

CRIMINAL PROCEDURE

✓ This symbol denotes recent rulings decided by the U.S. Supreme Court during the two most recent terms.

Abbreviation key: A. = Amendment; Art. = Article

NCBE/MBE TOPICS

CONSTITUTIONAL PROTECTION OF ACCUSED PERSONS

1. Arrest, search, and seizure
2. Confessions and privilege against self-incrimination
3. Lineups and other forms of identification
4. Right to counsel
5. Fair trial and guilty pleas
6. Double jeopardy
7. Cruel and unusual punishment
8. Burdens of proof and persuasion
9. Appeal and error
10. Evidence

THE 14TH A. & ITS INCORPORATION BY THE STATES

1. The 14th A. provides that no state "may deprive any person of life, liberty, or property, without due process of law"
2. Incorporation of the 14th A. extends Due Process requirements provided under the Bill of Rights to the states

INCORPORATION DEBATE

1. Extent to which the 14th A. makes the Bill of Rights apply to the states
2. **Majority view:** Selective incorporation
 - A. Not all rights in the Bill of Rights apply to the states, but only as particularly necessary to fundamental fairness [*Duncan v. L.A.*]
 1. Most prominent amendments of Bill of Rights have been incorporated
 - B. The 4th A. freedom from unreasonable searches and seizures [*Mapp v. OH*]; the 5th A. privilege against self-incrimination [*Malloy v. Hogan*]; the 6th A. guarantee against double jeopardy [*Benton v. MD*] (does not include civil forfeiture [U.S. v. Ursery]); the 8th A. right to counsel [*Gideon v. Wainwright*]; the 9th A. right to a speedy trial [*Klopfer v. NC*]; the 10th A. right to confront witnesses [*Pointer v. TX*]; the 14th A. right to an impartial jury [*Duncan v. L.A.*] (does not extend to petty offenses [*Lesch v. U.S.*])
4. Recent Supreme Court cases interpreting clauses apply to states
 - A. State liberty interests protected by Due Process Clause are generally limited to freedom from restraint, which imposes a typical and significant hardship on inmate in relation to ordinary prison life [*Walters v. McDonnell*]
 - B. Segregation for misconduct and refusal of presentation of witnesses at disciplinary hearing are not protected liberty interests [*Sandlin v. Connor*]
5. Only 2 Bill of Rights guarantees have not been extended to the states
 - A. Right not to be subject to excessive bail
 - B. Right to a grand jury indictment in felony cases [*Hurtado v. CA*]
6. **Minority view:** Total incorporation
 - A. The effect of 14th A. is to make all Bill of Rights guarantees directly applicable to the states

STATE & FEDERAL STATUTES & RULES

Procedures set forth for administration of criminal justice

1. These procedures must not violate the USC
 - A. Federal wiretapping statute cannot authorize conduct that is prohibited by 4th A. search and seizure guarantees
2. FRCP are applicable only to federal crimes
3. State constitutions may provide additional rights beyond federal law, but not less
 - A. The **Selective Incorporation Doctrine** requires state courts to apply nearly all the guarantees of the Bill of Rights in state criminal trials
 - i. States are free to place additional criminal safeguards in their own state constitutions
 - B. If a state constitution's clause articulates the same guarantee as the USC, state courts are free to interpret their state's clause to provide more individual protection than the U.S. Supreme Court's interpretation of the federal clause

SOURCES OF CRIMINAL PROCEDURE LAW

1. The USC, specifically the Bill of Rights, is the source for criminal procedure law
2. Originally enacted exclusively for the purpose of limiting the federal government
3. **Pertinent amendments:**
 - A. 4th A.: Freedom from unreasonable searches and seizures
 - i. Applies to both searches and seizures of property and to arrests of persons
 - B. 5th A.: Freedom from self-incrimination (voluntary confessions); federal Due Process Clause
 - C. 6th A.: Right to assistance of counsel; right to a speedy trial

1. Right to a speedy trial applies directly to federal prosecutions and applies to state prosecutions by way of the 14th A.'s Due Process Clause
2. 6th A.: Freedom from cruel and unusual punishment
3. The USC sets out the minimum constitutional rights for criminal investigations and prosecutions; however, state constitutions can provide additional rights and limitations on government
4. Federal Rules of Civil Procedure (FRCP)
5. Federal statutes
6. Federal statutes
7. State statutes

OVERVIEW OF A CRIMINAL PROCEEDING

PROBABLE CAUSE FOR ARREST

1. Prior to any arrest, police must have probable cause to believe that a crime has been committed and the suspect being arrested has committed that crime
2. **Felony or misdemeanor arrests conducted in a suspect's home** usually require a valid arrest warrant [*Payton v. NC*]
3. **Felony or misdemeanor arrests made in a public place** can be with or without a warrant [U.S. v. Watson]
4. **Misdemeanor arrests without a warrant** can only be for offenses committed in the officer's presence

POLICE STATION BOOKING

1. Suspect's file is opened (fingerprints, booking photos, and pertinent information, such as date of birth, height, weight, etc.)
2. Pursuant to a lawful arrest, an arrestee's person and belongings are subject to an **inventory search** consistent with standard inventory procedures [U.S. v. Liddell]
3. If an arrestee is being placed in the jail population, the arrestor can be strip searched, even if the arrest is for a minor offense [*Heck v. Bd. of Chosen Freeholders of the City of Burlington*]
4. Police reports are submitted with a request for prosecution

FILING CHARGES

1. Prosecutor has discretion to approve, deny, upgrade, or downgrade the charges requested or request additional investigation prior to filing charges
2. If there is sufficient evidence, prosecutor files a criminal complaint

FIRST APPEARANCE

1. Promptly following a custodial arrest, within a maximum of 48 hours, the arrestee is taken for a hearing before a magistrate or judge and advised of [*Garrity v. Pugh, City of Riverdale v. McLaughlin*]:
 - A. The charges against him/her
 - B. The right to counsel and/or indigent appointment of counsel
 - C. Bail: Amount is set or the defendant is released on his/her own recognizance may not be excessive
 - D. Bail is the amount of money the defendant must post with the court in order to be released; defendant forfeits this money if he/she does not show up at subsequent court proceedings
 - E. Hearing: Date is set for preliminary hearing

PRELIMINARY HEARING

1. Live witnesses, prosecution, and defendant with counsel are present
2. Magistrate determines whether there is probable cause sufficient to believe the suspect committed the crime and to bind the case over for trial

INFORMATION OR INDICTMENT

1. **Information**
 - A. After a finding of probable cause at the preliminary hearing, prosecutor prepares and files information alleging all the charges with the trial court, which replaces the criminal complaint
 - B. If there is no finding of probable cause at the preliminary hearing, the criminal complaint is dismissed and no information is filed
2. **Indictment**
 - A. A grand jury hearing is an ex parte presentation of evidence by the prosecutor to the grand jurors often without defendant or defense counsel present

- B. If the grand jury decides there is sufficient probable cause to support the charges, the prosecutor prepares and files an indictment with the trial court
- C. A defendant charged with a federal felony may only be tried pursuant to a grand jury indictment

ARRAIGNMENT

1. The defendant pleads guilty, not content (nolo contendere), or not guilty to the information or indictment
2. The 6th A. right to counsel attaches
 - A. Initial appearance before magistrate judge, where defendant learns charge against him/her and his/her liberty is subject to restrictions, marks the initiation of adversary proceedings that trigger attachment of 6th A. right to counsel
 - B. It is not required for the public prosecutor to be aware of the initial proceeding or involved in it for the 6th A. right to counsel to attach [*Rothgery v. Gillespie Cnty.*]
3. The 6th A. right to **speedy trial** attaches
 - A. Speedy trial applies to federal prosecutions and to state prosecutions by the 14th A.'s Due Process Clause
 1. "Good-cause continuances" are allowed upon court finding [NY v. Hill]
 2. Defendant may not prospectively waive speedy trial rights "for all time" [Zabala v. U.S.]

PRETRIAL

1. Pretrial motions

1. **Motion to suppress:** A motion to exclude evidence that was obtained in violation of defendant's constitutional rights
 - i. Motion to suppress fruits of an illegal search or seizure
 - ii. Motion to suppress an un-Mirandized confession
2. **Motion to dismiss:** A motion to dismiss charges
 - i. Motion to dismiss based on insufficiency of charging document's allegations and/or lack of notice to defendant
 - ii. Motion to dismiss based on venue of the prosecution and/or joinder or severance of the charges or defendants [FRCP 18, 21(a), 8, 14]
 - iii. Motion to dismiss based on constitutional overbreadth or vagueness of the statute

2. MOTION FOR DISCOVERY

1. **Prosecution's duty to disclose** includes documents, tangible objects, and lists of witnesses the prosecution intends to call at trial
 - A. Due Process requires the prosecution to disclose to the defense any exculpatory evidence within the prosecution's possession [*Brady v. MD*]
2. **Defendant's duty to disclose** is more restricted than prosecution's (includes advance notice of alibi and insanity defenses)

TRIAL

1. **Jury trial:** Federal level and all states give the defendant the right to a jury trial if charged with a felony or a misdemeanor punishable by more than 6 months in jail
2. **Confrontation Clause**
 - A. The 6th A. gives the defendant the right to confront the witnesses against him/her
 - i. Applies to the states by way of the 14th A.
 - ii. Includes defendant's right to be present at trial
 - iii. Applies at trial, not at preliminary hearing [*Stovall v. CA* (9th Cir.)]
 - B. Defendant's right to cross-examine witnesses
 - C. **Confrontation rule:** Otherwise-admissible hearsay evidence offered against defendant may still be excluded under

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Michael Pittaro



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