

3.12: Procedural Law

As noted above, procedural law governs the process used to investigate and prosecute an individual who commits a crime. Procedural law also governs the ways a person convicted of a crime may challenge their convictions. The source of procedural law includes the same sources of law you have just read about which govern substantive criminal law: the constitution, cases law or judicial opinions, statutes, and common law. Whereas most substantive criminal law is now statutory, most procedural law is found in judicial opinions that interpret the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the U.S. Constitution, the U.S. Code, and the state constitutional and legislative counterparts. Generally, the federal and state constitutions set forth broad guarantees (for example, the right to a speedy trial), then statutes are enacted to provide more definite guidelines (for example, the Federal Speedy Trial Act) and then judges flesh out the meaning of those guarantees and statutes in their court opinions.

Phases of the Criminal Justice Process

The processing of a case through the criminal justice system can be broken down into five phases: investigative phase, the pre-trial phase, the trial phase, the sentencing phase, and the appellate or post-conviction phase.

Investigative Phase

The investigative phase is governed by laws covering searches and seizures (searches of persons and places, arrests and stops of individuals, seizures of belongings), interrogations and confessions, identification procedures (for example, line ups, showups, and photo arrays). This phase mostly involves what the police are doing to investigate a crime. However, when police apply for a search, seizure or arrest warrant, “neutral and detached” magistrates (i.e., judges) must decide whether probable cause exists to issue search warrants, arrest warrants, and warrants for the seizure of property and whether the scope of the proposed warrant is supported by the officer’s **affidavit** (sworn statement). When an individual is arrested without a warrant, judges will need to promptly review whether there is probable cause exists to hold them in custody before trial.

Pretrial Phase

The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel, the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial either with some financial surety (posting bail) or on his or her own recognizance and with court-determined conditions imposed (for example, not having contact with the alleged victim); the selection and use of a grand jury or preliminary hearing processes (in which either a grand jury or a judge determines whether there is sufficient evidence that a felony has been committed); any pretrial motions such as motions to suppress evidence (for examples, asking the court not to let the government use evidence it may have obtained illegally through a search or getting a confession), motions to challenge a subpoena, motions to change venue (to move the trial), motions to join or sever cases (for example if two or more individuals are charged with the offense, should the trials be held together or separately). During the pretrial phase, prosecutors and defendants through their defense attorneys will engage in plea bargaining, and will generally resolve the case before a trial is held.

Trial Phase

The trial phase is governed by laws covering speedy trial guarantees, the selection and use of **petit jurors** (trial jurors); the **rules of evidence** (statutory and common law rules governing the admissibility of certain types of evidence such as hearsay or character evidence, the competency and impeachment of witnesses, the existence of any privilege, and the exclusion of witnesses during the testimony of other witnesses); the right of the defendant **compulsory process** (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government against him; fair trials free of prejudicial adverse pre-trial or trial publicity; fair trials which are open to the public; and the continued right of the defendant to have the assistance of counsel and be present during his or her trial.

Sentencing Phase

The sentencing phase is governed by rules and laws concerning the substantive criminal laws on punishment (discussed above); time period in which a defendant must be sentenced; the defendant’s **right of allocution** (right to make a statement to the court before the judge imposes sentence); any victims’ rights to appear and make statements at sentencing; the defendant’s rights to present mitigation evidence and witnesses; and the defendant’s continued rights to the assistance of counsel at sentencing. In capital cases in which the state is seeking the death penalty, the trial will be **bifurcated** (a trial split into the “guilt/innocence phase” and the “penalty phase”) and the sentencing hearing will be more like a mini-trial.

Post-Conviction Phase (Appeals Phase)

The post-conviction phase is governed by rules and laws concerning the time period in which direct appeals must be taken; the defendant's right to file an **appeal of right** (the initial appeal which must be reviewed by an appellate court) and right to file a discretionary appeal; the defendant's right to have the assistance of counsel in helping to file either the appeal of right or a discretionary appeal. The post-conviction phase is also governed by rules and laws concerning the defendant's ability to file a **writ of habeas corpus** (a civil suit against the entity who is currently holding the defendant in custody) or a **post-conviction relief suit** (a civil suit similar to a habeas corpus suit but one which can be filed by the defendant regardless if he or she is in custody). The post-conviction phase would also include any probation and parole revocation hearings.

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