

13.1: The Trial Process

Chapter 13 - Bail and the Trial Process

The Trial Process ^[131]

When a trial occurs, the first order of business is to select a jury. (in a civil case of any consequence, either party can request one, based on the Sixth Amendment to the US Constitution.) The judge and sometimes the lawyers are permitted to question the jurors to be sure that they are unbiased. This questioning is known as the *voir dire* (pronounced vwahr-DEER). This is an important process, and a great deal of thought goes into selecting the jury, especially in high-profile cases. A jury panel can be as few as six persons, or as many as twelve, with alternates selected and sitting in court in case one of the jurors is unable to continue. In a long trial, having alternates is essential; even in shorter trials, most courts will have at least two alternate jurors.

In both criminal and civil trials, each side has opportunities to challenge potential jurors for cause. For example, in the Robinsons' case against Audi, the attorneys representing Audi will want to know if any prospective jurors have ever owned an Audi, what their experience has been, and if they had a similar problem (or worse) with their Audi that was not resolved to their satisfaction. If so, the defense attorney could well believe that such a juror has a potential for a bias against her client. In that case, she could use a challenge for cause, explaining to the judge the basis for her challenge. The judge, at her discretion, could either accept the for-cause reason or reject it.

Even if an attorney cannot articulate a for-cause reason acceptable to the judge, he may use one of several peremptory challenges that most states (and the federal system) allow. A trial attorney with many years of experience may have a sixth sense about a potential juror and, in consultation with the client, may decide to use a peremptory challenge to avoid having that juror on the panel.

After the jury is sworn and seated, the plaintiff's lawyer makes an opening statement, laying out the nature of the plaintiff's claim, the facts of the case as the plaintiff sees them, and the evidence that the lawyer will present. The defendant's lawyer may also make an opening statement or may reserve his right to do so at the end of the plaintiff's case.

The plaintiff's lawyer then calls witnesses and presents the physical evidence that is relevant to her proof. The direct testimony at trial is usually far from a smooth narration. The rules of evidence (that govern the kinds of testimony and documents that may be introduced at trial) and the question-and-answer format tend to make the presentation of evidence choppy and difficult to follow.

Anyone who has watched an actual televised trial or a television melodrama featuring a trial scene will appreciate the nature of the trial itself: witnesses are asked questions about a number of issues that may or may not be related, the opposing lawyer will frequently object to the question or the form in which it is asked, and the jury may be sent from the room while the lawyers argue at the bench before the judge.

After direct testimony of each witness is over, the opposing lawyer may conduct cross-examination. This is a crucial constitutional right; in criminal cases it is preserved in the Constitution's Sixth Amendment (the right to confront one's accusers in open court). The formal rules of direct testimony are then relaxed, and the cross-examiner may probe the witness more informally, asking questions that may not seem immediately relevant. This is when the opposing attorney may become harsh, casting doubt on a witness's credibility, trying to trip her up and show that the answers she gave are false or not to be trusted. This use of cross-examination, along with the requirement that the witness must respond to questions that are at all relevant to the questions raised by the case, distinguishes common-law courts from those of authoritarian regimes around the world.

Following cross-examination, the plaintiff's lawyer may then question the witness again: this is called redirect examination and is used to demonstrate that the witness's original answers were accurate and to show that any implications otherwise, suggested by the cross-examiner, were unwarranted. The cross-examiner may then engage the witness in re-cross-examination, and so on. The process usually stops after cross-examination or redirect.

During the trial, the judge's chief responsibility is to see that the trial is fair to both sides. One big piece of that responsibility is to rule on the admissibility of evidence. A judge may rule that a particular question is out of order—that is, not relevant or appropriate—or that a given document is irrelevant. Where the attorney is convinced that a particular witness, a particular question, or a particular document (or part thereof) is critical to her case, she may preserve an objection to the court's ruling by saying "exception," in which case the court stenographer will note the exception; on appeal, the attorney may cite any number of exceptions as adding up to the lack of a fair trial for her client and may request a court of appeals to order a retrial.

For the most part, courts of appeal will not reverse and remand for a new trial unless the trial court judge's errors are "prejudicial," or "an abuse of discretion." In short, neither party is entitled to a perfect trial, but only to a fair trial, one in which the trial judge has made only "harmless errors" and not prejudicial ones.

At the end of the plaintiff's case, the defendant presents his case, following the same procedure just outlined. The plaintiff is then entitled to present rebuttal witnesses, if necessary, to deny or argue with the evidence the defendant has introduced. The defendant in turn may present "surrebuttal" witnesses.

When all testimony has been introduced, either party may ask the judge for a directed verdict—a verdict decided by the judge without advice from the jury. This motion may be granted if the plaintiff has failed to introduce evidence that is legally sufficient to meet her burden of proof or if the defendant has failed to do the same on issues on which she has the burden of proof. (For example, the plaintiff alleges that the defendant owes him money and introduces a signed promissory note. The defendant cannot show that the note is invalid. The defendant must lose the case unless he can show that the debt has been paid or otherwise discharged.)

The defendant can move for a directed verdict at the close of the plaintiff's case, but the judge will usually wait to hear the entire case until deciding whether to do so. Directed verdicts are not usually granted, since it is the jury's job to determine the facts in dispute.

If the judge refuses to grant a directed verdict, each lawyer will then present a closing argument to the jury (or, if there is no jury, to the judge alone). The closing argument is used to tie up the loose ends, as the attorney tries to bring together various seemingly unrelated facts into a story that will make sense to the jury.

After closing arguments, the judge will instruct the jury. The purpose of jury instruction is to explain to the jurors the meaning of the law as it relates to the issues they are considering and to tell the jurors what facts they must determine if they are to give a verdict for one party or the other. Each lawyer will have prepared a set of written instructions that she hopes the judge will give to the jury. These will be tailored to advance her client's case. Many a verdict has been overturned on appeal because a trial judge has wrongly instructed the jury. The judge will carefully determine which instructions to give and often will use a set of pattern instructions provided by the state bar association or the supreme court of the state. These pattern jury instructions are often safer because they are patterned after language that appellate courts have used previously, and appellate courts are less likely to find reversible error in the instructions.

After all instructions are given, the jury will retire to a private room and discuss the case and the answers requested by the judge for as long as it takes to reach a unanimous verdict. Some minor cases do not require a unanimous verdict. If the jury cannot reach a decision, this is called a hung jury, and the case will have to be retried. When a jury does reach a verdict, it delivers it in court with both parties and their lawyers present. The jury is then discharged, and control over the case returns to the judge. (If there is no jury, the judge will usually announce in a written opinion his findings of fact and how the law applies to those facts. Juries just announce their verdicts and do not state their reasons for reaching them.)

Legal Rights During Trial ^[132]

Learning Objectives

- Describe the most significant constitutional rights of defendants in US courts and name the source of these rights.
- Explain the Exclusionary rule and the reason for its existence.

Search and Seizure

The rights of those accused of a crime are spelled out in four of the ten constitutional amendments that make up the Bill of Rights (Amendments Four, Five, Six, and Eight). For the most part, these amendments have been held to apply to both the federal and the state governments. The Fourth Amendment says in part that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Although there are numerous and tricky exceptions to the general rule, ordinarily the police may not break into a person's house or confiscate his papers or arrest him unless they have a warrant to do so. This means, for instance, that a policeman cannot simply stop you on a street corner and ask to see what is in your pockets (a power the police enjoy in many other countries), nor can your home be raided without probable cause to believe that you have committed a crime. What if the police do search or seize unreasonably?

The courts have devised a remedy for the use at trial of the fruits of an unlawful search or seizure. Evidence that is unconstitutionally seized is excluded from the trial. This is the so-called exclusionary rule, first made applicable in federal cases in

1914 and brought home to the states in 1961. The exclusionary rule is highly controversial, and there are numerous exceptions to it. But it remains generally true that the prosecutor may not use evidence willfully taken by the police in violation of constitutional rights generally, and most often in the violation of Fourth Amendment rights. (The fruits of a coerced confession are also excluded.)

Double Jeopardy

The Fifth Amendment prohibits the government from prosecuting a person twice for the same offense. The amendment says that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb.” If a defendant is acquitted, the government may not appeal. If a defendant is convicted and his conviction is upheld on appeal, he may not thereafter be reprosecuted for the same crime.

Self-Incrimination

The Fifth Amendment is also the source of a person’s right against self-incrimination (no person “shall be compelled in any criminal case to be a witness against himself”). The debate over the limits of this right has given rise to an immense literature. In broadest outline, the right against self-incrimination means that the prosecutor may not call a defendant to the witness stand during trial and may not comment to the jury on the defendant’s failure to take the stand. Moreover, a defendant’s confession must be excluded from evidence if it was not voluntarily made (e.g., if the police beat the person into giving a confession). In *Miranda v. Arizona*, the Supreme Court ruled that no confession is admissible if the police have not first advised a suspect of his constitutional rights, including the right to have a lawyer present to advise him during the questioning. *Miranda v. Arizona*, 384 US 436 (1966). These so-called Miranda warnings have prompted scores of follow-up cases that have made this branch of jurisprudence especially complex.

Speedy Trial

The Sixth Amendment tells the government that it must try defendants speedily. How long a delay is too long depends on the circumstances in each case. In 1975, Congress enacted the Speedy Trial Act to give priority to criminal cases in federal courts. It requires all criminal prosecutions to go to trial within seventy-five days (though the law lists many permissible reasons for delay).

Cross-Examination

The Sixth Amendment also says that the defendant shall have the right to confront witnesses against him. No testimony is permitted to be shown to the jury unless the person making it is present and subject to cross-examination by the defendant’s counsel.

Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to have the assistance of defense counsel. During the eighteenth century and before, the British courts frequently refused to permit defendants to have lawyers in the courtroom during trial. The right to counsel is much broader in this country, as the result of Supreme Court decisions that require the state to pay for a lawyer for indigent defendants in most criminal cases.

Cruel and Unusual Punishment

Punishment under the common law was frequently horrifying. Death was a common punishment for relatively minor crimes. In many places throughout the world, punishments still persist that seem cruel and unusual, such as the practice of stoning someone to death. The guillotine, famously in use during and after the French Revolution, is no longer used, nor are defendants put in stocks for public display and humiliation. In pre-Revolutionary America, an unlucky defendant who found himself convicted could face brutal torture before death.

The Eighth Amendment banned these actions with the words that “cruel and unusual punishments [shall not be] inflicted.” Virtually all such punishments either never were enacted or have been eliminated from the statute books in the United States. Nevertheless, the Eighth Amendment has become a source of controversy, first with the Supreme Court’s ruling in 1976 that the death penalty, as haphazardly applied in the various states, amounted to cruel and unusual punishment. Later Supreme Court opinions have made it easier for states to administer the death penalty. As of 2010, there were 3,300 defendants on death row in the United States. Of course, no corporation is on death row, and no corporation’s charter has ever been revoked by a US state, even though some corporations have repeatedly been indicted and convicted of criminal offenses.

Presumption of Innocence

The most important constitutional right in the US criminal justice system is the presumption of innocence. The Supreme Court has repeatedly cautioned lower courts in the United States that juries must be properly instructed that the defendant is innocent until proven guilty. This is the origin of the “beyond all reasonable doubt” standard of proof and is an instruction given to juries in each criminal case. The Fifth Amendment notes the right of “due process” in federal proceedings, and the Fourteenth Amendment requires that each state provide “due process” to defendants.

Key Takeaway

The US Constitution provides several important protections for criminal defendants, including a prohibition on the use of evidence that has been obtained by unconstitutional means. This would include evidence seized in violation of the Fourth Amendment and confessions obtained in violation of the Fifth Amendment.

Discussion Questions

- Do you think it is useful to have a presumption of innocence in criminal cases? What if there were not a presumption of innocence in criminal cases?
- Do you think public humiliation, public execution, and unusual punishments would reduce the amount of crime? Why do you think so?
- “Due process” is another phrase for “fairness.” Why should the public show fairness toward criminal defendants?

Standards of Proof ^[133]

The standard of proof asks how convinced the trier of fact must be in order to make a finding. Canadian criminal law has three core standards:

1. Proof beyond a reasonable doubt which is the standard to be met by the Crown against the accused;
2. a balance of probabilities or Proof on a preponderance of the evidence which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or an excuse;
3. Evidence raising a reasonable doubt which is what is required to overcome any other presumption of fact or of law. Once a prima facie case has been established by the evidence of the crown, there is no need to prove innocence. Rather the accused need only raise a doubt in the evidence.

The US has a fourth standard known as “clear and convincing evidence” which is a middle ground between the two standards. When a proposition at issue in a case, such as an element of an offence, must be proven, the standard must be reached using the weight of the totality of evidence presented, not on each individual piece of evidence.

Totality Principle

When weighing evidence against any standard of proof, the general rule of totality will govern. Each piece of evidence or each fact cannot be considered in isolation to establish a fact. They must be considered in the context as a whole. This principle is central to consideration of [Circumstantial Evidence](#).

Standards

The standard of proof for establishing a fact in most cases will be on a balance of probabilities. However, there are “certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt” where a standard of proof beyond a reasonable doubt may be required. Those exceptions that have a “conclusive effect” include confessions and hearsay evidence that satisfies the co-conspirators' exception.

Generally, the standard of proof beyond a reasonable doubt will apply to essential elements of the offence, but not to any other facts.

"Some Evidence" and "prima facie Case"

The standard of “some evidence” “prima facie case” are unique standards of proof that apply to certain evidentiary tests.

These two standards are obviously lower than that of balance of probabilities.

Balance of Probabilities

The “balance of probabilities” is described as being “more probable than not”, “more likely than not”, or more technically, the chance of the proposition being true is more than 50%. This standard is known as the civil standard as it exclusively used in civil

trial cases.

Generally, where there are factual questions that are preconditions to the admissibility of evidence should be on a standard of balance of probabilities. This standard should only be increased "in those certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt".

Admissibility Usually on a BOP

In most circumstances the standard of proof required for the admissibility of evidence is on a balance of probabilities. Only in "rare occasions" where the admission of the evidence is determinative of guilt will the court apply a standard beyond a reasonable doubt. [5]

Sufficiency of Proof

Before any evidence gets to a trier of fact there is often a requirement to discharge an evidential burden for the trier of law (i.e., the judge).

In a preliminary inquiry, the state must show on the whole that the evidence they will present is sufficient to potentially convict the accused. The purpose of this initial evaluation is to avoid frivolous suing being brought in that has no chance of success.

The standard of proof needed before evidence can be put to the jury is "whether the evidence is sufficient to justify him in withdrawing the case from the jury, and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilt."

In a case where some of the evidence is not directly to the issue of the case, the state must satisfy the judge that "the evidence, if believed, could reasonably support an inference of guilt." [2]

Steps in Jury Trial ^[134]

The Jury

The right to a trial by jury in federal criminal cases is guaranteed by the Sixth Amendment to the Constitution.

Extensive [background on juries](#) is available. In addition, most district courts post a jury plan on their websites, which explains how potential jurors are selected from the community, as well as the court's policy on whether and when to release jurors' names.

By law, the courts seek to empanel juries that are a "fair cross-section" of the community. This starts with a "jury wheel," a traditional term that dates to when prospective jurors' names were drawn from a revolving container. Today, the jury wheel is an automated database filled with names randomly selected from a source list or source lists, for use in further random selection of possible jurors for qualification and summoning. The number of names included in a court's jury wheel is proportional to the number of registered voters in each county comprising the district or jury division within the district.

During jury selection, often called voir dire, the judge, the lawyers, or both will question prospective jurors about their backgrounds, and potential biases that may hinder their ability to be impartial. In federal court, often only the judge will question potential jurors; counsel can request that specific questions be asked.

Voir dire is critical to ensuring an impartial jury. Prospective jurors may be struck from the panel in two ways. Lawyers may exercise a "challenge for cause," claiming the juror cannot be impartial. If the judge agrees, the potential juror is excused. Lawyers also may exercise "peremptory challenges," allowing them to remove jurors without stating a reason. The number of available peremptory challenges varies by case type, pursuant to statute and the [Federal Rules of Criminal Procedure](#).

During voir dire, a party may object to another party's exercise of a peremptory challenge on grounds that the party tried to exclude a potential juror based on race, ethnicity, or gender. Such objections are known as "Batson challenges," referring to *Batson v. Kentucky*, a 1986 Supreme Court decision that ruled such exclusions unconstitutional.

Unless the parties agree otherwise, the jury consists of 12 persons. The court may impanel up to six alternates to replace any jurors who become disqualified or otherwise are unable to perform their duties.

In death penalty and other complex cases, jury selection can take as long as several weeks. In some courts, judges handling a high-profile trial will have hundreds or, in rare instances, even thousands of potential jurors fill out an extensive questionnaire. A manageable number of eligible jurors are then called in each day to be questioned individually.

In death penalty and other complex cases, jury selection can take as long as several weeks.

On the final day of jury selection, the qualified pool of jurors is called in to the courtroom, and both sides exercise their peremptory challenges until the jury is seated. In capital cases, each side is allowed a greater number of peremptory challenges, in accordance with the [Federal Rules of Criminal Procedure](#).

For exceptional cases, a judge may decide there is a need to sequester a jury – that is, keep all jurors in the court’s protection until the trial concludes.

As noted in [Jurors](#), journalists should not contact a juror before a case is concluded. Even where a court permits the release of jurors’ names after the trial, a judge may order that jurors in a specific case remain anonymous.

Juror payment amounts are set by federal statute, and current rates are available at [Juror Pay](#). Jurors also are reimbursed for reasonable transportation expenses and parking fees, and a judge may authorize an additional \$10 a day if a proceeding lasts more than 10 days. Federal law does not require an employer to pay jurors during a trial, but the Jury Act forbids any employer from firing, intimidating, or coercing any permanent employee because of his or her federal jury service.

Opening Statements

Defense counsel are not obligated to make an opening statement or present any evidence, since the defendant is presumed innocent.

At the beginning of a criminal trial, lawyers are limited to telling the jury what they believe the evidence will show. Thus, this is an opening statement, not an argument.

Prosecutors go first because they bear the burden of proving beyond a reasonable doubt that the defendant committed the offense(s) he or she has been charged with. Defense counsel are not obligated to make an opening statement or present any evidence, since the defendant is presumed innocent. Defense counsel may choose to make an opening statement at the conclusion of the initial set of prosecution witnesses, as opposed to at the start of trial. Reporters usually want to be present for opening statements. Not only do they hear a road map of the case the lawyers intend to present, but they often can get quotes that are useful to their coverage.

Witnesses

Some individual judges or local rules of court require the prosecution to file a list of potential witnesses prior to trial, along with a list of exhibits that may be entered into evidence. Reporters may ask the clerk of court’s office before the trial whether either list will be available to the public.

Prosecution witnesses take the stand first. Each will be asked questions by the prosecutor and can be cross-examined by the defense lawyer. If a witness is cross-examined, the prosecution is permitted a “redirect,” asking the witness only questions related to the topics discussed during cross-examination.

You may speak to witnesses after they are excused by the court, unless the judge indicates the witness is subject to recall to the stand later in the trial. The witness, however, is not obligated to answer your questions, and often may be advised by counsel not to do so.

Exhibits, Transcripts, and Courtroom Audio

Trial exhibits that are admitted into evidence become part of the public record. Subject to logistical considerations, they usually are available through the clerk of court’s office to inspect and copy. You also can request a copy of an exhibit from the party that introduced it. In some courts this is necessary, because parties retain custody of exhibits even after they have been introduced into evidence.

In high-profile cases, courts may work with the parties to make extra copies of exhibits that the news media can review, or the court may decide to post exhibits on its website. The presiding judge has some discretion in this area, so he or she might deny public access to certain evidence until after the conclusion of the trial.

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Transcripts of courtroom proceedings are not produced unless ordered by a party, a member of the public, or the court. However, by statute, every session of the court is recorded in some format.

Written transcripts are produced by a court reporter or transcriber. As noted in the [Federal Court Reporting Program](#) webpage, under Judicial Conference policy these transcripts are not available on PACER until 90 days after they are delivered to the clerk’s office.

During this 90-day period, transcripts are available at the clerk's office for inspection only or may be purchased from the court reporter or transcriber. The maximum per-page fee is set by the Judicial Conference, and each district sets a local rate subject to that maximum. A few courts have special exceptions to set their transcript rates higher.

After the 90-day period, transcripts can be viewed, downloaded, or printed for 10 cents per page on PACER. Additionally, the transcript is available for inspection and copying in the clerk's office under the same terms and conditions as any other official public document in the case file.

In most bankruptcy cases, and also in some district court cases (especially proceedings involving magistrate judges), the official record is kept through digital audio recordings. When this is the case, under Judicial Conference policy, the presiding judge may choose to make a copy of the recordings available through PACER.

Copies of such digital audio recordings also may be purchased from the clerk's office. The current rate is available in the miscellaneous fee schedules for [district courts](#) and for [bankruptcy courts](#), which are set by the Judicial Conference. Courts may make these recordings available via tape, CD, email, and/or digital download. When a court reporter is employed to create a transcript, there is no public entitlement to the reporter's personal backup recording.

Motion to Acquit

After the prosecution's last initial witness, the defense often makes a Rule 29 motion. Named after Federal Rule of Criminal Procedure 29, the motion asks the judge to acquit the defendant because the prosecution's evidence is insufficient to sustain a conviction. This motion also may be made after the conclusion of testimony by defense witnesses.

These motions are not granted often, but when they are, the defendant goes free. The prosecution cannot appeal such a ruling and the defendant cannot be tried again in federal court on the same charges because of the constitutional protection against "double jeopardy." If, however, the judge grants a Rule 29 motion after the jury reaches a guilty verdict, prosecutors can then appeal the judge's acquittal.

Closing Arguments

Unlike during the opening statement, prosecutors and defense lawyers are permitted to make an argument after the completion of testimony. That is, they may marshal facts in an attempt to prove or disprove the government's allegations.

The prosecution goes first, followed by the defense and a rebuttal by the prosecution. Because the prosecution has the burden of proof, it gets the final word. Reporters will want to be present for this portion of the trial.

Jury Instructions, Deliberations, and the Verdict

Before deliberations, the judge will give the jury its final instructions, a step that can have enormous impact on the verdict. Both sides may request in writing that specific language be included in the instructions. Once the judge finalizes proposed instructions, both sides review them in advance. Any objections must be submitted on the record before the jury begins deliberation. While jury instructions typically are given in open court and can be tedious to listen to, they spell out the matters the jurors are to consider and those they are not. In complex or high-profile cases, reporters may find it useful to be present.

Jury deliberations are private; nobody other than the jurors may be present during this process. Jurors have two responsibilities: to determine the facts based on the evidence presented during the trial and to apply the relevant law that the judge provides during the jury instructions. During deliberations, the jurors may have questions about the evidence or the instructions. If they do, they give a note to the deputy marshal or the appropriate person designated by the court, who takes it to the judge. The judge then calls the lawyers back into court to discuss what the answers to the note should be, calls the jurors back into the courtroom, and gives them the answer, provided it does not deal with issues outside the scope of the case or require the judge to interpret the facts for the jurors.

Criminal juries must reach a unanimous verdict of guilty "beyond a reasonable doubt" or not guilty. After thorough deliberation, the jury may report to the judge that it is deadlocked and unable to reach a verdict. At this point, the judge may give the jury what is known as the Allen charge. Named after an 1896 U.S. Supreme Court case, the Allen charge urges jurors to reconsider their positions, as well as those of other jurors, and resume their deliberations in an effort to reach a verdict. If they attempt to do so but still report that they are deadlocked, the judge may declare a mistrial.

In most federal courthouses, once a jury has reached a verdict, it is announced as soon as all the lawyers can get to the courtroom. Reporters may have as little as 15 minutes' warning. Inquire before the trial how members of the media will be notified when a verdict has been reached. Reporters will want to be present for the reading of the verdict.

Post-Verdict Interviews

Any media interviews must be arranged directly with lawyers and their clients. In high-profile cases, some type of media availability is common for prosecutors and defense lawyers, in or near court property, once a trial is completed. Rules regarding cameras are set by the court. You also are free to speak to jurors after the verdict is read. As noted in [Jurors](#), they are not obligated to grant interviews. Similarly, lawyers and their clients are free to determine whether they wish to talk with the media or not.

Non-Capital Sentencing

Whether there is a plea agreement or a trial that ends with a conviction, sentencing is generally scheduled for a later date. The court's probation office prepares a presentence investigation report on circumstances that may help the judge in determining a sentence. The report is based on conversations with the defendant and his or her family and friends, victims and their families, and others with relevant information. It is always filed under seal and accessible only to the judge, prosecutor, and defense counsel.

Since 1987, sentencing in federal court has been governed by the U.S. Sentencing Guidelines. They are set by the [U.S. Sentencing Commission](#), an independent agency in the judicial branch, created by Congress to make sentencing more consistent and proportionate. In January 2005, the Supreme Court ruled that the guidelines are merely advisory. Judges are urged to consider the guidelines but can depart from the guideline ranges, so long as the sentence is reasonable and does not exceed the maximum term set by statute for a particular crime.

The presentence report makes a recommendation based on how the guidelines rate the seriousness of the offense and on the defendant's criminal history. The judge is not required to follow the recommendations of the probation office or the parties, but if the judge rejects a sentence agreed to by the defense and prosecution, a defendant may withdraw a guilty plea. During the sentencing hearing, defendants are given a chance to tell the court anything they believe the judge should consider before the sentence is imposed.

Death Penalty Sentencing

When a capital crime may have been committed, federal prosecutors must receive written authorization from the attorney general before they can seek the death penalty. Federal law provides for a two-part, or bifurcated, trial in a death penalty case. If a defendant is found guilty of a crime punishable by death, the same jury that convicted him or her will determine the sentence. During a second phase of the trial, known as the penalty phase, both sides can present witnesses and evidence. The prosecution presents aggravating circumstances to justify the death penalty, while the defense presents mitigating circumstances that support a sentence less than death. The jury has only two choices: execution or life in prison.

Death penalty cases are fairly rare in federal courts. When they do occur, a defendant is given two lawyers, including one who has specific expertise in capital trials, as well other resources to support the defense.

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