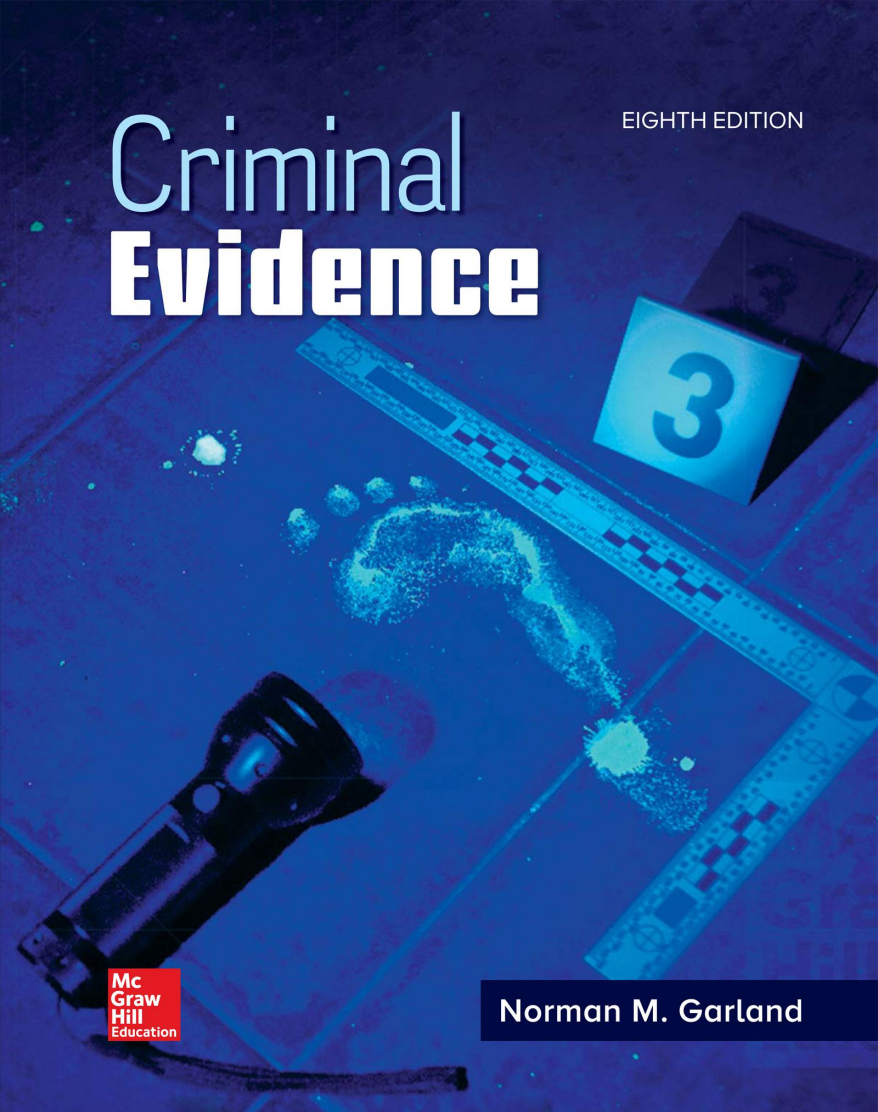
EIGHTH EDITION

# Criminal Evidence



Norman M. Garland

Mc Graw Hill Education

# CRIMINAL EVIDENCE

## EIGHTH EDITION

Norman M. Garland

*Second Century Chair in Law*
*Professor of Law*
*Southwestern Law School-California*

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CRIMINAL EVIDENCE, EIGHTH EDITION



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*This book is dedicated to Melissa Grossan.*

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# ABOUT THE AUTHOR

**Norman M. Garland** is second century chair in law and professor of law at Southwestern Law School in California, where he teaches Evidence, Criminal Procedure, Advanced Criminal Procedure, and Trial Advocacy. He received his B.S.B.A. and J.D. from Northwestern University; his L.L.M. from Georgetown Law Center, where he was an E. Barrett Prettyman Fellow in Trial Advocacy; and an Honorary LL. D. from Southwestern Law School in 2016. Professor Garland is a member of the Illinois, District of Columbia, and California Bars. He has 10 years of trial experience as a criminal defense attorney, mainly in federal felony cases. In 1968, he joined the law faculty at Northwestern University, where he helped establish the Northwestern Legal Clinic. He joined the faculty of Southwestern Law School in 1975 to help establish the Southwestern Approach to Conceptual Legal Education (S.C.A.L.E.). In the mid-1980s, he spent two summers as Deputy District Attorney in Ventura County, California, where he gained experience as a prosecutor. He is coauthor of *Exculpatory Evidence,* 4th ed. (Lexis-Nexis, 2015), coauthor of *Advanced Criminal Procedure* (West Nutshell, 2d ed., 2006), and author of *Criminal Law for the Law Enforcement Professional*, 4th ed. (McGraw-Hill, 2018). Professor Garland has published a number of CALI Lessons in criminal law and evidence (www.cali.org) and has published numerous articles in legal journals.

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# BRIEF CONTENTS

# CONTENTS

# PREFACE

The eighth edition of *Criminal Evidence* presents the basic concepts of criminal evidence applied in the criminal justice environment. *Criminal Evidence,* eighth edition, includes a description of the trial process, types of evidence, the rules relating to relevance, hearsay (including the Confrontation Clause), documentary evidence, qualification of witnesses, privileges, presumptions, judicial notice, photographs, and character. The text also presents the principles relating to the impact of the Constitution of the United States on the admissibility of evidence (i.e., search and seizure, opposing party's statements (admissions) and confessions, the right to counsel, and identification procedures). Finally, the text presents those principles relating to the law enforcement professional as a witness.

This text is written in a clear, lively, and personal style to appeal to criminal justice professionals and students on the way to becoming professionals. Special attention is given to helping students understand the legal aspects of the principles relating to the admissibility of evidence at a criminal court hearing or trial. Students often perceive the law as a complex of incomprehensible rules with uncertain application in the workplace. In *Criminal Evidence,* eighth edition, when an evidence principle is presented, an example or application to the real world of law enforcement immediately follows. Relevant court decisions that affect the admissibility of evidence are discussed in the text, but only to the extent necessary to illustrate the rules. All program components fit into an integrated learning system that helps students learn and apply important course concepts.

## ACKNOWLEDGMENTS

I had a lot of help in producing this eighth edition of *Criminal Evidence.* I would like to thank the dean, faculty, and board of trustees of Southwestern Law School for their generous support. I have been fortunate to have two research assistants at Southwestern who worked on this project: Caylin W. Jones and Shahla Jalil-Valles, Southwestern, class of 2019.

For their insightful reviews, criticisms, and suggestions, I would like to thank these colleagues: Pamela Baldwin, Sinclair Community College; John Oare, Solano Community College; Harvey Wolf Kushner, Long Island University.

Finally, and most important, I thank my wife, Melissa Grossan, who was truly my partner in the production of this edition as well as being my loving companion in life.

## Changes Made for the Eighth Edition

Chapter 2

- Noting the Supreme Court's decision in *Warger v. Shauers,* 135 S.Ct. 521 (2014), holding that FRE 606(b), which makes inadmissible certain juror testimony regarding what occurred in a jury room, precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voir dire*, because the dishonesty alleged in Warger's new trial motion relates to the juror's personal experience and not to specific knowledge of the case, the Rule's exception for evidence of "extraneous prejudicial information," 606(b)(2)(A), does not apply.
- Noting the Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), holding the Sixth Amendment requires that the no-impeachment rule—which recognizes that a verdict, once entered, cannot be challenged based on comments the jurors made during deliberations—must give way in order for the trial court to assess the possible denial of the jury trial guarantee where compelling evidence indicates that a juror relied on racial stereotypes or animus to convict a criminal defendant.

Chapter 7

- Noting the Supreme Court's decision in *Ohio v. Clark*, 132 S.Ct. 2173 (2015), holding that the Sixth Amendment's Confrontation Clause did not prohibit prosecutors from introducing statements made by a child abuse victim to his teachers, where neither the child, who was unavailable for cross-examination, nor his teachers had the primary purpose of creating an out-of-court substitute for trial testimony.

Chapter 9

- Noting the Supreme Court's decision in *Bailey v. United States*, 568 U.S. 186 (2013), holding that Bailey's detention at a point beyond the immediate vicinity of his apartment while it was being searched by police was not permissible under *Michigan v. Summers*, 452 U.S. 692, as a detention incident to the execution of a search warrant.
- Noting the Supreme Court's decision in *Missouri v. McNeely,* 569 U.S. 141 (2013), holding that, in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without securing a search warrant.
- Noting the Supreme Court's decision in *Heien v. North Carolina*, 135 S.Ct. 530 (2014), holding that, because it was objectively reasonable for an officer in Sergeant Darisse's position to think that NC law required vehicles to have two functioning brake lights instead of one, Darisse's stop of Heien's vehicle was lawful under the Fourth Amendment.
- *Grady v. North Carolina*, 135 S.Ct. 1368 (2015), holding that the NC Court of Appeals erred in concluding that the state's satellite-based monitoring of petitioner for repeated sex offenses was not a 4th A search, but

the state courts should determine in the first instance the reasonableness of such a search.

- Noting the Supreme Court's decision in *Utah v. Strieff,* 136 S.Ct. 2056 (2016), holding that the discovery of a valid pre-existing and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop of Strieff and the evidence seized.
- Noting the Supreme Court's decision in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), holding that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.
- Noting the Supreme Court's decision in *Collins v. Virginia*, 138 S.Ct. 1663 (2018), holding that partially enclosed top portion of driveway of home, in which defendant's motorcycle was parked, was "curtilage," for purposes of Fourth Amendment analysis of police officer's warrantless search of motorcycle; driveway ran alongside front lawn and up a few yards past front perimeter of house, top portion of driveway sitting behind front perimeter of house was enclosed on two sides by a brick wall about the height of a car and was enclosed on third side by the house, side door provided direct access between this partially enclosed section of driveway and house, and a visitor endeavoring to reach front door of house would walk partway up driveway but would turn off before entering enclosure and instead would proceed up a set of steps leading to front porch. Automobile exception to Fourth Amendment's warrant requirement for searches did not justify police officer's invasion of curtilage of home, for warrantless search of motorcycle covered by tarp and parked in partially enclosed top portion of driveway of home, though officer had probable cause to believe that the motorcycle was the one that had eluded officer's attempted traffic stop; officer invaded not only defendant's interest in the item searched, i.e., the motorcycle, but also invaded defendant's Fourth Amendment interest in the curtilage of the home.

Chapter 12

- Noting the Supreme Court's decision in *Wearry v. Cain,* 136 S.Cr. 1002, holding that the prosecution's failure to disclose material evidence at petitioner's capital murder trial violated his due process rights under *Brady v. Maryland.*

## eTextbooks for *Criminal Evidence*

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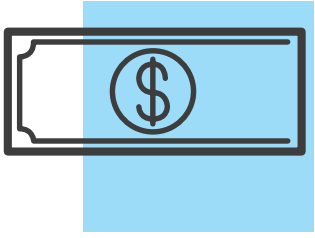



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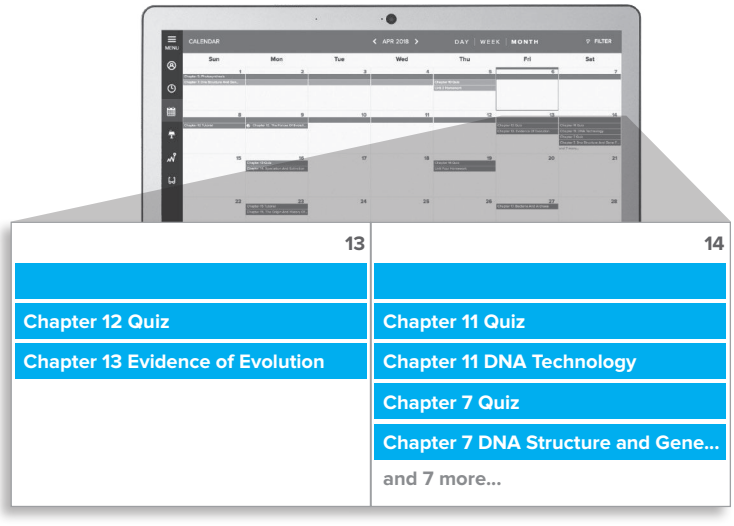


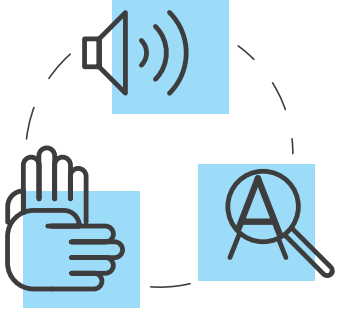

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# 1 INTRODUCTION TO THE LAW OF EVIDENCE AND THE PRETRIAL PROCESS

## CHAPTER OUTLINE



## CHAPTER OBJECTIVES

This chapter is an introduction to the law of evidence, the court process, personnel, and pretrial process from the law enforcement professional's viewpoint. After reading this chapter you will be able to:

- Explain what constitutes evidence.
- State the objectives of the rules of evidence.
- Name the most common version of evidence law in the United States.
- Describe the three basic police functions.
- Contrast the jobs of the prosecuting attorney and the defense attorney.
- Describe the dual court system in the United States.
- Define probable cause to arrest.
- State the two alternative ways that a defendant can be formally charged with a serious crime in the United States.

## INTRODUCTION TO THE RULES OF EVIDENCE: DEFINITION OF EVIDENCE

**LAW OF EVIDENCE**
The rules that govern what a jury can hear and see during the trial of a case in an American courtroom.

Most Americans are aware that there are rules that govern what a jury can hear and see during the trial of a case in an American courtroom. These rules are defined in what is called the **law of evidence.** In this text, we will explore why there is a law that restricts what a jury may hear, the details of the law, and its importance to the effective performance of the law enforcement professional. Before exploring those questions, the reader should know what constitutes evidence.

**EVIDENCE**
Information that people base decisions on. In a legal sense, evidence is the information presented in court during a trial that enables the judge and jury to decide a particular case.

Most simply stated, **evidence** is information that people base decisions on. In a legal sense, evidence is the information presented in court during a trial that enables the judge and jury to decide a particular case. Technically, evidence consists of testimony or physical items presented to the judge and jury that they use to decide the truth of an assertion, the existence of a fact, and ultimately the guilt or innocence of the accused in a criminal case.

In the American judicial system, a criminal defendant is entitled to have a jury decide his or her guilt or innocence. The jury in all trials makes its final decision based on what it believes the facts are that are involved in the case. Evidence is the means by which those facts are proved or disproved. If this definition were taken literally, then anything that sheds some light on the truth of a fact in question should be revealed during the trial. Perhaps, if the creators of the law trusted juries completely, that would be the way the law of evidence worked. However, the creators of the law believed that juries need some guidance and protection from undue manipulation by competing attorneys during a trial. Therefore, the law limits what constitutes admissible evidence.

Most law enforcement professionals use the term "evidence" with special meaning, since so much of their efforts are concerned with ensuring that physical evidence is usable at trial. So, although law enforcement professionals know that testimony is important, they often refer to evidence as the articles collected at a crime scene, on a suspect, or in the suspect's car or home that are connected to the crime, such as weapons, fruits of a crime, or **contraband** (an object or material that is illegal to possess). Additionally, evidence may mean those things discovered during investigation, such as bloodstains, latent fingerprints, or plaster casts of shoe impressions in the earth.

**CONTRABAND**
An object or material that is illegal to possess.

These items of evidence, once found, are transported to the station and taken to the evidence room, where items are logged in and tagged. On the evidence tag are the date of the booking, the incident report number, the offense, the number of items (pieces), cash, from whom the evidence was taken, the location, the owner, and the signature of the officer who booked in the evidence. The property room officer signs in the evidence and the date received and then deposits the evidence in a secure location known as the **evidence locker**.

**EVIDENCE LOCKER**
A place, usually in a police station, where evidence gathered by law enforcement officers is deposited and kept safe from tampering pending its use in court.

Evidence can be checked out (or released) from the evidence locker to the defense attorney, or the prosecutor, or be sent to a laboratory as long as the chain of custody remains intact and each piece of evidence is logged in and out each time it is examined. The last entry in the log is usually the release for the purpose of taking it to court. Some items, such as drugs, blood, or other substances, must be carefully weighed or counted on the initial booking date, weighed or counted

again before being checked out, and finally again when returned. Laboratory technicians must also weigh the amount of any substance or material they use for testing purposes.

Unless released for the purposes just described, items remain in the evidence locker, free from illegal tampering, until they can be utilized as exhibits and admitted into evidence during trial proceedings. Legally, these articles found and retained do not become "evidence" until they are introduced in court proceedings and become exhibits. However, if the law enforcement officer does not take the proper precautions with these articles, they cannot be introduced into evidence. This is so because, generally, no item of physical evidence can be introduced at trial unless the law enforcement officer has maintained the proper "chain of custody" of the item. **Chain of custody** refers to how evidence is handled, and by whom, accounting for its whereabouts and condition from the moment it is found until the moment it is offered in evidence. It is the maintenance of custody and control over an object to such a degree that the custodian can prove the object is in the same condition as it originally was when custody was obtained.

CHAIN OF CUSTODY
The maintenance of custody and control over an object to such a degree that the custodian can prove the object is in the same condition as it originally was when custody was obtained.

The testimony of anyone with personal knowledge pertaining to the case is simply another form of evidence. A good definition of what constitutes evidence is as follows: Evidence is any information about the facts of a case, including tangible items, testimony, documents, photographs, or recordings, which, when presented to the jury at trial, tends to prove or disprove these facts.

Evidence may be classified in many different ways. There is a classification of evidence as real or demonstrative. There are direct evidence and circumstantial evidence. Evidence may be physical or intangible. Testimony of experts often relates to scientific evidence. The differences between these classifications of evidence is fully discussed in Chapter 3.

## THE RULES OF EVIDENCE

"Rules of evidence," or the "law of evidence," as they are also known, are a set of regulations that act as guidelines for judges, attorneys, and law enforcement professionals who are involved in the trials of cases. These guidelines determine how the trial is to be conducted, what persons may be witnesses, the matters about which they can testify, the method by which articles at a crime scene (physical evidence) are collected and preserved, what is admissible, and what is inadmissible. These rules make for the orderly conduct of the trial, promote efficiency, enhance the quality of evidence, and ensure a fair trial. They are the product of many years of judicial evolution and, more recently, legislative study. They were developed by trial and error, through logic and sound judgment, following the basic needs of

### FYI

There was a rather famous white Bronco involved in the 1994 O.J. Simpson trial. One of the big problems for the prosecution was the chain of custody of the Bronco. It was towed to a privately maintained storage lot and was not properly secured. During the time the Bronco was there, an employee broke into the vehicle and took some papers. Judge Ito, presiding at the trial of O.J. Simpson, ruled that the bloodstains later discovered on the Bronco's front console were admissible, but the defense, in its attack on the bloodstain evidence, made much of the fact that the Bronco was not properly stored. A proper chain of custody would have reduced or eliminated the impact of the defense's argument.

society. They make for the orderly conduct of the trial and ensure that evidence is properly presented at the trial. For example, the rules prevent one spouse from testifying against another, except in certain instances. The rules also generally forbid the use of hearsay as evidence and prohibit the admission of illegally obtained evidence. Law enforcement professionals should not look upon these rules as roadblocks in their efforts to secure convictions. Instead, they must realize that the objective of these rules is to ensure the integrity of all evidence, protect a defendant's rights, and ensure a fair trial.

## History of Trial by Jury

In the days before jury trials, proof of guilt or innocence was decided by ordeal, battle, or compurgation. For the most part, trial by ordeal was an appeal to the supernatural. An example of an ordeal used to determine guilt or innocence consisted of forcing an accused person to remove a rock from the bottom of a boiling pot of water. Any accused whose hands became blistered was found guilty. If the hands did not blister, the accused was acquitted. Acquittals under this system were, not surprisingly, rare.

Another kind of trial was introduced in England as a result of the Norman Conquest in 1066. This was trial by battle or combat, also known as "wager of battle." In this system the victim of a crime and the accused were forced into hands-on combat. Even litigants in civil matters were often required to ascertain who was right and who was wrong by this method of proof, with the one who was right being the winner. It was assumed that God would give victory to the one who was right. In criminal matters, if the accused won, the accused was acquitted. Judicial combat became a prevalent way to establish justice and continued to hold sway for a period of time, but eventually it died out as a means of establishing right and wrong.

A more humane method of ascertaining guilt or innocence utilized from time to time was trial by compurgation, also known as "wager of law." In this system the accused would testify in his or her own behalf, pleading innocence. The accused would be supported by helpers known as "compurgators," or oath helpers, often twelve in number. These supporters or helpers would testify to the good character of the accused and particularly his or her reputation for veracity. These persons would not necessarily know anything about the facts of the case, but merely came forth to tell how good the accused was. This system provided fertile grounds for perjury and proved to be as ineffective at determining the truth as the ordeal and combat methods. But it is considered to be the forerunner of our use of character witnesses.

Later, a trial by jury system began to make its appearance. It was in no way like the trial by jury as we know it. The first juries functioned by charging the accused with a crime, acting in much the same capacity as a grand jury of today. They served to substantiate an accusation, leaving the test of innocence or guilt to be decided by some other means, such as trial by ordeal, battle, or wager of law. As time passed and these methods lost favor, the accusatory jury was given a dual function. Jury members would gather information from the countryside, mostly hearsay (unsworn, out-of-court statements), concerning the alleged crime

and, later, would decide whether the accused should be held for trial. If a trial were ultimately held, the same jury would try the accused and render a verdict.

## INTRODUCTION TO THE LAW OF EVIDENCE AND THE PRETRIAL PROCESS

Later it was decided that the accusatory jury, known by then as the grand jury, should not also try the accused. Therefore, a separate jury, known as the petit jury, was selected for that function. This jury, like the accusatory jury, relied upon evidence from the countryside. Later this petit jury was composed of individuals with personal knowledge about the case. As time passed, witnesses who had information about the case were called to testify before the jury. However, much of the testimony of the witnesses was based upon hearsay information. Finally, around 1700 the trial by jury as we know it today was becoming a reality, characterized by the swearing in of witnesses and the right to cross-examine those witnesses. Additionally, hearsay evidence began to disappear from jury trials. It was then that our rules of evidence began to develop into what they are today.

### Development of the Rules of Evidence

Rules of evidence in jury trials are designed to keep some information from the jury even though it may be relevant. This is because sometimes relevant information cannot be received by the jury without violating some principle or policy that the law seeks to promote. For example, hearsay evidence (a statement made by a person out of court) may be very relevant but is often unreliable and untrustworthy. Hence, the hearsay rule bans the admission of hearsay at a trial, except in specific, defined situations. Likewise, evidence that has been obtained by a law enforcement officer in violation of a suspect's constitutional rights may be declared by the law to be inadmissible in order to deter future misconduct by officers. (The rules governing illegally seized evidence are discussed in detail in Chapter 9.)

Today, the rules of evidence in most jurisdictions are in the form of a statute or code, meaning that they are laws enacted by a legislative body. These evidence laws have supplanted the rules made by judges that evolved over the centuries during the development of the jury system, though many may be traced back to the judge-made rules. By far, the most common codification of evidence law is the **Federal Rules of Evidence** (**FRE**). The FRE apply in all federal courts throughout the United States and in the 43 states that have relied upon them as a model in adopting their own evidence codes.

**FEDERAL RULES OF EVIDENCE (FRE)**
The most common codification of evidence law—the rules that apply in all federal courts throughout the United States and in the 43 states that have relied upon them as a model in adopting their own evidence codes.

The evolution of the FRE began in 1942 when the American Law Institute adopted the Model Code of Evidence. The drafting and advisory committees for the Model Code included all the great figures in the field of evidence. The Model Code was considered to be reformist and controversial. So, although the Model Code stimulated debate and development of the law, it was not adopted by any jurisdiction. In 1954, the Uniform Rules of Evidence, authorized by the Commissioners on Uniform State Laws, were produced. While these rules were less radical, they were adopted by only two states. Finally, in 1961, the United States Supreme Court Chief Justice Earl Warren appointed a special committee to determine the feasibility and desirability of a federal evidence code. The committee

came back with an affirmative response. An Advisory Committee on Rules of Evidence was appointed to draft proposed rules and, in 1972, a revised draft of proposed rules was promulgated by the Supreme Court as the Federal Rules of Evidence, to be effective July 1, 1973. The rules were referred to Congress, which enacted the rules into law, effective July 1, 1975. The rules have been subsequently amended by Congress but have remained, for the most part, the same since enactment. Effective December 1, 2011, the entire FRE were "restyled," meaning that the language of the rules was simplified to render them more understandable. No substantive changes were made by this amendment to the FRE.

Forty-three state legislatures have adopted evidence codes patterned after the FRE as of January 2013. Those states that have not adopted the rules, however, are some with heavy population centers that account for a substantial number of the state criminal cases generated in the United States. States that have not yet adopted the rules include California, Connecticut (commentators differ about the extent to which the Connecticut Code of Evidence differs from the FRE)[1], Kansas, Massachusetts, Missouri, New York, and Virginia. Although these states follow rules of evidence based on the same general principles that exist in all of Anglo-American evidence law, their rules differ substantially in many respects from the FRE. Therefore, the rules of evidence of each state must be consulted to learn these differences. Moreover, even those states that have patterned their evidence codes on the FRE may have some substantial variances from the FRE.

The FRE, and their state counterparts, cover the entire field of judicial procedure. These rules apply equally in civil and criminal matters. Because the rules are complex, the line between what is admissible and what is inadmissible is very fine. Therefore, these rules may create much confusion for all who deal with them, including the law enforcement professional. Further, it is sometimes difficult to abide by some of the rules, primarily because an appellate court may invalidate or modify what was once perfectly legal and proper. The rules themselves, much like judges' interpretations of the rules, are constantly changing, many times becoming more restrictive on the officer and his or her work.

Despite such problems, the rules of evidence enable officers to know during the investigation what evidence will be admissible at a trial. It is the purpose of this book to concentrate on those rules of evidence most applicable to the work of the law enforcement professional and to help in understanding them.

## OVERVIEW OF THE COURT PROCESS: THE PRETRIAL PROCESS

Figure 1–1 is a flow chart of the criminal justice system. It covers the entire process from the observation or report of a crime through investigation, arrest, prosecution, trial, sentencing, appeal, service of sentence, and release. The court process from pretrial to appeal will be briefly described in this section. Later in this chapter, the pretrial process will be described in greater detail. The trial process will be described in greater detail in Chapter 2.

**BOOKING**
A formal processing of the arrested person by the police that involves recording the arrest, fingerprinting, photographing, and inventorying all the personal items taken from the suspect.

The process begins with an arrest based upon detection, investigation, and/or the filing of a criminal complaint against a person. After arrest, the suspect is booked. **Booking** is a formal processing of the arrested person by the police that involves recording the arrest, fingerprinting, photographing, and inventorying all

the personal items taken from the suspect. The prosecutor will decide whether to proceed with the charges against the defendant. If so, the accused will then make an initial appearance in court, at which time the judge will review the charges to determine the following:

1. that the crime is properly charged (i.e., that all required elements are alleged);
2. that the right person has been named as the defendant;
3. that there is a reasonable basis for the charges;
4. whether the accused has or needs counsel; and
5. what bail or other conditions for release pending trial will be set.

The next step is a preliminary hearing, at which the judge considers the prosecution's case to decide whether there is probable cause to believe the defendant committed the crimes charged. If so, the defendant is held to answer to formal charges in the form of a grand jury indictment or an information.

After the grand jury indicts or the prosecutor files an information formally charging the defendant, the accused appears in the trial court for arraignment and plea. At the arraignment, the defendant can enter a plea of guilty, not guilty, or *nolo contendere* (no contest), or he or she can stand mute. If the defendant pleads guilty (or *nolo contendere*), he or she enters the plea and the judge imposes the judgment of guilt upon the plea. At that time, or shortly after, the judge will impose sentence upon the defendant.

If the defendant pleads not guilty or stands mute at the arraignment, the case will be set for trial. Immediately after this, the lawyers will begin to file papers (pretrial motions) to test legal issues (such as the legality of any searches or seizures or change of venue) before trial, and they will exchange information about the merits of the case. This exchange of information is called **discovery** and is designed to lessen the element of surprise at trial. In most jurisdictions, there are time limits within which such pretrial motions must be filed, often within ten days to two weeks of arraignment. During this post-arraignment, pretrial period, the law enforcement officer will continue to investigate the case, maintain the evidence gathered, prepare further evidence when necessary, and assist the prosecution in any other way appropriate to ensure that the trial proceeds in a timely and effective manner.

DISCOVERY
The right afforded to the adversary in a trial to examine, inspect, and copy the evidence in the hands of the other side.

At the trial, the chief law enforcement officer assigned to the case may be called upon to assist the prosecutor by sitting at the counsel table in the courtroom.

At the very least, all officers who have personal knowledge of significant facts may be called upon to testify on behalf of the prosecution. At the conclusion of the trial, the jury or the judge will render a decision. If the judge or jury convicts the defendant, the judge will set a date for sentencing.

Usually, the probation department will prepare a pre-sentence investigation report (PSI), which recommends a sentence to the judge. The PSI is prepared by a probation officer who investigates all aspects of the defendant's life, seeking to verify all information by public and private records. The recommendation for sentencing contained in the PSI reflects the results of the PSI writer's evaluation of the defendant based upon the information gathered and reference to the sentencing guidelines, if any, that apply in the jurisdiction. If the defendant objects to the PSI, he or she can file an objection to the report, but there is no right of appeal.

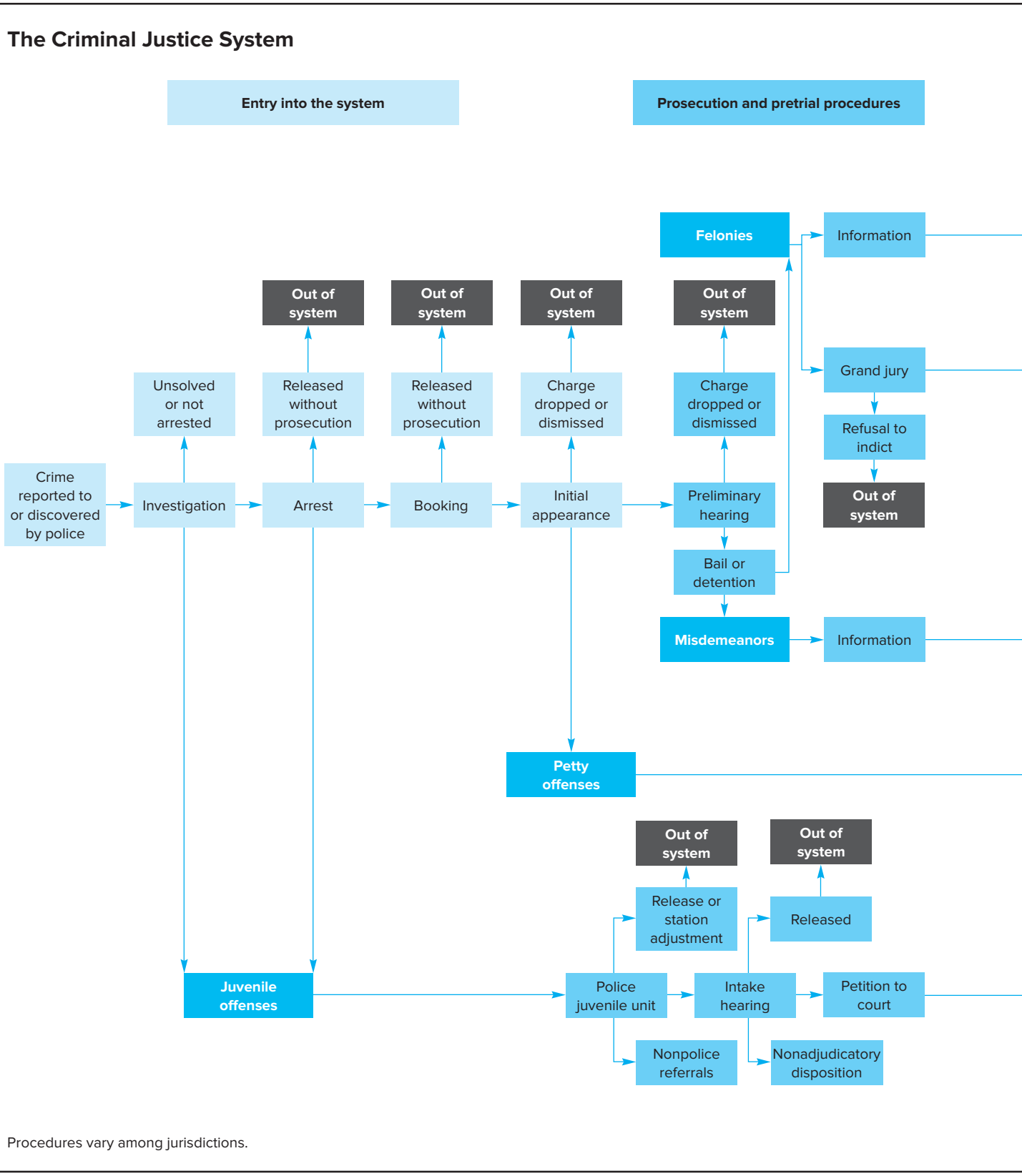
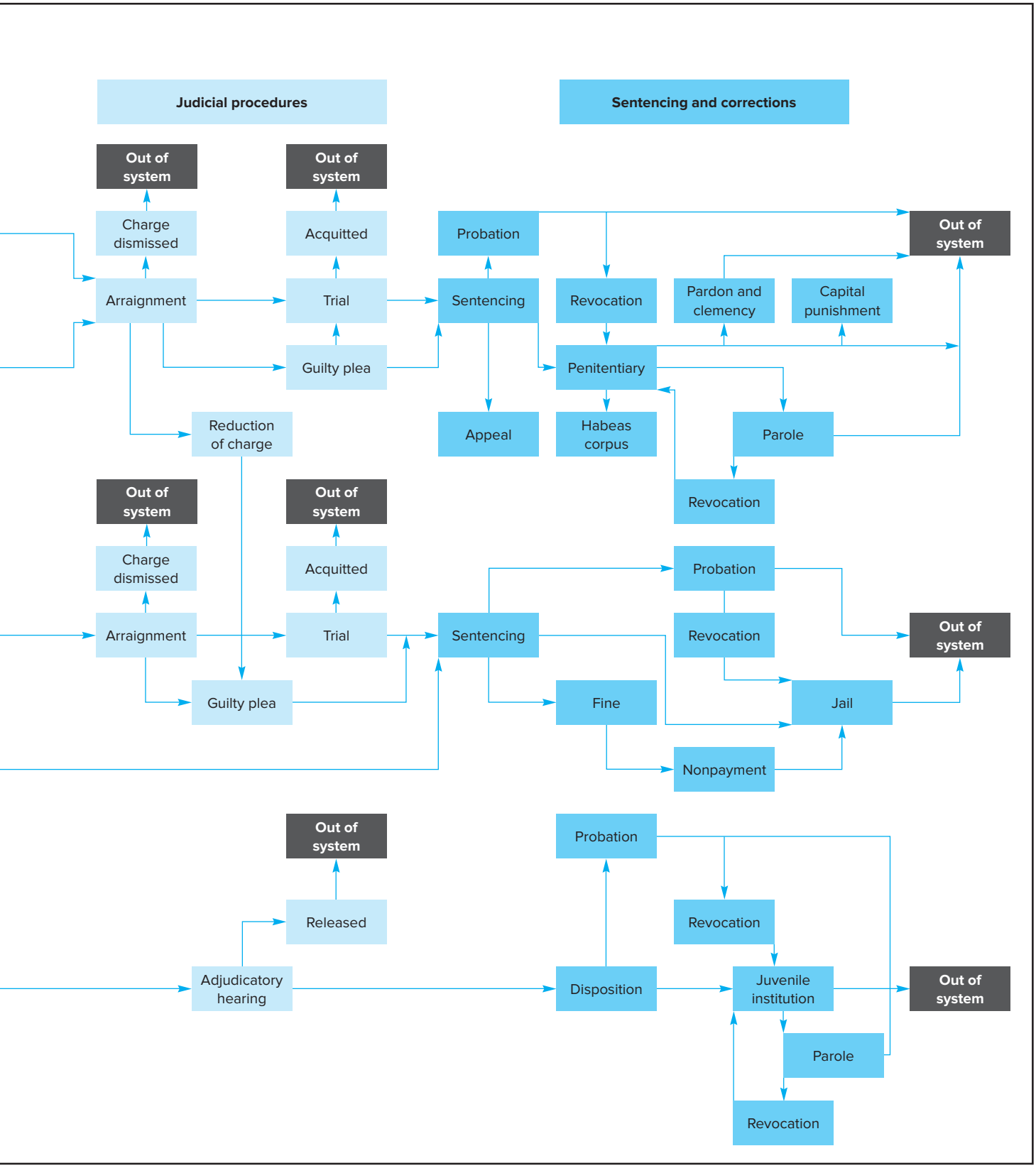



**FIGURE 1–1** Overview of the criminal justice system.


Judicial procedures
Sentencing and corrections
Out of system
Out of system
Charge dismissed
Acquitted
Probation
Out of system
Arraignment
Trial
Sentencing
Revocation
Pardon and clemency
Capital punishment
Guilty plea
Penitentiary
Reduction of charge
Appeal
Habeas corpus
Parole
Revocation
Out of system
Out of system
Charge dismissed
Acquitted
Probation
Arraignment
Trial
Sentencing
Revocation
Out of system
Guilty plea
Fine
Jail
Nonpayment
Out of system
Probation
Released
Revocation
Adjudicatory hearing
Disposition
Juvenile institution
Out of system
Parole
Revocation

The sentence is imposed after a hearing in court for that purpose. After sentencing, the defendant has a set number of days, usually 30, within which to issue a notice to appeal the conviction to the next highest court.

## PARTICIPANTS IN THE CRIMINAL JUSTICE SYSTEM

The criminal justice system consists of a number of distinct components. The criminal justice system is composed of law enforcement, the prosecution and defense, the courts, and corrections.

### Law Enforcement Personnel

The main law enforcement agency in the United States is the police force. Police departments in cities, sheriff departments in counties, state police, and state bureaus of investigation constitute the largest number of law enforcement officers in the country. The national law enforcement staff–population ratio was 2.8 police officers and civilian personnel per thousand citizens in 2016.[2] This statistic does not include the enormous number of private police who are employed on private property, such as office buildings, apartment buildings, malls, and private residential communities. Private police agencies are believed to be the largest employers of officers in the United States and outnumber the public police, in terms of both the number of agencies and the number of personnel.[3] In 2017, it was estimated that there were 1.1 million private security officers and 800,000 police officers in the United States,[4] and in 2008 it was estimated that there were 12,501 local police departments, 3,063 sheriff departments, 1,733 special police (such as park service or transit police), 50 state police agencies or highway patrols, and 638 other agencies, primarily county constable offices in Texas.[5]

The police are called upon to perform three basic functions:

1. enforcing the law, which includes detecting and investigating crimes, apprehending suspects, and assisting in the prosecution of offenders;
2. maintaining public order, which includes activities such as crowd control and crime prevention, as well as responding to domestic and civil disturbances; and
3. providing various public services, such as responding to emergencies, helping stranded motorists, and finding missing children.

Many police functions are carried out by low-ranking officers; for example, crime prevention is usually carried out by patrol officers assigned to cruise an area and watch for criminal activity. In the course of carrying out his or her duties, the police officer exercises substantial discretion as to whether to arrest a person suspected of criminal wrongdoing. It is impossible for the police to arrest all the offenders they encounter. Often, an officer will make a decision based on his or her interpretation of the spirit of the law rather than the letter of the law. Police functions, such as crime detection and investigation, are often performed by specialized squads consisting of older, more experienced, and higher-ranking officers. Most police departments spend the majority of their time in public services, such as traffic control, crowd control, and emergency services.

Nationally, the Federal Bureau of Investigation (FBI) is charged with the responsibility of investigating federal law violations. There are a number of other federal law enforcement agencies—notably the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, and Firearms; ICE (formerly the Customs Service and the Immigration and Naturalization Service, now combined under Homeland Security); the United States Marshals Service; the Border Patrol; the United States Park Service; the Bureau of Postal Inspection; and the Secret Service.

As a component of the law enforcement function, all law enforcement agencies provide assistance to the prosecuting attorneys in presenting evidence in court to prosecute those arrested for criminal activities. Therefore, the gathering of evidence, maintenance of evidence collected, and preparation of evidence for presentation in a court of law are major activities of the law enforcement agencies. In complicated cases, most law enforcement agencies employ specially trained and educated personnel who are familiar with such specialized fields as ballistics, fingerprint analysis, bloodstain analysis, DNA analysis, and other areas utilizing scientific methodology. Such specialists, often called criminalists or forensic investigators, have gained prominence through high-profile trials and popular television programs depicting crime scene investigations. In smaller departments, the officers will do as much of the scientific work as their expertise allows, and then seek help from other law enforcement agencies where necessary.

Depending on the type of case tried, other law enforcement personnel will be involved in the criminal court process. They might include investigators other than those employed by the police department, courtroom personnel (bailiffs, marshals, or other guards), jail personnel, probation officers, and prison personnel.

The staff of the courts, in addition to judges, includes courtroom clerks, judges' clerks, and bailiffs. Bailiffs are law enforcement personnel assigned to keep order in the courtroom, attend to juries, oversee prisoners who are in custody during their court appearances, and otherwise provide security in the courtroom. In many jurisdictions, the bailiff is a deputy sheriff; in the federal courts, the bailiffs are deputy United States Marshals.

## Prosecution and Defense

The American criminal justice system is an adversarial one. In it, the accused is presumed innocent until proven guilty and has a right to counsel even before he or she is brought to court. The adversary process by which guilt is determined is competitive, pitting the defense attorney and the prosecuting attorney against each other. The battle lines between these lawyers are often drawn based upon the conduct of the law enforcement officers working on the case. For example, if the investigating officers do a complete, solid job, the defense will find it difficult to argue the quality of the evidence.

The chief prosecuting attorney in most state jurisdictions is a full-time, public, county official, usually elected to office, with a staff of assistant prosecuting attorneys below. Depending on the state, the chief prosecuting attorney may be called the District Attorney, County Attorney, State's Attorney, or Prosecuting Attorney. In some states and in the federal system, the prosecutor is an appointed

official. In some rural areas, the office of the prosecutor may be occupied by only one person, who may work only part-time at the job. In many urban areas, the prosecutor's office is very large. For example, the Office of the District Attorney of Los Angeles County, which employs about 1,000 attorneys, may be the largest law office in the country, and certainly the largest prosecutorial office in the United States.[6]

The chief prosecutor in the federal system is the Attorney General of the United States. In each of the 94 federal districts, the chief prosecuting officer is the United States Attorney for that geographic district. The Attorney General and the United States Attorneys are all appointed by the President of the United States. The assistant United States Attorneys are all federal employees.

It is the job of the prosecutor to pursue a case developed by the police until the case terminates by trial, guilty plea, or dismissal. The prosecutor must decide whether to pursue a formal charge and, if so, what crime to charge. The prosecutor is also responsible for conducting any plea negotiations, deciding whether to dismiss charges, and trying the case.

Since the 1970s, the Constitution of the United States has required that a defendant who is sentenced to any time in jail or prison is entitled to an attorney, whether or not he or she can afford one. Also, any suspect who is in custody and interrogated by the police while in custody is entitled to warnings (*Miranda* warnings) about the right to remain silent and to have an attorney present during interrogation, whether or not he or she can afford one. Therefore, state and federal governments provide defense counsel to many criminal suspects and defendants who cannot afford to hire a lawyer on their own. This is accomplished through either the private bar (the local attorneys' association) or a public defender system. Defense counsel must zealously represent the criminal defendant from the point of interrogation through the trial process, demanding that the prosecution respect the defendant's rights, treat the defendant fairly, and meet the burden of proof beyond a reasonable doubt in the event the case goes to trial.

## Courts

There is a dual judicial system in the United States: The federal and state courts coexist. The federal court system applies nation-wide, and federal courts are located in each state. These courts coexist with individual state court systems. Whether a defendant is tried in a federal or state court depends on which court has jurisdiction over the case.

JURISDICTION
The power or authority of the court to act with respect to any case before it.

The **jurisdiction** of a court is the power or authority of the court to act with respect to any case before it. The acts involved in the case must have taken place within or have had an effect within the geographical territory of the court, or there must be some statutory authority for the court's power. There are currently federal trial courts in each state and thirteen United States Courts of Appeal, arranged by circuit (eleven numbered circuits, a District of Columbia circuit, and one federal circuit—see Figure 1–2). The lowest level of the federal court system consists of 94 District Courts located in the 50 states (except for the District of Wyoming, which includes the Montana and Idaho portions of Yellowstone National Park); Puerto Rico; the District of Columbia; and the United States Territories of Guam, the Virgin Islands, and the Northern Mariana Islands. Each

| Court of Appeals | Districts Included in Circuit |
|---|---|
| Federal Circuit | United States |
| District of Columbia Circuit | District of Columbia |
| First Circuit | Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico |
| Second Circuit | Connecticut, New York, and Vermont |
| Third Circuit | Delaware, New Jersey, Pennsylvania, and the Virgin Islands |
| Fourth Circuit | Maryland, North Carolina, South Carolina, Virginia, and West Virginia |
| Fifth Circuit | Louisiana, Mississippi, and Texas |
| Sixth Circuit | Kentucky, Michigan, Ohio, and Tennessee |
| Seventh Circuit | Illinois, Indiana, and Wisconsin |
| Eighth Circuit | Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota |
| Ninth Circuit | Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands |
| Tenth Circuit | Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming |
| Eleventh Circuit | Alabama, Florida, and Georgia |

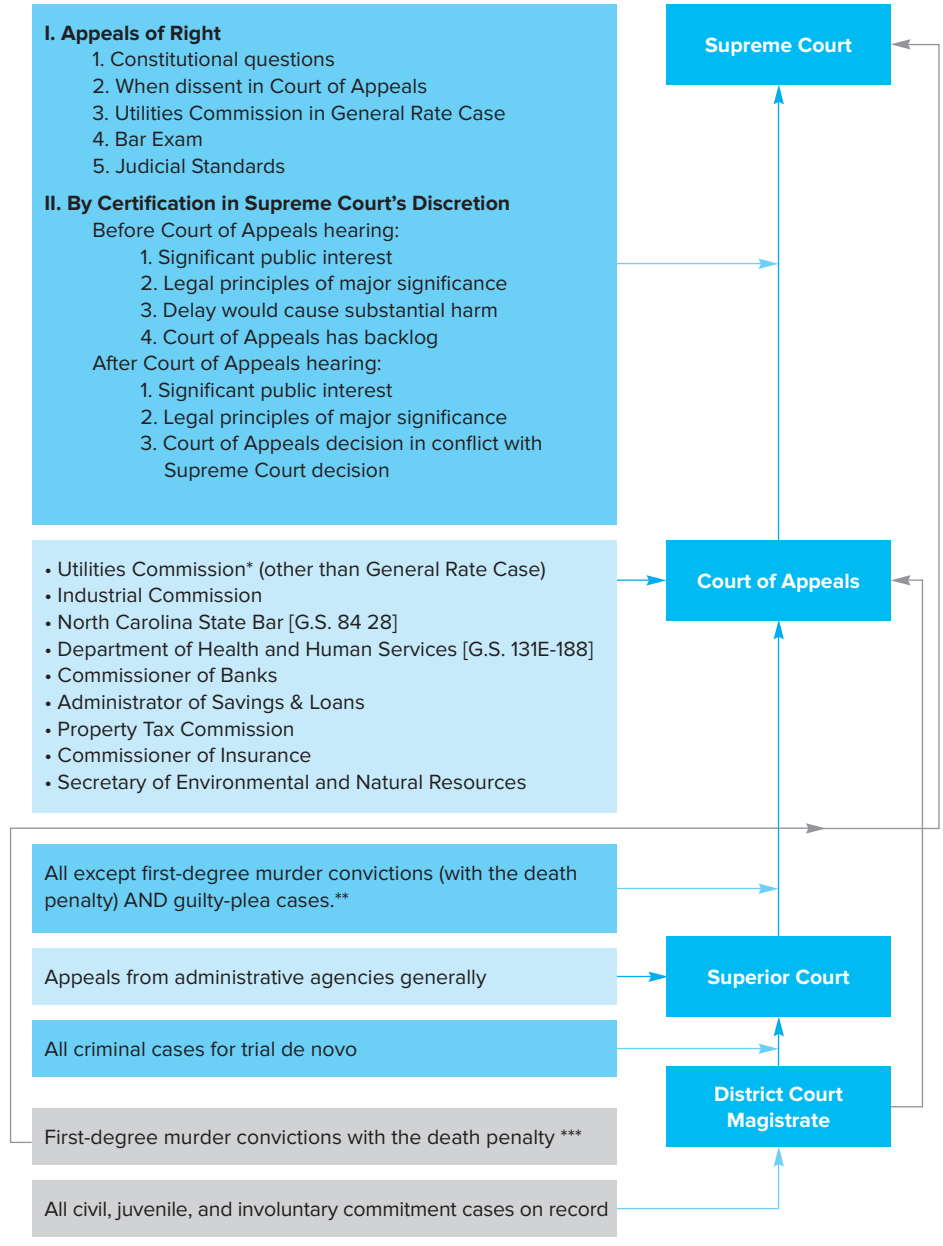
**FIGURE 1–2** United States Courts of Appeal.
**Source:** Administrative Office of the United States Courts.

state has at least one United States District Court, and some, such as New York and California, have as many as four. District Courts are the trial courts of the federal system and have original jurisdiction over cases charging defendants with violation of federal criminal laws. For example, crimes involving such matters as possession and sale of certain dangerous drugs, transportation of stolen property across state lines, and robbery of federally insured banks will be tried in the federal courts even though the crime was committed within a state or local geographical area. In addition, crimes committed on federal lands or property are subject to federal trial court jurisdiction.

Law enforcement officers will hear the term "venue" in connection with the power of a court to hear a case. **Venue** refers to the neighborhood, place, or county in which an act is declared to have been done or, in fact, happened, thus defining the particular county or geographical area in which a court with jurisdiction may hear and determine a case. Venue deals with locality of suit, that is, with the question of which court, or courts, of those that possess adequate personal and subject matter jurisdiction may hear a case. "Venue" does not refer to jurisdiction at all. "Jurisdiction" of the court means the inherent power to decide

**VENUE**
The neighborhood, place, or county in which an act is declared to have been done or, in fact, happened, thus defining the particular county or geographical area in which a court with jurisdiction may hear and determine a case.

**FIGURE 1–3** Flow of cases in the courts of North Carolina.
**Source:** www.nccourts.gov (https://perma.cc/3GGA-BTY3) (last visited 4/28/18).




* Appeals from agencies must be heard by Court of Appeals before Supreme Court.

** Post-conviction-hearing appeals and reviews of valuation of exempt property under G.S. Ch. 1C are final with Court of Appeals.

*** The only first-degree murder cases with direct appeal to the Supreme Court (tried after December 1, 1995) are those where defendant receives a sentence of death.

a case, whereas "venue" designates the particular county or city in which a court with jurisdiction may hear and determine the case. As such, while a defect in venue may be waived by the parties, lack of jurisdiction may not.

Each state also has its own court system. Most states' structures are similar to that of the federal courts—a trial court, an intermediate appellate court, and a supreme court. (See Figure 1–3, showing the flow of cases in the North Carolina State Court system.) In most states, the trial courts are organized by county.

Furthermore, in most states, the trial courts are divided into two levels, an inferior and a superior court. The inferior court, often called the municipal court or justice of the peace court, conducts preliminary hearings in felony cases and trials in cases involving misdemeanors or petty offenses. The superior court, sometimes called the circuit or district court, is a court of general jurisdiction and has jurisdiction over felony trials.

Federal offenses are prosecuted in federal court and all state offenses are prosecuted in state courts. Since about 1930, the United States Supreme Court has been interpreting the Due Process Clause of the Fourteenth Amendment to have incorporated all but two provisions of the Bill of Rights into constitutional criminal procedural requirements that apply to the states[7]:

- the right to trial by jury in cases involving serious offenses (Sixth Amendment);
- the right to assistance of counsel in any case in which a sentence of more than six months in jail or prison is imposed (Sixth Amendment);
- the privilege against self-incrimination, including a ban against comment by the prosecution on the defendant's failure to testify (Fifth Amendment);
- the presumption of innocence and requirement of proof beyond a reasonable doubt (Fifth and Fourteenth Amendments' Due Process Clauses);
- the freedom from unreasonable searches and seizures (Fourth Amendment);
- the right to silence and counsel during police interrogations (in aid of the Fifth Amendment's privilege against self-incrimination);
- the right to compel witnesses' attendance at trial, to confront them, and to cross-examine them (Sixth Amendment);
- the right to a speedy and public trial (Sixth Amendment);
- the freedom from double jeopardy (Fifth Amendment);
- the freedom from cruel and unusual punishment (Eighth Amendment); and
- the freedom from racial and sexual discrimination in substantive and procedural criminal law (Fourteenth Amendment).

Violation of any of these constitutional requirements can be the subject of both state appeals and separate federal suits by prisoners, known as ***habeas corpus*** claims (a form of legal action that seeks to free a prisoner from unlawful confinement).

*HABEAS CORPUS*
A form of legal action that seeks to free a prisoner from unlawful confinement.

There is also a juvenile court system in each state. Criminal offenders under a certain age, usually 18 or 16, are dealt with in juvenile courts by way of civil, rather than criminal, proceedings. In cases that are serious, the juvenile may be certified for prosecution as an adult, and the case will then be heard in adult criminal court. Many youthful offenders who commit offenses that would be crimes if committed by an adult are tried in the juvenile courts, the purpose of which is to have specialized judges determine the youth's involvement in the offense and whether the child should receive rehabilitation rather than punishment. Juvenile court procedure was intended to be more informal than criminal courts, but the United States Supreme Court decisions since the 1960s have imposed due process restrictions on the juvenile courts that have caused juvenile proceedings to become more formal.

## APPLICATION CASE

The case of *In re Gault*[8] was the vehicle for the United States Supreme Court to declare that a juvenile is a citizen and is entitled to the protections of the Bill of Rights when juvenile court proceedings result in the child's deprivation of liberty. In the case, the 15-year-old child was committed as a juvenile delinquent to a state industrial school for his involvement in making lewd telephone calls. His commitment followed a hearing in the juvenile court of Arizona, in which he and his parents claimed denial of notice of charges, right to counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination. The United States Supreme Court agreed that the state had denied these basic constitutional rights and that even state juvenile court proceedings must accord these rights to children in order for due process to be met when a child's liberty is at stake.

## Correctional Institutions and Agencies

**Jails** are used to maintain custody of persons arrested pending prosecution and to maintain custody of those sentenced to short periods of confinement. On any given day, over 700,000 adults are being held in jail.[9] The majority of inmates are serving sentences for misdemeanor convictions of less than one year. Most jails are operated by cities, counties, or both. Jails provide few services, since most inmates are there temporarily. Usually, there are separate jail facilities for women and juveniles.

All states maintain state penal institutions (**prisons**), consisting of state penitentiaries, reformatories, and training facilities for juveniles. Often, the institutions are graded according to level of security, ranging from high, or maximum, to low, or minimum, security. As of March 2018, there were 1,719 state prison facilities in the United States,[10] with a total population of 2.3 million and of 225,000 federal prisoners.[11] Prison facilities are administered by a separate correctional agency of the state or federal government.

Most court systems have a probation department attached to them. The **probation department** investigates defendants prior to sentencing and provides a pre-sentence investigation probation report to the court. Just over 4.5 million adults were on probation at year-end 2016 in the United States.[12] In addition, the probation department provides supervision over those persons placed on probation after conviction.

**Probation** is the most frequent sentence imposed on first-time offenders. Probationers are released back into the community and are required to obey the rules and conditions set out in writing by their probation officers after approval by the judge. Conditions include not being in possession of a firearm, not frequenting places where drugs or alcohol are used, obeying all city and state laws and ordinances, not associating with known criminal offenders, attempting to find a job, avoiding the use of alcohol and drugs, submitting to urinalysis, and reporting to a probation officer periodically. The probation service is designed to provide counseling, but because of the overwhelming case-load, probation officers usually are

**JAILS**
The facilities used to maintain custody of persons arrested pending prosecution and to maintain custody of those sentenced to short periods of confinement, usually less than one year. Most jails are operated by cities, counties, or both.

**PRISONS**
Penal institutions maintained by the state or federal government consisting of state penitentiaries, reformatories, and juvenile training facilities.

**PROBATION DEPARTMENT**
An agency that investigates defendants prior to sentencing, provides a pre-sentence probation report to the court, and supervises persons placed on probation after conviction.

**PROBATION**
The most frequent sentence imposed on first-time offenders, whereby the offender is released back into the community and required to obey the rules and conditions set out in writing by the probation officer after approval by the judge.

only able to engage in nominal supervision. The sentencing judge gives probation and the judge can take it away if the probationer continually disregards the rules and regulations or is involved in another crime.

If a person is sentenced to a term in prison but is released on parole prior to the expiration of the full sentence, the person is said to be **paroled** under supervision into the community. Supervision on parole is similar to probation supervision, except that the **parole service** is an agency of the state correctional system, rather than the court system. Violations of probation and terms of parole lead to hearings that, in turn, may lead to warning, incarceration, or re-incarceration.

PAROLED
When a person who has been convicted of a felony and sentenced to a term in prison is released, under supervision, into the community, prior to the expiration of the full sentence.

PAROLE SERVICE
An agency of the state correctional system that is similar to the probation department but supervises those released on parole from the penitentiary.

## THE PRETRIAL COURT PROCESS

### Arrest

The criminal process most often begins with an arrest. An officer can arrest an individual only if probable cause exists. Probable cause deserves a thorough discussion, which it receives in Chapter 9. At this point, it is enough to say that **probable cause to arrest** exists when a police officer has enough evidence to lead a reasonable person to believe that a crime has been committed and that the suspect was the one who committed the crime. An officer possessing probable cause may arrest the suspect without a warrant, unless the suspect is in his or her home.[13] Alternatively, the officer can obtain a warrant from a judicial officer authorizing arrest of the suspect at home if the officer can show sufficient probable cause. Arrests made by police on patrol are made without a warrant because of the need for a speedy response. Warrants are usually obtained during an investigation of a crime.

PROBABLE CAUSE TO ARREST
The level of information required for a police officer to arrest a suspect—enough evidence to lead a reasonable person to believe that a crime has been committed and that the suspect was the one who committed the crime.

The law enforcement officer has the responsibility for filing the **criminal complaint**, whether in advance of an arrest in order to obtain an arrest warrant or after an arrest is made without a warrant. The complaint charges the defendant

CRIMINAL COMPLAINT
A document that charges the defendant with a specific crime, usually signed by a law enforcement officer or prosecutor.

©redhumv/Getty Images

An officer's report may become the focus of intense pretrial scrutiny.

AFFIDAVIT
A written statement, sworn under oath, in which the officer states the facts within his or her personal knowledge that support the criminal complaint.

with a particular crime and is supported by an **affidavit**, a written statement, sworn under oath, in which the officer states the facts within his or her personal knowledge that support the complaint.

Not all arrests result in prosecution. The question of whether to prosecute is not made by the police officer. That decision is made by the prosecuting attorney and the courts.

## Bail

Most suspects are entitled to release after arrest and booking, either on the accused's own recognizance or on bail. In less serious cases, this release can be approved at the station house. In more serious cases, the judge decides conditions for release at the initial appearance. Often you will hear that a person is released on his or her own recognizance. **Recognizance** is a promise to appear in court. **Bail** is a deposit of cash, other property, or a bond guaranteeing that the accused will appear in court. A **bond** is a written promise to pay the bail sum, posted by a financially responsible person, usually a professional bondsman. Bail is usually not very high, except in cases where it is shown that there is a risk that the accused will fail to appear for trial or poses a threat to the community, as well as in capital cases.

RECOGNIZANCE
A promise to appear in court.

BAIL
A deposit of cash, other property, or a bond guaranteeing that the accused will appear in court.

BOND
A written promise to pay the bail sum, posted by a financially responsible person, usually a professional bondsman.

## Plea Bargaining

Following arrest, either before or after charges have been made, counsel for the accused and the prosecutor may meet and discuss the charges to be filed against the accused and whether the accused will enter a plea of guilty or not guilty. These discussions are called plea negotiations or plea bargaining. Plea negotiations resolve over 90 percent of all prosecutions filed, both state and federal (94 percent state and 97 percent federal).[14] Plea negotiations may result in a reduction of the original charge, which reduces the level of penalty that the judge may impose upon the accused. Another result of plea negotiations is for the prosecution to recommend a specific sentence to the court, usually involving a lesser punishment than otherwise would be the case. In return, the defense enters a plea of guilty, and the prosecution does not have to go through the time and expense of taking the case to trial.

## Charging the Crime

After arrest, the prosecutor will file a charge against the defendant if the prosecutor is satisfied that the evidence is sufficient to support the charge and that the case is worthy of prosecution. After the prosecutor files the charge, a judge holds a **preliminary hearing** to determine whether probable cause exists. In some jurisdictions, the preliminary hearing is minimal, providing only a summary review of the sufficiency of the evidence. In other jurisdictions, the preliminary hearing is very extensive, amounting to a mini-trial.

PRELIMINARY HEARING
A court proceeding in which a judge decides whether there is enough evidence that an accused person committed a crime to hold that person for trial.

At the preliminary hearing, the prosecutor is likely to call one or more law enforcement officers to the witness stand. The officer's duty is to testify to those facts known to the officer that prove that there is probable cause to believe that the defendant committed a particular crime. At the preliminary hearing in most jurisdictions, the question of probable cause is one that can be proven by evidence

## ON THE JOB

The law enforcement officer should be careful to give only that information necessary to show probable cause at the preliminary hearing. Testimony by the officer at the preliminary hearing makes a record that defense counsel can use later at trial to try to trip up the officer. Moreover, further investigation from the time of the preliminary hearing, sometimes called the prelim, to the time of the trial may change the way the case is tried. Therefore, the officer should testify only to the bare minimum to show probable cause. On the other hand, the officer cannot be so tight-lipped as to fail to provide the necessary information to supply probable cause.

in the form of hearsay. The issue is whether the information possessed by the prosecution makes it probable that the defendant is the person who committed the crime. Proof beyond a reasonable doubt is not required at the preliminary hearing. On the other hand, the officer will be subjected to cross-examination by the defense in an attempt to attack the prosecution's case. At the very least, defense counsel will try to get as much information as possible about the prosecution's case during the preliminary hearing.

If the prosecution makes its showing of probable cause, the defendant is required to answer to the charge in the trial court. If the crime is a misdemeanor or petty offense, the defendant will respond to the complaint filed by the prosecutor and enter a plea of guilty or not guilty. If the plea is not guilty, the case will be assigned to a court for trial. When the crime is a felony, the procedure is more complex. The common law rule required that a person could be charged with a felony only by a grand jury indictment.

A **grand jury** is a panel of persons chosen through strict court procedures to review criminal investigation and, in some instances, to conduct criminal investigations. Grand juries decide whether to charge crimes in the cases presented to them or investigated by them. The United States Supreme Court has ruled that states can charge using an information rather than an indictment if they so choose. When a grand jury charges a person with a crime, it does so by issuing an **indictment**.

**GRAND JURY**
A panel of persons chosen through strict court procedures to review criminal investigations and, in some instances, to conduct criminal investigations. Grand juries decide whether to charge crimes, in the form of an indictment, in the cases presented to them or investigated by them.

**INDICTMENT**
A formal written accusation issued by a grand jury charging a specified person with the commission of a specified crime, usually a felony.

## APPLICATION CASE

Early in the development of the criminal justice system in the United States, there was some question whether a state proceeding to prosecute an accused by filing an information following a preliminary hearing, rather than using a grand jury indictment procedure, gave accused persons their required rights under the Fifth Amendment. This question was answered in the 1883 case of *Hurtado v. California*,[15] in which the preliminary hearing, in lieu of a grand jury hearing, was permitted. The Supreme Court of the United States held that the requirement of a grand jury set forth in the Fifth Amendment applies to the federal government, not the states. Furthermore, the Court held that the states did not need to proceed by means of a grand jury indictment in order to satisfy constitutional fairness requirements with respect to felony prosecutions. The *Hurtado* case stands as good case law even today.

In the federal system and in many states, felonies can still be prosecuted only by indictment of a grand jury. In those jurisdictions, after the police investigate a crime, the prosecutor presents the case to the grand jury. The grand jury hears only the prosecutor's case and decides whether to indict the accused. If the grand jury votes to indict, then a bill of indictment, or true bill, is issued. If the grand jury votes not to indict, a no bill is issued. Grand jury proceedings are secret. Only the jurors, the prosecutor, and witnesses are present. The defendant, the defense counsel, and the public cannot be present during grand jury proceedings. When the defendant has been arrested on the street, the case can be presented to the grand jury after arrest. In those jurisdictions that do not follow the grand jury procedure, felony cases are prosecuted by the filing of a formal charge, an **information**, by the prosecutor. The information is merely a piece of paper on which the formal charge appears, and that is signed by the prosecutor.

INFORMATION
A formal written accusation submitted to the court by the prosecutor, alleging that a specified person has committed a specified crime. It is used in many jurisdictions instead of an indictment.

Every state, except two and the District of Columbia, uses a grand jury to indict. Both the District of Columbia and twenty-three states, i.e., Alabama, Alaska, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and West Virginia, require the use of indictments to charge certain criminal offenses. These states generally follow federal practice by requiring indictments for serious crimes, while allowing other charging instruments to be used for minor felonies and misdemeanors.

In twenty-five states, i.e., Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming, the use of indictments is optional. Prosecutors can choose an indictment or an information to charge any offense.

## Arraignment and Plea

After the formal charges have been filed against a defendant, either by indictment or information, the defendant appears in court at a proceeding called an arraignment or **arraignment and plea**. This is the defendant's appearance to respond formally to the charges. The defendant will enter a plea of guilty, not guilty, or, in some special cases, *nolo contendere* (no contest). If the defendant pleads guilty, then the case will be set for sentencing. If the defendant pleads not guilty, the case will be set for trial. There is usually nothing that the law enforcement officer needs to do at the arraignment and plea. In fact, it is unlikely that the prosecutor will even need the officer present.

ARRAIGNMENT AND PLEA
The defendant's appearance in court after the filing of a formal charge (either by indictment or information), at which the defendant enters a formal plea to the charges, and at which issues about right to counsel and bail are decided by the judge.

## Pretrial Motions

After arraignment and plea and before trial, the defense attorney will file certain pretrial motions. The types of motions that will be filed include a motion to suppress evidence based on claimed violations of the defendant's constitutional rights, a motion for severance of defendants or charges, a motion for discovery

of evidence or information, a motion for change of venue, a motion for a bill of particulars, a motion to determine the defendant's competency to stand trial, a motion for appointment of experts, a motion to continue the trial, or a motion to dismiss the charges.

Often these motions will require that the trial court hold a hearing to decide them. The officers involved in the case may be called upon to testify at those hearings.

### Pretrial Issues for the Law Enforcement Professional

The prosecuting attorney will be concerned with some technical legal matters during the time after arraignment and before trial. For example, the defendant has a right to challenge the validity of the indictment or information by moving to dismiss the charges. Any claims that the defendant's constitutional rights have been violated may be raised. Both the defense and the prosecution may ask the trial judge to decide other legal questions, including what evidence will be admissible at trial.

The law enforcement officer will be involved in numerous ways during the pretrial period. First, the officer may continue investigating the case. In many instances, the criminal investigation will continue up to the time of trial and sometimes even during the trial itself.

All the officer's reports will be of potential significance at trial. As a result, the officer will want to organize, review, and summarize his or her own reports and even become familiar with the reports of other officers.

The evidence that has been gathered must be maintained and prepared for trial by either the police or criminalists involved in the investigation. Any new evidence that has been identified should similarly be gathered and properly maintained. Where an officer or a criminalist has been responsible for particular items of evidence, he or she will be called upon at trial to lay the foundation for that evidence's admission and should be aware of the questions the prosecutor will ask and the answers that must be given to lay that foundation. Officers, criminalists, or forensic investigators will also testify as to tests that may have been done to the evidence. This textbook will provide you with the knowledge you will need to gather, prepare, and present evidence in a case in a proper and effective manner.

# REVIEW AND APPLICATION

## SUMMARY

(1) Evidence is any information about the facts of a case—including tangible items, testimony, documents, photographs, and tapes—that, when presented to the jury at trial, tends to prove or disprove these facts.

(2) The objectives of the rules of evidence are to know what is admissible at a trial, ensure the integrity of all evidence, protect a defendant's rights, and ensure a fair trial.

(3) The most common version of evidence law in the United States is the Federal Rules of Evidence (FRE).
(4) The police are called upon to perform three basic functions:
   (a) enforcing the law, which includes detecting and investigating crimes, apprehending suspects, and assisting in the prosecution of offenders;
   (b) maintaining public order, which includes activities such as crowd control and crime prevention, as well as responding to domestic and civil disturbances; and
   (c) providing various public services, such as responding to emergencies, helping stranded motorists, and finding missing children.
(5) It is the job of the prosecutor to take a case from the police and pursue it until the case terminates by trial, guilty plea, or dismissal. The prosecutor must decide whether to pursue a formal charge and, if so, what crime to charge. Defense counsel must zealously represent the criminal defendant from the point of interrogation through the trial process, demanding that the prosecution respect the defendant's rights, treat the defendant fairly, and meet the burden of proof beyond a reasonable doubt in the event the case goes to trial.
(6) The federal court system applies nation-wide, and federal courts are located in each state. Each state also has its own court system. The federal courts coexist with individual state court systems. Whether a defendant is tried in a federal or state court depends on which court has jurisdiction over that case. Most states' structures are similar to that of the federal courts—a trial court, an intermediate appellate court, and a supreme court.
(7) Probable cause to arrest is when an officer possesses enough evidence to lead a reasonable person to believe that a crime has been committed and that the suspect was the one who committed the crime.
(8) A defendant can be formally charged with a serious crime in the United States either by indictment of a grand jury or by the filing of an information by the prosecution after a preliminary hearing.

## KEY TERMS

law of evidence 4
evidence 4
contraband 4
evidence locker 4
chain of custody 5
Federal Rules of Evidence (FRE) 7
booking 8
discovery 9
jurisdiction 14
venue 15
*habeas corpus* 17
jails 18
prisons 18
probation department 18
probation 18
paroled 19
parole service 19
probable cause to arrest 19
criminal complaint 19
affidavit 20
recognizance 20
bail 20
bond 20
preliminary hearing 20
grand jury 21
indictment 21
information 22
arraignment and plea 22

## QUESTIONS FOR REVIEW

1. What is evidence?
2. Describe the purpose of the rules of evidence.
3. What law of evidence exists in a majority of American jurisdictions?
4. List some common activities of police officers.
5. Describe what a prosecuting attorney does. How is this different from the defense attorney's job?
6. What courts are in the federal judicial system? How does this compare with a typical state court system? What are the courts in your state?
7. When may a police officer arrest a person?
8. What is a grand jury indictment? When must it be used?

## WORKPLACE APPLICATIONS

1. When an officer secures an item of physical evidence, he or she must ensure a proper chain of custody of it, so that the item can be introduced into evidence in court. Assume that an officer has obtained a knife from the scene of a murder. What steps should the officer take to maintain a chain of custody of the knife up to the time the officer appears in court with the knife for the preliminary hearing?
2. Before a preliminary hearing is held in a criminal case, the law enforcement officer may be approached in person or by telephone by an attorney hired or appointed to represent the defendant. The attorney will want to know what the officer's testimony at the preliminary hearing will be. What do you think an officer should do when contacted by defense counsel before the preliminary hearing?

## ENDNOTES

1. *See* 2018 Connecticut Court Order 0411 (C.O. 0411).
2. *2016 Crime in the United States, Overview Table 23,* FBI (2017), https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-23/table-23-overview.pdf (last visited 04/22/18).
3. *See* Niall McCarthy, Private Security Outnumbers the Police in Most Countries [Infographic], Forbes https://www.forbes.com/sites/niallmccarthy/2017/08/31/private-security-outnumbers-the-police-in-most-countries-worldwide-infographic/#3f74b015210f (last visited 4/28/18).
4. *Id.*
5. bjs.ojp.usdoj.gov/content/pub/pdf/csllea08.pdf (last visited 01/21/13).
6. The Los Angeles County District Attorney reported in April 2018 that it employed nearly 1,000 Deputy District Attorneys; http://da.lacounty.gov/about/office-overview (last visited 4/28/2018).
7. James J. Tomkovicz & Welsh S. White, *Criminal Procedure: Constitutional Constraints upon Investigation and Proof* xxvi n.2 (8th ed. 2017). Only the Fifth Amendment's requirement of a grand jury indictment for "capital or otherwise infamous crimes" and the Eighth Amendment's prohibition of "excessive bail" have not specifically been incorporated.
8. In re Gault, 387 U.S. 1 (1967).
9. The most recent statistic, mid-year 2016, was that 740,700 inmates were incarcerated in "the nation's local jails." https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6186 (last visited 4/28/18).
10. Peter Wagner & Wendy Sawyer, Prison Policy Initiative, Mass Incarceration: The Whole Pie, https://www.prisonpolicy.org/reports/pie2018.html (last visited 4/28/18).
11. http://www.bjs.gov/content/pub/pdf/p12ac.pdf (last visited 11/8/13).
12. *Id.*
13. Steagald v. United States, 451 U.S. 204 (1981).
14. Erica Goode, *Stronger Hand for Judges in the "Bazaar" of Plea Deals,* N.Y. Times (March 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html (last visited 4/28/18).
15. Hurtado v. California, 110 U.S. 516 (1883).

# 2 THE TRIAL PROCESS

## CHAPTER OUTLINE



## CHAPTER OBJECTIVES

In the prior chapter, we discussed the criminal process from arrest through pretrial. In this chapter, an overview of a criminal trial is presented. After reading this chapter you will be able to:

- Describe the sequence of events in a typical criminal trial.
- Contrast the level of proof required in a criminal case with the level of proof required in a civil case.
- Name the two types of challenges of a juror used during *voir dire.*
- Describe the various duties of a judge in a criminal trial.
- Cite a working definition of reasonable doubt.
- Contrast the roles of the prosecuting attorney and defense attorney.
- Describe the burden upon the prosecution in its case-in-chief.
- List the five requirements for being a witness.
- State the difference between the types of questions allowed on direct and on cross-examination.
- Identify the order of presentation of the closing argument.

## INTRODUCTION

Each arrest of a person formally accused of a crime must be followed by some kind of prosecutorial action, including dismissal. If the accused enters a plea of guilty to the charge for which he or she was arrested, the prosecutorial procedure is comparatively simple, and the law enforcement officer usually does not become involved. On the other hand, if the accused enters a plea of not guilty, the trial that follows can become a very time-consuming, complicated ordeal. The officer will play an important role in the entire process. For this reason, before beginning a detailed discussion of the law of evidence, a brief review of the structure and procedure of a trial is helpful to gain a better understanding of the rules of evidence and their application. Although the sequence of events in a criminal trial may vary slightly from jurisdiction to jurisdiction, the sequence depicted in Figure 2–1 is typical.

Some people think that a trial is a search for the truth and that juries determine what actually happened in a case by looking at the evidence presented in court. Other people believe that, since it is impossible to determine what truly happened in a case when humans attempt to re-create history through evidence, the true aim of a trial is to bring the competing sides to a peaceful conclusion and to do justice. In either case, a trial is society's last-ditch effort to prevent the chaos that would result if individuals tried to settle disputes themselves. Regardless of which definition of purpose is used, the American justice system is set up as an adversarial system. This means both sides are fighting to win. Winning a trial means convincing the jury or a judge to believe one side's evidence rather than the other side's.

### FYI

The problem of re-creating historical fact in a trial is the subject of the classic 1950 Japanese film *Rashomon*. The film depicts a rape-murder and the criminal's subsequent trial in ninth-century Japan. The double crime is depicted four times—from the viewpoints of the three participants (the criminal, the woman he raped, and her husband) as well as from the viewpoint of a woodcutter who witnessed the episode. Each "witness" gives an account of the crime that increases the prestige of his or her conduct. Continuously reconstructing the crime through the "witnesses," the film asks, "How can we ever know the truth?" Anyone who has ever participated in a trial is probably aware of what has come to be known as the "Rashomon syndrome," in which witnesses to the same event present very different accounts of it. The vagaries of human perception, memory, and narrative ability are probably to blame for this fact of life.

Although an American trial is an adversarial proceeding, it provides a forum and a process for telling the story of the case in a logical sequence, so that the judge and jury may more clearly understand the case. Each witness reveals his or her part in the story while testifying to personal knowledge of the pertinent facts. However, since the law does not allow every possible piece of evidence to be heard or seen by the jury, the trial is controlled by a set of rules we refer to as the rules of evidence.

Although there are vast differences between criminal and civil trials, there is very little difference between the rules of evidence applicable in a criminal case and those applicable in a civil matter. Perhaps the most marked difference is the amount of proof necessary. In a criminal case, the prosecution must present enough evidence to convince the jury of the defendant's guilt beyond a reasonable doubt. In a civil trial, only a preponderance of the evidence must be presented on the part of one side or the other to receive a favorable judgment.

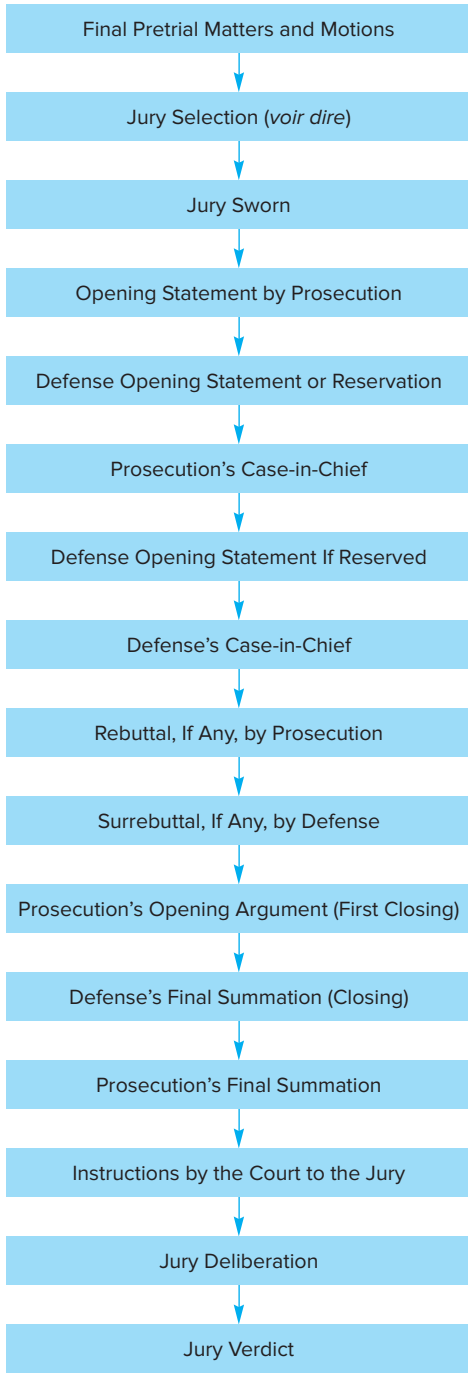



**FIGURE 2–1** Sequence of events in a typical criminal trial.

Proof beyond a reasonable doubt is not proof beyond all doubt, but it is the highest level, or quantity, of proof that American law demands in any case. Proof beyond a reasonable doubt is far more than 50 percent. On the other hand, proof by a preponderance of the evidence—the quantity required to win in a civil trial—is 50 percent plus a feather. An example of this difference in quantity of proof is the difference in outcomes in the criminal and civil trials of O.J. Simpson in connection with the murders of Nicole Brown Simpson and Ronald Goldman. The jury in the criminal trial was not convinced beyond a reasonable doubt of Mr. Simpson's guilt in the murders and, in October 1995, entered a verdict of acquittal. However, the jury in the civil trial, in February 1997, believed, by a preponderance of the evidence, that Mr. Simpson killed the two victims.

## JURY OR COURT TRIAL

### Instructions by the Court to the Jury

A criminal trial may be conducted in one of two ways. It may be what is known as a "jury trial" or it may be a "court trial," which is a trial by a judge without a jury (also known as a "bench trial"). Most states permit a defendant to waive a jury, but the right may not be absolute. In some states, the prosecuting attorney may also be required to agree to this waiver in order for the judge to try the case without a jury. In any event, a trial before a judge alone is conducted in much the same manner as a trial before a jury. The structure of the trial is the same, and the same rules of evidence apply.

## ON THE JOB

Chapter 9 will introduce the terms "reasonable suspicion," "Terry Doctrine," and "probable cause." These are the principles that allow an officer to take action, to begin or continue an investigation, and to make an arrest. For now, however, it is enough to know that the standards that allow an officer to act are far below the standards required for "proof beyond a reasonable doubt," which a prosecutor will need for a successful conviction. The law enforcement professional must help to gather and prepare the evidence for trial to ensure that the prosecutor can present enough evidence to fill in the gap between the police officer's standard of probable cause and the prosecutor's standard of proof beyond a reasonable doubt.

## APPLICATION CASE

The Sixth Amendment to the Constitution of the United States, as well as provisions in the constitutions of the fifty states, guarantees to a defendant in a criminal trial the right to be tried by an impartial jury. For many years those provisions were interpreted to mean that the defendant must have a jury trial. It was not until 1930, in the case of *Patton v. United States*,[1] that the Supreme Court of the United States gave a qualified approval for a defendant to waive the jury and be tried by a judge alone.

## THE JURY

The common law rule and the rule in most states in this country call for a jury in a criminal case consisting of 12 persons. Although in the early history of Europe many of the inquisitory councils, also referred to as "juries," consisted of 4 to 66 members, by the thirteenth century 12 was the usual number found on an inquisitory council. By the fourteenth century, the requirement of 12 members had become more or less fixed. Thereafter, this number seemed to develop a somewhat superstitious reverence.

When the colonists came to America, juries in England were composed of 12 persons, so it was only natural that juries in this country should also consist of 12, yet the Sixth Amendment to the United States Constitution prescribes no set number for a jury. The Amendment states only, "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury." Inasmuch as there appears to be no real significance to a jury being composed of 12 persons, some states have broken with tradition and have passed laws permitting a jury in a criminal case to be composed of fewer than 12 members. All states, however, require a jury of 12 for capital crimes. The United States Supreme Court has held that a defendant is entitled to a trial by jury when charged with a serious crime,[2] distinguishing trials for "petty" offenses for which an accused is not entitled to a jury trial. An offense is petty, for purposes of the right to trial by jury, when the penalty is incarceration for a period of less than six months.[3] In *Williams v. Florida,*[4] the Supreme Court upheld a conviction for a nonpetty offense on a verdict by a six-member jury. However, a few years thereafter, the Court struck down a state statute providing for five-member

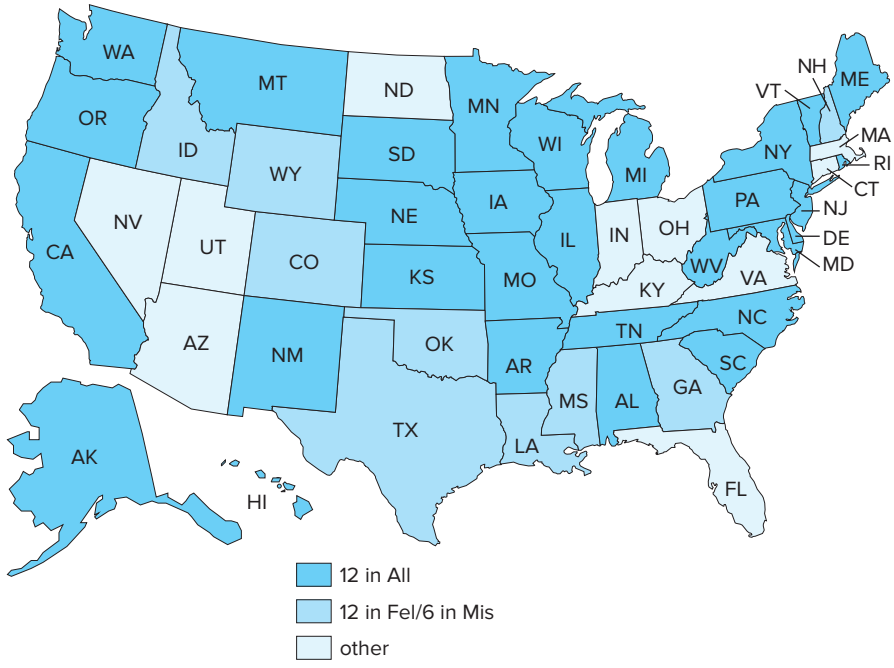



**FIGURE 2–2** Number of jurors in criminal cases by state.

juries in misdemeanor cases in *Ballew v. Georgia.*[5] Taken together, the two cases set the bottom limit for jurors at 6, permitting the states to designate juries of any number between 6 and 12 for trials in which the punishment could exceed six months in jail or prison (see Figure 2–2).

Another important factor involved in trial by jury is the requirement as to how the jury votes. Historically, not only was the jury in a criminal case required to consist of 12 persons, but the verdict reached by the panel was required to be unanimous. In the aftermath of the Supreme Court decisions relating to jury size just discussed, there also arose questions regarding the unanimity requirement. In *Johnson v. Louisiana*[6] and *Apodaca v. Oregon,*[7] two cases decided together, the Supreme Court upheld nonunanimous jury verdicts in criminal trials. All of the juries involved in those cases were panels of 12 persons. A few years after these two decisions, in *Burch v. Louisiana,*[8] the Court clarified the issues by striking down a statute allowing for nonunanimous verdicts of six-person juries for non-petty offenses. The result of all of these cases is that six-member juries are permitted in serious crimes cases, but only if they reach unanimous verdicts. Otherwise, juries of any size greater than six may reach nonunanimous verdicts.

## Qualifications of Jurors

Although the qualifications of a trial juror may vary somewhat from state to state, the general qualifications are quite similar. The person must be an adult, meaning 18 years of age or over. He or she must be a citizen of the United States and a resident within the jurisdiction of the court involved. The prospective juror must have a sufficient knowledge of the English language to understand the testimony

## FYI

As stated in the text, qualifications to be a juror generally include the ability to see, hear, and talk. However, a number of states have adopted laws that permit persons with disabilities to serve as jurors with the necessary assistance. Alaska's statute[10] is illustrative:

(a) A person is qualified to act as a juror if the person is
  (1) a citizen of the United States;
  (2) a resident of the state;
  (3) at least 18 years of age;
  (4) of sound mind;
  (5) in possession of the person's natural faculties; and
  (6) able to read or speak the English language.

(b) A person is not disqualified from serving as a juror solely because of the loss of hearing or sight in any degree or a disability that substantially impairs or interferes with the person's mobility.

(c) The court shall provide, and pay the cost of services of, an interpreter or reader when necessary to enable a person with impaired hearing or sight to act as a juror.

and to be able to communicate during the deliberation. In most states, the person must have use of his or her natural faculties, meaning the ability to see, hear, and talk, although in some jurisdictions in recent years persons with disabilities have been permitted to sit on juries with assistance.[9] A person with a past felony conviction will be disqualified from jury duty in most states. And, in most states, jurors are selected from lists of registered voters.

## Jury Selection, or *Voir Dire*

The process of selecting a jury varies from state to state and within the federal system, but there is a general similarity overall. In most jurisdictions, jurors are identified from voter registration lists and called to service in large groups for periods varying from one day to several weeks. The pool of available jurors in a courthouse on any given day provides the pool sent to any one courtroom. The pool of jurors sent to a courtroom is called the **venire**. After that pool enters the courtroom, the judge engages in a general introduction and the initial questioning of the prospective jurors. Usually some jurors are excused from service as a result of this general questioning (e.g., because of the financial hardship from sitting as a juror). However, thereafter begins the more extensive process of questioning prospective jurors to select the final panel, a process known as ***voir dire***, which roughly means "to speak the truth."

**VENIRE**
The pool of prospective jurors from which the jury panel is selected.

**JURY *VOIR DIRE***
The process of questioning a panel of prospective jurors to select the fi nal panel; roughly it means "to speak the truth."

**CHALLENGES FOR CAUSE**
The motion that a prospective juror should be excluded because he or she is incapable of being impartial.

**PEREMPTORY CHALLENGE**
The motion that excludes a prospective juror from the jury panel without specific reason or justification.

*Voir dire* is conducted exclusively by the judge in the federal system and in many states. That means that the attorneys for both sides may only suggest questions for the judge to ask, although attorneys may address the court to challenge jurors for any reason. In those jurisdictions that allow lawyers to conduct *voir dire,* either partially or entirely, the lawyers pose the questions on *voir dire* directly to the prospective jurors.

The purpose of *voir dire* is to eliminate from the jury any person who is incapable of acting impartially. Any prospective juror found by the judge to be biased or prejudiced against the parties because of the type of case, pretrial publicity, or any other factor that may reasonably affect the prospective juror's ability to be fair may be excluded for cause on a motion, made by the prosecution, the defense, or the judge. Such motions are known as **challenges for cause**. There is no limit to the number of challenges for cause that may be made. *Voir dire* usually will also produce information from which the attorneys will decide to exercise peremptory challenges. A juror may be excluded based on a **peremptory challenge** for any reason or no reason whatsoever. The only exception is that neither the prosecution[11] nor the defense[12] may exercise a peremptory challenge in a discriminatory manner that violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United

States, particularly with respect to the race of the prospective juror. For example, in *Batson v. Kentucky,* the Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race, or on the assumption that black jurors as a group will be unable to impartially consider the state's case against a black defendant.[13] The attorney exercising a challenge merely asks the court to exclude the prospective juror. The number of such challenges is severely limited, usually 6 to 10 per side in most states in noncapital cases, 20 in capital cases.

In addition to the jurors selected for the panel, most states require the selection of additional jurors, known as "alternates," who hear all the evidence but do not participate in deliberation unless one or more primary jurors are excused from jury duty during the trial. The process for the selection of alternates follows the same pattern as the process for the selection of regular jurors.

## FYI

Certain occupations, such as law enforcement officers, may be excluded from jury duty due to a conflict of interest. Other occupations (doctors, teachers, attorneys) may be excused due to financial hardship or work schedule. Some jurisdictions, including California, Colorado, Connecticut, and Massachusetts, have adopted a system to make the jury more representative of the general population by having a juror serve either one day or one trial. As a result of this shortened requirement, most requests to be excused from jury duty are denied. Financial hardship, work schedule, and the need to care for children, the sick, or the elderly are no longer accepted as excuses. Teachers are required to postpone their service, so that they may serve during school vacations.

## Function of the Jury

In a jury trial, the function of the jury is to determine the facts of the case and render a verdict based on the law explained to them by the judge during jury instructions. In other words, the jury interprets the evidence as it is presented and tries to determine what happened. The jury's ultimate goal in a criminal trial is to ascertain whether the defendant is guilty beyond a reasonable doubt of the crime as charged. This decision is made after the evidence has been submitted to the jury by the prosecution and defense. A defendant in a criminal trial does not have to testify or present any evidence, particularly if the defendant believes the prosecution's case is so weak that there is already a reasonable doubt about his or her guilt. On the other hand, the defendant's evidence may be offered in an effort to overcome that presented by the prosecution. This is done in the hope that it will create a doubt in the minds of the jurors, if that doubt is not already present. The ultimate function of the jury in a criminal case is rendering a verdict of guilty or not guilty.

A jury can participate in determining a defendant's sentence directly or indirectly. In certain instances, in order for a defendant's sentence to be enhanced above a certain minimum, the prosecutor must allege the aggravating factors as part of the charge against the defendant. The jury, will decide whether these factors have been proved at the same time they decide the guilt or innocence of the defendant. In other instances, such as the circumstances described in *Ring v. Arizona,* after the defendant is found guilty of a crime, the prosecution, in a separate phase, presents additional evidence to the jury, so that it can determine whether aggravating circumstances are present. Finally, in six states, the jury, not the court, will pronounce the actual sentence to be received by the defendant in all or some specific types of cases. Those states are Arkansas, Kentuckys, Missouri,

Oklahoma, Texas, and Virginia. In those six states, juries mete out sentences in criminal cases generally or only in some types of cases specified by statute. Under the pertinent United States Supreme Court decisions, juries must make decisions on sentencing in death penalty cases, or cases in which enhancement factors are part of the crime charged.

## APPLICATION CASE

In three successive cases, the United States Supreme Court has adopted and applied the principle that the Sixth Amendment right to trial by jury requires that certain facts, in addition to the finding of guilt, must be found by the jury, not the judge. In *Apprendi v. New Jersey,*[14] the Court held that, other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The case of *Ring v. Arizona*[15] was the vehicle for the United States Supreme Court to decide that, if a jury finds a defendant guilty of a crime subject to the death penalty, the Sixth Amendment principle stated in *Apprendi* requires that a jury determine the presence or absence of the aggravating factors required in order to impose the death penalty. Finally, in *Blakely v. Washington,*[16] the Court declared that a state's sentencing guidelines allowing a trial judge to find the fact necessary to trigger a sentence above the statutory maximum also violated the Sixth Amendment principle stated in *Apprendi.*

## Jury Nullification

The jury in a criminal trial in the United States renders an unappealable, unassailable verdict of acquittal of an accused person. Although each juror takes an oath to decide the case by applying the facts, as he or she finds them to be, to the law as the judge states it, there is no redress if the jury violates this oath in favor of a defendant in a criminal case. Should a jury acquit an accused for the wrong reason, or for no reason at all, the law is powerless to correct the error. Also, this means that if the jury does not wish to follow the law, for whatever reason, there is no redress. This power is known as **jury nullification** because it is a fact that the jury may thereby nullify the law. This power is little known and rarely discussed. It is not lawful for a judge or lawyer to tell a jury of its power to nullify.[17] For example, if a person is on trial for drug possession involving possession of marijuana for personal use, a jury might acquit because its members do not believe such drug possession should be illegal even if the prosecution has presented evidence to support all of the elements of the crime.

JURY NULLIFICATION
The power of a jury in a criminal case to acquit a defendant for any reason or no reason at all. When a jury in a criminal case exercises this power, its decision cannot be appealed.

The federal Constitution, in the Fifth Amendment, contains a provision banning twice putting a criminal accused in "jeopardy." Under this provision, if a trial results in a jury verdict of acquittal, the defendant cannot be retried. Thus, the jury's nullification power stems from this Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

Historically, the jury's nullification power was used to vindicate injustices, where the jury reacted to an unpopular law, or where strict application of the law might have seemed unfair. Examples are the libel prosecutions in the

American Colonies by the British government for political protest and the imposition of severe penalties for possession of small quantities of marijuana, as mentioned earlier. In recent years, there has been a growing movement to inform jurors of their power to nullify. However, most states still do not permit this notification.

Law enforcement professionals should be aware that it is possible for a jury to render a verdict in favor of a defendant, using the power to nullify, even though law enforcement did all they could to prepare and present a strong case. As jurors become more aware of their power, such cases may be even more common.

## THE JUDGE

The judge's principal responsibility is to see that the defendant in a criminal case gets a fair trial. To accomplish this, the judge has many duties, including deciding what law applies to the case; interpreting the law of the case for the jury; deciding what evidence is and is not admissible; ruling on objections made by the attorneys; determining the qualifications of witnesses; protecting witnesses from overzealous cross-examinations; ensuring that the trial proceeds efficiently and effectively; and, in most states, in most instances, imposing sentence upon the defendant in a criminal case. In some jurisdictions, the judge may comment on the credibility of the witnesses and the weight of the evidence.

In a jury trial, the function of the judge is much like that of a referee. The judge keeps order in the court and sees that the trial progresses properly and smoothly. It is the judge's duty to maintain control over the conduct of those involved in a trial proceeding. To assist in this regard, the judge may exercise the power of contempt. **Contempt** is the power of the court to punish persons for failure to obey court orders or to coerce them into obeying court orders. When a judge holds a person in contempt, the judge fines or jails the person for criminal failures to obey the court. In cases of civil contempt, the judge orders the person to jail until the person complies with the judge's order. A person held in civil contempt is said to "hold the keys to the jail cell in his or her pocket"; if the person complies with the court order, he or she will be released from custody.

CONTEMPT
The power of a court to punish persons for failure to obey court orders or to coerce them into obeying court orders.

When the trial is conducted without a jury, the judge acts in a dual capacity. The judge does the same things he or she would do when presiding over a jury trial, as well as performing the function of the jury in determining the facts of the case. The judge therefore renders the verdict of guilt or innocence.

## PROSECUTING ATTORNEY'S RESPONSIBILITY AND THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Once a trial begins, the duties of the law enforcement officer are, for the most part, completed, except for testifying. By this time, the officers will have collected physical evidence, interviewed the witnesses, and discussed the case in detail with the prosecuting attorney. All that remains for the officers to do is to testify in a forthright, unbiased, and intelligent manner. The progress of the trial is largely the responsibility of the prosecuting attorney, who assumes the leading role in the judicial process.

Prosecutors, however, have many responsibilities long before the trial begins. Their duty is to prosecute the guilty and to see that the innocent are protected. In the landmark case of *Gideon v. Wainwright,*[18] where the Supreme Court of the United States applied the Sixth Amendment right to counsel in felony cases to the states through the Fourteenth Amendment's Due Process Clause, the Court noted that prosecutors "are everywhere deemed essential to protect the public's interest in an orderly society." In this capacity, prosecutors must decide which criminal charges should be prosecuted and which should be dismissed in the interests of justice. The prosecutor has broad power to decide whether or not to pursue any given case. The public has the right to demand that the prosecutor use that power wisely and impartially.

When the decision to prosecute is reached, the prosecutor must decide which witnesses will be used and what evidence will be presented. It is not necessary that every witness who has some knowledge of the case be called upon to testify. Neither is it required that every bit of physical evidence be presented. The only requirement is that a sufficient number of witnesses be called and sufficient evidence be presented to convince the jury that the accused committed the crime. In deciding what evidence to use, the prosecutor will consider past experience with the particular charge involved, knowledge of the personality of the judge who will be hearing the case, and the potential dramatics of the situation as the trial progresses. In addition, the prosecutor has an obligation to disclose to the defense attorney any evidence that could be used to aid the defense. Any evidence that tends to prove the innocence of an accused is called **exculpatory evidence**. The prosecution has a duty to disclose exculpatory evidence to the defense when requested. Failure to do so, regardless of the good or bad faith of the prosecution, violates the defendant's due process rights. The United States Supreme Court announced this doctrine in the 1963 case of *Brady v. Maryland*.[19] In many states, reciprocal pretrial exchange of information is required and is called **pretrial discovery**.

**EXCULPATORY EVIDENCE**
Any evidence that tends to prove the innocence of an accused.

**PRETRIAL DISCOVERY**
A reciprocal exchange of information between the prosecuting and defending attorneys, before trial, either as ordered by the court in a particular case or required by statute or rule.

The United States Supreme Court has held that the Constitution makes it the responsibility of the prosecutor to prove every element of a charged offense beyond a "reasonable doubt." The Court has also held that the "Constitution does not require any particular form of words be used" in instructing the jury on the definition of reasonable doubt.[20] The trial judge may choose not to define reasonable doubt, but, if he or she does choose to define the term, then "taken as a whole the instructions [must] correctly conve[y] the concept of reasonable

## ON THE JOB

Law enforcement professionals do not exist in a vacuum. They work long hours in different shifts. This tends to limit their social contacts to people involved in the criminal justice system. It is not uncommon for friendships to develop among law enforcement professionals, including police, criminalists, court bailiffs, court clerks, prosecutors, defense attorneys, and even judges. The trick is to manage such relationships responsibly. When called to testify in court, law enforcement professionals must remember that, when they are in court, the court official, who may be a weekend fishing buddy or shopping companion, is now involved in running a trial that will greatly affect the defendant's life. Therefore, the law enforcement professional must treat the judge, and other court professionals, with the formal respect they deserve whenever they are in the courthouse or in other professional settings. It will enhance both personal and professional respect from other participants.

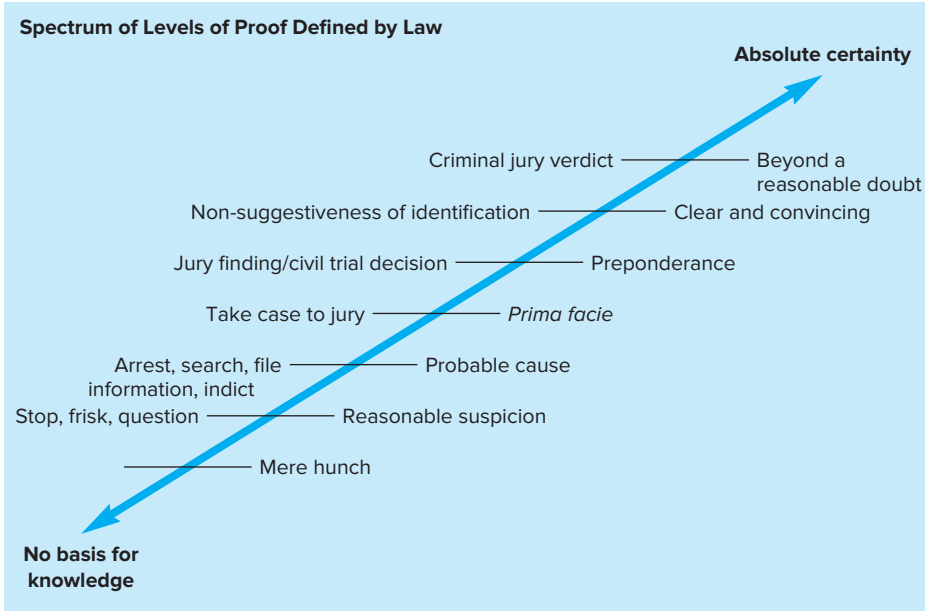



**FIGURE 2–3** Spectrum of levels of proof.

doubt to the jury."[21] The concept is that proof beyond a reasonable doubt is a high standard of proof, but not one that leaves no doubt at all. In practical terms, the Court has approved a definition that indicates that **reasonable doubt** is a doubt based upon reason: that which would make a reasonable person hesitate to act in connection with important affairs of life.

**REASONABLE DOUBT** The standard of proof in a criminal case. A doubt based upon reason: that which would make a reasonable person hesitate to act in connection with important affairs of life.

A number of standards of proof are used in legal definitions. This is a good time to refer to the spectrum of those standards of proof. The first chapter presented the concept of probable cause—that level of proof a police officer needs to arrest a suspect and a prosecutor needs to show in court to formally charge an accused. The standard of proof in a civil case, preponderance of the evidence, was discussed earlier in this chapter. There are a few other levels of proof that the law enforcement officer should be familiar with: mere hunch, reasonable suspicion, *prima facie,* and clear and convincing. A graphical spectrum of these levels of proof is presented in Figure 2–3. Each of these terms will be more fully described at an appropriate point in the text. For now, the focus is on the fact that the requirement of proof beyond a reasonable doubt is the highest level of proof that the law demands.

In recent years, the Supreme Court has addressed the problem of defining reasonable doubt for the jury in a criminal case. The Court disapproved of one definition and approved two others. In the 1990 case of *Cage v. Louisiana,*[22] the Court said that using the words "substantial" and "grave," when coupled with the term "moral certainty," could be understood by a reasonable juror to allow the juror to find an accused guilty "on a degree of proof below that required by the Due Process Clause."[23]

In 1994, in *Victor v. Nebraska,*[24] the Court considered definitions of reasonable doubt from two states, California and Nebraska. The Court held that both definitions were constitutional. Both definitions contained the language relating to "moral certainty." The Court sufficiently questioned use of the term "moral certainty" in modern times to cause the California Supreme Court to consent to the elimination of the phrase from its approved definition thereafter.[25] Thus,

after the *Victor* case, the approved definition of reasonable doubt in California is as follows:[26]

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

Likewise, the Nebraska courts have altered the definition of reasonable doubt upheld in *Victor*, even though the United States Supreme Court did not reject the definition used in the case, as set forth below. The instruction reads in its entirety[27]

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

## ROLE OF THE DEFENSE ATTORNEY

Among other guarantees, the Sixth Amendment to the Constitution of the United States provides that, "in all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." An accused is entitled to assistance of counsel for his or her defense in all instances, except where incarceration is not possible; if the accused cannot afford an attorney, one must be provided. An accused is entitled to the assistance of counsel even before trial—as early as at the time of a suspect's arrest.

Because an accused is entitled to counsel at every stage of a criminal proceeding—from focused investigation or arrest through trial—the defense attorney is an important figure in the administration of criminal justice. Defense counsel's primary function is to make certain that all the rights of the accused are properly protected. Counsel will make certain that the charge against the defendant is a valid one and that there was sufficient probable cause to arrest the defendant or conduct any search or seizure. Defense counsel will conduct pretrial investigation and discovery and otherwise prepare for trial. The defense attorney will advise the accused concerning statements that he or she may or may not make. At the time of the trial, the defense attorney will cross-examine the prosecution witnesses and present any defense necessary under the circumstances. Along with the judge, defense counsel has the responsibility of seeing that the defendant receives a fair trial.