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What happens now?

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You've Been Arrested. What Happens Now?

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Chapter 1: You and the Criminal Justice System

I. Introduction

When you are arrested, you are automatically thrust into the criminal justice system. This system is a collection of individuals and government agencies working together to fight crime on the street, enforce the law in the courtroom, dispense justice and punish offenders. The police and prosecutors are working together, against you; the judge (at least in theory) remains in the neutral middle. Who is on your side? What rights do you have in the criminal justice system? Is there any way to level the playing the field?

This chapter will answer those questions. We'll explain what you can expect on your journey through the criminal justice system; your constitutional rights at each step along the way; and how a smart and experienced criminal defense lawyer can help you assert those rights and protect your best interests.

II. Your Journey Through the Criminal Justice System

Though every situation is unique, and the process does not always follow a precise order or timeline, your journey through the criminal justice system following your arrest will go something like this:

§1:01 Booking

Upon your arrest, you will be taken to the police station and "booked." Booking is the process of identifying you and recording the fact of your arrest. You will be photographed and fingerprinted, and an officer will ask you a series of questions, including questions about where you live, where you work, and your immigration status.

Tip from the Trenches: Answer pedigree questions.

Unless you know that the answers to these "pedigree" questions will provide law enforcement with incriminating information that otherwise would not be discovered, you should answer these questions. The authorities will learn the true answers to most of these questions on their own soon enough, and refusing to answer guarantees that you will not be released on bail.

§1:02 Post-Arrest Investigation

In addition to booking you, the police may use their access to you to undertake further investigation. They may:

- Place you in a line-up.
- Take handwriting samples and voice exemplars.
- Seek consent to search your property.
- Interrogate you.
- With a court order or warrant, collect your hair or saliva for testing.

If you are arrested for drunk-driving, you may be asked to submit to both a breathalyzer and the drawing of blood for blood alcohol analysis. In addition, depending on your particular circumstances and the charges against you, you may be subjected to a cheek swab for DNA collection.

With the exception of a police interrogation and a request for consent to search, you do not have the right to refuse any of these authorized post-arrest investigation procedures. However, if you refuse, the police are not likely to try to wrestle you into a line-up or forcefully bleed you. Rather, your refusal will be used against you at trial, as evidence of consciousness of guilt.

§1:03 Initial Appearance in Court

Shortly after you are arrested and booked, you will be taken to court for your first appearance before a judge or other judicial officer (with, perhaps, a stop along the way for you to be interviewed by a bail agency). At this initial court appearance, the judge will review the charges against you to determine whether there is probable cause to hold you.

This initial appearance must occur promptly. The Fourth Amendment to the Constitution requires some probable cause determination within 48 hours of your arrest. State law may impose more stringent demands and require an appearance well before 48 hours (e.g., within 24 hours or "without unnecessary delay").

In addition to a probable cause determination, at your initial appearance you are entitled to:

- Notice and explanation of the charges against you.
- A copy of the charges.
- Notice of your legal rights, especially your right to remain silent and your right to counsel.
- Representation by counsel or appointment of counsel.
- A bail determination.
- Setting of a preliminary hearing date.

If you are charged with a misdemeanor, you will enter a plea. If you plead "guilty," the judge will impose a sentence or set a date for a sentencing hearing. If you plead "not guilty," the judge will determine a bail amount and set a trial date. In a felony case, you will not enter a plea. The judge will hear arguments on bail, and will either set bail or return you to jail to await trial. [You will learn more about bail in Chapter 2.] The judge also will set a date for a preliminary hearing.

§1:04 Preliminary Hearing

At the preliminary hearing (sometimes called an "arraignment"), the judge will determine whether there is probable cause to believe that (1) a crime was committed; and (2) you committed that crime. If so, the judge will bind you over for trial. If not, the matter will be dismissed and you will be released.

If the judge finds probable cause, you will enter a plea of "guilty" or "not guilty." A plea of guilty is normally entered at this stage only if you and your criminal defense attorney have negotiated a plea bargain with the State. Assuming you plead "not guilty," your case will proceed to trial (though it still may be resolved before trial by means of a plea bargain). [You can learn more about plea bargaining in Chapter 3.]

In some cases (usually serious felonies) or jurisdictions, a grand jury may serve the same function as a preliminary hearing. A grand jury is a group of 16-23 average citizens who were summoned for jury duty and selected to sit on the grand jury. The grand jury determines whether there is enough evidence against an individual to go forward with a criminal trial. (By contrast, a trial jury determines whether there is enough evidence to convict that individual). The grand jury is meant to be a check on prosecutorial power. Basically, the grand jury has to give its "okay" before the government can bring criminal charges against a person.

§1:05 Discovery / Pre-Trial Motions

Following the preliminary hearing, the prosecution and your defense attorney will engage in a process called "discovery," during which both sides will exchange information and evidence. Discovery usually involves three steps:

1. The prosecution will make an initial, voluntary disclosure of its evidence against you.
2. Your lawyer will make an informal request or demand for additional evidence, usually by means of a letter to the prosecutor.
3. Your lawyer will file a motion (a formal written request), asking the court to order the prosecution to turn over any outstanding evidence.

In general, the government must turn over to your defense attorney the following types of evidence as part of discovery:

- Copies of any statements you made to law enforcement.
- Your criminal record.
- Documents and physical evidence seized from you, or which the government intends to use at trial, or which are material to your defense.
- Expert and scientific reports.
- Witness statements.
- Exculpatory evidence – evidence that is favorable to you on the issues of guilt or punishment. Evidence is exculpatory if it (a) tends to disprove your guilt, whether by showing your innocence or undermining the credibility of government witnesses; or (b) tends to mitigate the punishment.

Depending on the facts of your case, your defense lawyer may ask the prosecution to produce additional evidence, including, for example:

- The identity of a confidential informant.
- Information pertaining to the training and handling of drug dogs.
- Confidential records, such as police personnel and discipline records.
- The police squad car video.

During the discovery process, the court will set multiple status hearings with the attorneys, to monitor the progress of the case.

During this pre-trial period, your defense attorney also may be able to identify legal issues that can be addressed. For example, if the evidence against you was obtained in violation of your constitutional rights (e.g., by means of an unlawful search and seizure), your defense attorney might be able to have that evidence "suppressed" or tossed out. [You can learn more about challenging the evidence against you before trial in Chapter 4.]

§1:06 Trial

Trial will begin with jury selection. Following jury selection, the lawyers will give opening statements. The prosecution then will present its evidence against you, through the testimony of witnesses. Your defense lawyer will challenge the witnesses' veracity and credibility through cross-examination. At the close of the prosecution's case, it will be your lawyer's turn to present your defense. The evidence phase of the trial will conclude with closing arguments by the attorneys. The case will then go to the jury for deliberations and a verdict.

Depending on the facts of a particular case, a trial can be as quick as a morning hearing where the State presents one witness (e.g., the arresting officer) and the decision about guilt or innocence is made that same day. Alternatively, a more complicated trial can last several months, during which time dozens of witnesses and multiple pieces of evidence are presented prior to a determination of guilt or innocence. The trial process is discussed in detail in Chapter 5.

§1:07 Sentencing

If the jury finds you "not guilty," then the case is over and you are released from the criminal justice system to return to your life. If, however, you are found guilty, then a separate hearing will take place to determine your sentence. Evidence at the sentencing hearing can come in many forms. Some common examples of mitigation evidence (that is, evidence that favors a lesser sentence) are mental health records, which might explain your conduct on the day of the incident; testimony from friends and family to show that the incident was out of character for you; or evidence of good behavior since the incident (such as enrolling in DUI school or a drug treatment program), which shows you are taking responsibility for your actions.

III. Your Constitutional Rights in the Criminal Justice System

The United States Constitution establishes the basic rights of citizens of this country. The first ten Amendments (collectively known as the Bill of Rights), in particular, set forth fundamental rights that are designed to protect you from overreaching by the government and overzealous prosecutors. They serve as both sword and shield against the full weight of the criminal justice system. Let's review these key rights:

§1:08 Fourth Amendment

The Fourth Amendment **prohibits "unreasonable searches and seizures"** and provides that the police must have a warrant to invade the sanctity of your home, your personal property, or your body. Moreover, the warrant must be issued by a judge and must be based on a sworn statement that the law enforcement officers have "probable cause" to believe they will find evidence of criminal activity. The warrant must be specific in identifying the places to be searched and the items or persons to be seized.

This means that, in principle, the police cannot detain you and search you or your home or your property without a warrant. Over time, however, the law has carved out many exceptions to the warrant requirement.

If the police conduct an illegal search or seizure, in violation of the 4th Amendment, any evidence they find may be "suppressed," which means it cannot be used against you at trial. A motion to suppress can be a powerful tool in your defense.

§1:09 Fifth Amendment

The Fifth Amendment establishes:

The **prohibition against self-incrimination.** This is your "right to remain silent." This means you cannot be required to testify against yourself under any circumstances. You have the right to refuse to answer questions by law enforcement officers or other government agents when you are arrested and taken into custody; before a grand jury; and at trial. Moreover, if you choose to remain silent, your silence cannot be used against you as evidence of guilt.

The Fifth Amendment requires a **grand jury indictment** in capital and federal felony cases.

The Fifth Amendment **prohibits "double jeopardy,"** which means that you cannot be prosecuted more than once for the same offense. The government only gets one bite at the apple.

Lastly, the Fifth Amendment **guarantees you the right to due process of law.** This means the government must play by the rules and honor your rights under the law. You may not have your life, your liberty or your property taken from you with "due process of law." The right to due process is a broad one that comes into play at all stages of the criminal process, from arrest and indictment all the way through trial and sentencing.

§1:10 Sixth Amendment

The Sixth Amendment protects your rights at trial. The Sixth Amendment guarantees transparency in prosecutions and prohibits the government from secretly prosecuting its citizens for alleged offenses. The Sixth Amendment provides that all persons accused of a crime have these rights:

- The right to know the charges against you;
- The right to a "speedy and public trial, by an impartial jury" if you are charged with a crime punishable by six months or more in jail.
- The right to a lawyer to counsel you in defending against the charges. This right is granted to everyone, regardless of personal circumstances. If you cannot afford to hire a lawyer, the court must appoint one for you, at no cost to you. Moreover, you have the right to a competent attorney, who will represent you according to the recognized professional norms and standards for lawyers in the jurisdiction.
- The right to compel (subpoena) witnesses to testify in your defense.

- The right to confront the witness against you. This, essentially, is the right to cross-examine the witnesses against you and challenge the veracity of their statements and accusations, and the reliability of their memories. This means that, with very rare exceptions, the prosecution's witnesses must testify in person, in open court, and face cross-examination by your defense lawyer.

§1:11 Eighth Amendment

The Eighth Amendment **prohibits cruel and unusual punishment.** Outside of the death penalty context, the 8th Amendment is less an everyday part of the criminal justice process. It can, however, play a significant role in preventing jails and prisons from implementing unusual, extreme, or dangerous sorts of punishment or conditions of confinement.

The 8th Amendment also **prohibits the court from imposing "excessive" bail.** Note that you do not have a constitutional right to bail; you have a right to "not excessive" bail. Excessive means unreasonable under the circumstances, in light of the crimes charged. Bail is not "excessive" just because you do not have the funds or wherewithal to make bail.

IV. You and Your Criminal Defense Lawyer

It is easy to feel overwhelmed by the criminal justice system. Even if you know your rights, asserting those rights in the face of authority, when you are cut off from your family and friends, is difficult for most people. An experienced criminal defense lawyer can be your voice.

A. How a Criminal Defense Lawyer Can Help You

An experienced criminal defense attorney – one who understands the system, knows the (written and unwritten) rules, and speaks the language of the prosecutor – helps to level the playing field. A

knowledgeable criminal defense attorney can help you along every step of your journey through the criminal justice system. For example, your attorney will:

- **Investigate the charges against you.** Your criminal defense attorney will visit the scene of the crime; interview witnesses; review official reports and other documents; and examine the physical evidence. Unlike the police investigation, your attorney's investigation will consider the facts with an eye toward finding holes in the evidence, gaps in proof, inconsistencies, and anything that might give rise to reasonable doubt.

- **Scrutinize the officers' conduct.** Did the officers' conduct, in connection with your arrest and/or in gathering the evidence against you, violate your constitutional rights? If so, your attorney can bring a motion to have the evidence suppressed.

- **Stand between you and the government.** The law and procedures that govern a criminal case are complicated. Unless you have studied and trained in the law, it is impossible for you to know all of your rights or when those rights are being violated. Your attorney can help you assert your rights and protect you from an overzealous prosecutor.

- **Develop a theory of defense.** Did you act in self-defense? Do you have an alibi? Are the charges against you based on the claims of an unreliable eyewitness? Does the prosecution have a weak case, lacking sufficient evidence to prove the charges against

you "beyond a reasonable doubt"? Depending on the facts of your case, your attorney can help you formulate and present a coherent theory of defense.

- **Represent you at trial.** Your attorney will work on your behalf to select a jury and present your defense to the jury.
- **Help you make the big decisions required of a criminal defendant.** Should you accept a plea offer or go to trial? Should you testify at your trial? A knowledgeable criminal defense attorney can offer wise counsel, based on experience, to help you make the many strategic decisions you will have to make as your case winds its way through the criminal process.
- **Communicate with your family.** Your family will be worried about you. Your criminal defense attorney can serve as an intermediary between you and your family and the criminal justice system, helping to ease their anxiety.

B. What to Expect at Your First Meeting with Your Defense Lawyer

1. Your Lawyer Will Gather Information

Your lawyer's main goal at this initial meeting is to gather information; consequently, your lawyer will ask a lot of questions and will take notes during the meeting. While this may seem intrusive, remember that your criminal defense lawyer is on your side. The best way to help your lawyer help you is to be honest and forthcoming. Broad areas of questioning will include:

§1:12 Immediately Necessary Information

This includes background and contact information, as well as information necessary for what is often the most pressing task at the start of a criminal case: getting you out of jail. Your lawyer's questions will cover the following topics:

- Your full name, including middle name, nicknames, maiden names and any other names used.
- Home and work addresses and all phone numbers.
- E-mail address.
- Date and place of birth.
- Immigration status, if you were born in the United States.
- Social Security number.
- Arrest record and the outcome of those arrests. Your lawyer will want to know: "What happened with the case?" "Did you plead guilty or go to trial?" "Did you spend any time in jail?" "Were you put on probation, ordered to pay a fine or restitution, or sentenced to time served?"
- Education.
- Military service.
- Work history and current work phone number.
- Marital status, plus the ages of your children and whether you support them.
- Recent hospitalizations.

- Medications and other immediate medical needs. You likely will be asked to sign a release, to allow your attorney to begin the process of obtaining records from health care and mental health providers. Your criminal defense lawyer also can let the court, the police and the jail staff know about your medical situation.

§1:13 Information to Assist in Your Long-Term Defense

It is important to tell your lawyer everything, so that your lawyer can prepare for the longer-term tasks involved in your defense, including preparing suppression motions, preparing for trial, negotiating a plea or other favorable disposition, and preparing for sentencing. Since the facts usually will out and refute a false story, it is important that you be honest and forthcoming with your lawyer from the very start. Your lawyer will ask about:

The events on the day of your arrest

- Where did you go?
- Who did you see?
- What did you do?
- Did you eat? sleep? take your medication?

The circumstances surrounding your arrest

- Did the police have a warrant?
- At what point during the police encounter did you feel you were not free to leave?
- What restrictions were placed on your freedom of movement and when did this occur?

- At what point were you informed that you were under arrest?
- Were you handcuffed or otherwise physically restrained?

The immediate aftermath of your arrest

- Were you interviewed/interrogated by police?
- How long did you talk to the police?
- Was anyone else there (e.g., a friend or spouse)?
- Did the police take notes?
- Did they record the interview?
- Did you sign anything? What did it say?
- What did they ask you? What did you say?
- Did you talk to them about anything else?

Sources of evidence and witnesses

- If the prosecution has identified witnesses against you, your lawyer will ask:
- Were the witnesses present at the scene? Did you actually see them?
- Did the witnesses hear about the crime from someone else? Who might that be?
- Did you speak to any of the witnesses about it?
- Do you have the names and contact information for these (or any other) witnesses?
- What is your relationship to the witnesses?

§1:14 Charge-Specific Information

Depending on the circumstances of your case and the charges you may be facing, the initial meeting also may cover the following topics:

If you are facing misdemeanor charges

Your lawyer will discuss with you ways to dispose of the charges, including alternatives to prosecution, such as a deferred prosecution program; mediation; or drug and mental health treatment.

If you are facing theft charges

In nonviolent theft cases (e.g., bad checks or embezzlement), your lawyer will talk to you about the possibility of making restitution (perhaps in exchange for a dismissal of the charges). Think about whether there is any way you can pay back the victims of the crime. Can you borrow the money from a friend or relative? (Better to be in debt to a friend than to the court.)

If the charges stem from a motor vehicle accident

If you are charged with an assault or homicide arising from a motor vehicle accident, it is imperative that you describe for your attorney, in as much detail as you can, how the accident occurred, so that your attorney can have an investigator begin to gather evidence from the scene. Skid and yaw marks and debris disappear quickly. Your attorney's investigator needs to visit and photograph and even videotape the scene immediately.

If you are being investigated or facing fraud or business crime charges

Tell your lawyer all about your business. Often, the prosecution's Achilles Heel is that they do not understand your business, and what they perceive to be unusual or fraudulent is a standard and legiti-

mate business practice. The more you can show that you provide a legitimate service to the public, the less eager a prosecutor will be to shut you down.

If you are facing murder charges

With this charge more than any other, the prosecution will continue to build its case even after an arrest is made. Your lawyer will caution you, in the strongest terms, not to speak to anyone about the case because the prosecution will try to turn everyone state's evidence. All calls from jail will be recorded, and the police will study them to find something incriminating. Even without police encouragement, your fellow inmates realize that eliciting incriminating statements from a murder suspect can be their ticket out of jail. Therefore, you cannot confide in anyone.

If your case involves possible search and seizure issues

First and foremost, your lawyer will need to know how you came into contact with law enforcement officers. Your lawyer's questions will be guided, in part, by where you were at the time of the initial police contact and whether you had a reasonable expectation of privacy in the place searched and the items seized. For example, were you stopped on the street or other location open to the public? Were you in a private residence or a commercial building? Were you a passenger in another person's vehicle? Were you driving your own vehicle?

Were there any witnesses to the search? What was the scope of the search? Did officers present a warrant? Did officers ask for permission to search?

2. Your Lawyer Will Share Information With You

In addition to gathering information from you, your lawyer will want to share critical information with you. Even the most sophisticated individuals need to be educated and constantly reminded about their

legal rights and what they must do to avoid waiving or undermining them. Before this initial meeting ends, your lawyer will review with you:

§1:15 Your Right to Remain Silent

As we discussed above, you have the constitutional right to remain silent. Everything you say can and will be used against you. Accordingly, speak to no one about the charges against you.

Truly, this is easier said than done. Remember, though, that friends, co-workers, employees, cellmates and accomplices will be pressured to turn state's evidence with threats of prosecution and severe penalties, or they already may be informants. Family members can be subpoenaed and forced on penalty of contempt to testify about what you told them.

If you are worried that your silence will lead your friends and family to believe you are hiding your guilt, try these tactics:

- Blame your lawyer: "My lawyer told me that I can't talk about the case."
- Warn them of the potential consequences: "My lawyer said that if I talk to you, the prosecutor might subpoena you to find out what I said."
- Tell them to call your lawyer.

§1:16 The Attorney-Client Privilege

Communications between you and your attorney are confidential and may not be revealed to third parties, or uncovered by the prosecution as part of its investigation, or used against you in court.

As broad as this privilege is, it is not entirely unlimited. Significantly, it does not apply to communications at which a third party is present or communications which you could expect others to

overhear. With this in mind, be careful about communicating with your attorney from jail. Typically, all calls from jail are recorded; plus, jail phones often stand out in the open, where other inmates can overhear what is said. Unless you call on a line reserved for confidential attorney-client conversations, your conversations can be used against you, even conversations with your attorney.

§1:17 Your Constitutional Rights re: Searches and Seizures

If you are not in custody, or not yet charged with a crime, you may find the police at your home or place of business attempting to search for evidence. If the police have a warrant, you must allow the officers to enter and search. If the police do not have a warrant, do not consent to a search. In either case, call your criminal defense lawyer as soon as reasonably possible.

3. Your Lawyer Will Give You a Chance to Ask Questions

Discuss any concerns you have, including, for example, how a conviction or incarceration may affect you or your family, and what your possible exposure is. As much as possible, your lawyer wants to put you at ease with your situation. If you have questions, now is the time to ask.

Appendices

Appendix 1-1: Your Constitutional Rights

Arrests
Search & Seizure

U.S. Constitution, 4th Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Confessions
Self-Incrimination

U.S. Constitution, 5th Amendment: "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law [.]"

Confrontation
Right to Counsel
Speedy and Public Trial

U.S. Constitution, 6th Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence."

Due Process of Law
Equal Protection of the Law

U.S. Constitution, 14th Amendment, Sec. 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, 5th Amendment: "... No person shall ... be deprived of life, liberty, or property without due process of law..."

Jeopardy

U.S. Constitution, 5th Amendment: "... [n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Cruel and Unusual Punishments

U.S. Constitution, 8th Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Appendix 1-2: Dos and Don'ts in Encounters with Law Enforcement

The Constitution affords you many rights that are intended to protect you from government overreaching and provide a counterbalance against the enormous power of the criminal justice system. However, in many instances, you must assert your rights or risk losing (or "waiving") them. Accordingly, here is a short of list Do's and Don'ts for protecting and asserting your rights in an encounter with law enforcement:

Do:

- Remain calm.
- Answer "identification" questions.
- Pay attention to what is going on around you. Your criminal defense lawyer will want to know the details of the encounter and the words exchanged between you and the officers.
- Remain silent. Say only, "I do not want to talk or answer questions. I want a lawyer."
- Call your lawyer if you are taken into custody.

Do not:

- Make small talk.
- Volunteer information.
- Consent to a search.
- Make any kind of deal with the prosecutor or, worse, the police detectives until you have consulted with your criminal defense lawyer. (The prosecutors and/or the police might insist that you decide immediately whether to cooperate with their investigation and might threaten that all deals will be "off" if you decline to do so. In most instances, you should ignore this threat. If you have valuable information, it likely will retain its value after you have had time to meet with your lawyer.)

Appendix 1-3: Defendant's Motion for Discovery (Federal Court)

ATTORNEY NAME
FIRM NAME
Address
Phone

Attorneys for Defendant
XXX

UNITED STATES DISTRICT COURT
_______ DISTRICT OF __________
(HONORABLE XXX)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CR-XX-XXXX-XXX
	)	
vs.	)	
	)	MEMORANDUM IN
XXX	)	SUPPORTOF MOTION
	)	FOR DISCOVERY
Defendant.	)	
	)	
	)	

The discovery process in this case is currently proceeding pursuant to the order issued by Magistrate Judge _____ on [date]. By the terms of that order, the government has been providing discovery on an open file basis. In addition to the discovery already provided, the Defendant hereby makes formal demand upon the government to produce all discoverable evidence as authorized not only under the court's order, but under the Federal Rules of Criminal Procedure, this court's Local Rules, and the United States Constitution. This request encompasses, but is not limited to the following:

1. Disclosure of any existing exculpatory evidence in accordance with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Such disclosure also requires the government to reveal any information that would impeach the credibility of any of its witnesses in this case. Subsequent cases applying *Brady* indicate that nondisclosure of evidence impeaching the credibility of a government's witness violates due process. *United States v. Bagley*, 473

U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). Also, the *Brady* rule should be interpreted liberally on the side of disclosure. *United States v. Bailleaux*, 685 F.2d 1105 (9th Cir. 1982).

In *United States v. Sudikoff*, 36 F.Supp.2d 1196 (C.D. Cal. 1999), the district court noted that appellate standards of review for *Brady* errors are not appropriately applied in the pretrial context. *Id*. at 1198-99. Rather, the court ruled that "*Brady* requires disclosure of exculpatory information that is either admissible or is reasonably likely to lead to admissible evidence." *Id*. at 1200.

Brady requires disclosure not just of exculpatory evidence in the possession of the prosecutor, but in possession of the government in general. *United States v. Blanco*, 392 F.3d 382, 393 (9th Cir. 2004). In *United States v. Fort*, 472 F.3d 1106, 1113 (9th Cir. 2007), the Ninth Circuit held that local police officers who author reports that are turned over to the federal government in support of a federal prosecution are agents of the federal government for purposes of FRCrP 16. Accordingly, the defendant requests that the court order *Brady* disclosures not just by the prosecutor and federal agencies, but by all government officials involved in the prosecution of this case.

2. The defense requests that the government review the personnel files of its agents for exculpatory evidence and to turn over any such evidence to the defense. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). If the government is in doubt as to whether information is exculpatory, then the personnel files should be forwarded to the court for review in camera. *Id*. This request encompasses not only law enforcement officials employed by the federal government, but also state and local law enforcement officers who have been involved in the case against the defendant. See *United States v. Fort*, 472 F.3d 1106, 1113 (9th Cir. 2007)(explaining that when local police participate in the investigation of a defendant they are federal "agents").

3. Disclosure of the identity of all cooperating witnesses, persons, or informants and access to or contact information for such persons for the purposes of pretrial interviews. In addition to access to cooperating witnesses, the defense requests all exculpatory evidence pertaining to cooperating witnesses, including, but not limited to, the following:

a. The terms of the witnesses' cooperation agreements, including benefits to the witnesses as well as expectations established for the witnesses and any rules of conduct or instructions given to the witnesses, be they formal or informal;

b. Any suitability determinations established for the witnesses;

c. Any criminal history for the witnesses, including arrest records and conviction records(*United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988)(error not to release witness's entire record));

d. Any instances in which any of the witnesses have been untruthful to law enforcement or to a court or failed to comply with the terms of the witness's cooperation agreement (*United States v. United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993)(error not to disclose informant's lie about prior criminal history);

e. Any information regarding whether the witnesses have any personal relationships or interests that might cause bias in the witnesses' testimony; and

f. Any information regarding the witnesses' use of controlled substances (*Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002)(error not to turn over evidence of informant's drug usage).

4. Production of any and all relevant statements made by the Defendant which are in the custody or control of the government, the existence of which is known by the government, or the existence of which may become known to the government by the exercise of due diligence, as required under Fed. R. Crim. P. 16(a)(1)(A). This request includes any oral or written statements, and encompasses not only agents' reports containing the defendant's statements, but also rough notes of the defendant's statements. *See United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976)(recognizing discoverable nature of rough notes).

5. Disclosure of any prior criminal record of the Defendant that is within the government's possession, custody, or control, or the existence of which is known, or which may become known to the government through the exercise of due diligence, as required under Fed. R. Crim. P. 16(a)(1)(D).

6. Disclosure of and access to any photographs, books, papers, documents, tangible objects, buildings or places which either are material to the defense or are intended for use by the government in its case-in-chief, as well as copies of any audio and video recordings. Fed. R. Crim. P. 16(a)(1)(E).

7. Disclosure of and access to any results or reports of physical or mental examinations or scientific tests or experiments which either are within the possession, custody, or control of the government, the existence of which is known, or the existence of which may become known to the government through the exercise of due diligence, as required under Fed. R. Crim. P. 16(a)(1)(F).

8. Production of the material described under Rule 16(a)(1)(F)and (G) for each and every expert witness the government intends to use in its case-in-chief at trial. The Defendant would observe that Rule 16(a)(1)(G) requires the government to produce more than merely any conclusions by any and all experts, but also the *basis* of such conclusions. This rule also applies to any witness whose testimony would be based on "specialized knowledge." This may include the testimony of law enforcement officials. *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997).

9. Production of all arrest reports, investigator notes, memos from investigating officers, sworn statements and prosecution reports which have not already been provided. These reports are available under Fed. R. Crim. P. 16, 26.2, and 12.1; the Jencks Act, 18 U.S.C. §3500, et seq, and *Brady v. Maryland*, 373 U.S. 83 (1963).

10. Production of all witness statements as required under the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2.

11. Production of a list of witnesses that the government intends to call in its case-in-chief as well as a list of witnesses, including contact information, of the percipient witnesses that the government does not intend to call at trial. *United States v. Grace*, 526 F.3d 499 (9th Cir. 2008)(en banc); *United States v. Cadet*, 727 F.2d 1453, 1469 (9th Cir. 1984).

Dated: Respectfully submitted,

s/ Attorney
Attorney for Defendant, Bar No.
Address

Chapter 2: Bail and Pretrial Release

I. Introduction

Your journey from arrest to your first appearance before a judge may involve many stops: the local precinct or stationhouse; a central holding facility; a bail agency; an interrogation room; a jail cell. During this time, which can last many long hours (especially if you are arrested on a Friday and have to wait for court to open on Monday), you are likely to be consumed by one thought: Get me out of here!

Bail is your way out.

This chapter will explain the basics of bail; the two types of bail that are available to you; and how your criminal defense lawyer can help.

II. Bail Basics

§2:01 What is Bail?

"Bail" is the legal term for the conditions upon which a defendant will be released from custody. As described in more detail below, the conditions of your release may include the posting of collateral (money and/or property) and the promise to obey court-ordered restrictions on your liberty.

§2:02 When is Bail Set?

In most cases, bail will be set at, or immediately after, your initial appearance before a judge. Sometimes, though, if you are arrested for a minor offense, the arresting officer may have discretion to set a minimal bail and release you from the stationhouse, without a trip to the courthouse. This is sometimes called "stationhouse bail."

§2:03 Why is Bail Important?

Aside from the obvious reasons – bail gets you out of jail, restores your freedom, and returns you to your family – your release on bail is important because it makes it easier for your defense attorney to do his or her job and, therefore, improves your chances of obtaining a favorable outcome in your case. When you are free on bail, you can assist in your defense; help your lawyer locate witnesses; meet with your lawyer in private and at your convenience; and review with your lawyer, in private, any physical evidence or statements against you.

In contrast, when you are incarcerated, it is much more difficult for your attorney to consult with you and prepare your defense because:

- Your attorney will spend considerable time traveling to the jail, passing through security, and awaiting your delivery to an interview room.
- There is little privacy in jail, even in an interview room. The conference tables may sit side-by-side, enabling other inmates and their lawyers to overhear your conversations.
- The jailhouse is an awkward place in which to review documents and other physical evidence, especially audio and video tapes, but your attorney often will be left with no other option.
- You will not have free access to the phone to call your lawyer whenever you need to talk.

- The likelihood of someone repeating your words (ratting you out) increases enormously in a jail setting. After all, the other inmates also want out, and many realize that the most effective form of self-help is to turn state's evidence, especially in a serious or high-profile case.

III. What Types of Bail Are Potentially Available to You?

In general, two types of bail are available: (1) release on bond; and (2) release on conditions.

A. Release on Bond

§2:04 What is a Bond?

A bond is a form of debt security; it is a pledge that you will return to face the charges against you, on penalty of forfeiting the bond. The bond can be signed by a professional, licensed bail bond agent; by a family member or friend; or by you.

§2:05 What Types of Bonds Are Available?

There are two types of bonds – unsecured and secured (by cash, real property, or other collateral). Depending on your circumstances, these different types of bonds might be available to you:

- An **unsecured bond** – With this type of bail, you are released on your own recognizance (ROR) or on a bond with a face amount, but requiring no cash deposit and no collateral except for your signature. If you fail to appear or otherwise violate your bail conditions, you are liable to the court for the amount of the bond.

- A **cash bond** – With a cash bond, the court requires the deposit of cash as collateral to secure your release. The court will announce whether the bail is "straight" (requiring deposit of the whole amount) or whether a deposit of some percentage (typically ten-percent) will suffice. Even on a ten-percent bond, if you fail to appear, you are liable for the full amount of the bond.

- A **real property bond** – In this instance, you (or a family or friend) put up your home as collateral for your release. This can be an attractive option, if available to you, because it allows you and your family to keep your cash for living expenses and legal fees; it also makes a strong argument in favor of your release because if you fail to appear for trial you (or your family member or friend) will lose your home. This gives you a powerful incentive to return to court. Moreover, the willingness of a friend or family member to post property demonstrates great confidence in your reliability and often will persuade the court that you do not pose a danger to the community and you are not a flight risk.

- A **surety bond** requires the signature of a third party; the court also may require the third party to post collateral to secure your release.

Tip from the Trenches: Know the Risks Before Contacting a Bail Bond Agency

In some circumstances, you or your criminal defense attorney may want to approach a licensed bonding company about posting a cash bail for you, upon payment of a fee. There are pros and cons to this arrangement. On the plus side, a bonding company will be very familiar with the local court system and, once bail is posted, likely will be able to obtain your release rather quickly.

On the negative side, however, working with a bail bond agency can be costly, both financially and personally. If you deposit your own money with the court to satisfy a ten-percent or straight cash bail, that money will be refunded to you on completion of the case. On the other hand, when a bonding agency posts that money, it does so out of its own funds, and the bonding company becomes the suretor on the bail bond. The agency will charge you a fee for its services (which can be substantial), and that fee is not refundable.

In addition, using a bonding agency exposes you to the very real risk that a bounty hunter may one day attempt to "arrest" you for non-appearance. The law authorizes a suretor to arrest a defendant who skips bail and return him to the jurisdiction without any court hearing or protection—conduct that otherwise would be a criminal kidnapping and detention. Bounty hunters lack the professional training and accountability of the police, and there is a very real possibility that you or your loved ones could be harmed in dealing with these individuals.

B. Release on Conditions

§2:06 When is a Release on Conditions Available?

If the court is reluctant to release you on a bond, or if a bond is not practical (due to a lack of funds or collateral), then your criminal defense attorney may propose that you be released on conditions. This proposal may be granted if an appropriate combination of restrictive conditions exists that will satisfy the judge that you are not a flight risk or a danger to the community.

§2:07 What Types of Conditions May Be Imposed?

Common conditions that may be imposed on your release include:

- **Travel restrictions**, e.g., prohibiting you from leaving the state or the judicial district.
- **A curfew.**

- A requirement that you immediately **notify the court of any change in your address or phone number.**

- **A prohibition against the use of drugs and/or alcohol, along with monitoring or testing.** For example, you may be required to wear a SCRAM (Secure Continuous Remote Alcohol Monitor) device. This device straps onto your ankle and takes periodic readings through the skin of blood alcohol levels.

- **Consent to warrantless, random searches of your person and home.** These are onerous and risky conditions. Drug-testing will reveal if you are using drugs, but will not reveal any other criminal activity. A search of your home, on the other hand, may uncover contraband, such as guns or pornography, or may expose evidence (e.g., drug paraphernalia) that suggests other criminal activity. A search of your home will be disruptive to your family and will be noticed by your neighbors. Therefore, your criminal defense attorney will try to avoid having your release conditioned on your consent to searches. However, if you have an obvious drug problem that makes the judge reluctant to grant bail, these conditions may be necessary to secure your release.

- **Psychiatric evaluation and/or treatment.** As a condition of your release, you may be required to undergo a psychiatric evaluation to ensure that you are not a danger to the community. This condition usually is limited to defendants charged with certain types of violent offenses (e.g., homicide, arson, kidnapping, crimes against children, sex offenses). If you are charged with such an offense, the decision on your release can be delayed until the psychiatric

evaluation is completed. Furthermore, release conditions may include psychiatric treatment, including drug and alcohol dependency treatment.

- **A prohibition against contacting witnesses or the victim.** This is a condition you should welcome. Any contact likely will not end well for you. In fact, if the judge does not impose this condition, your criminal defense attorney probably will.
- **Electronic monitoring** (e.g., if you are under house arrest or a travel restriction).
- **A third-party custodian.** Your release conditions may include a requirement that you reside with a third-party custodian. This is, essentially, a court-ordered babysitter. The custodian is responsible for monitoring your compliance with any bail conditions and informing the court of any violations.

IV. How Your Criminal Defense Attorney Can Help

Bail hearings take place early in the criminal process, when both the prosecutor and the judge have little in the way of accurate information about you. Consequently, their recommendations and decisions on bail tend to be based largely (if not solely) on the seriousness of the current charge, your prior criminal record, past failures to appear, your parole/probation status, and whether you have other charges pending against you. Misunderstandings are the rule, but good lawyering can bear excellent results.

A. Before the Hearing

1. Gather Facts and Evidence

Bail hearings are won on the facts, not on sophisticated legal or constitutional arguments. Consequently, before the hearing, your lawyer will gather the facts, by interviewing you and, perhaps, one or more individuals close to you. Here is a sampling of the questions you can expect:

2. Sample Interview Topics and Questions

§2:08 Residential Information

- Where do you live?
- How long have you lived there?
- Do you rent or own?
- If you rent, who is the landlord and what is the rent? Do you have a written lease? How can your lawyer get his hands on it as soon as possible?
- If you own your home, in whose name[s] is the deed?
- How much equity does the house have: when was it purchased, for how much down, and what is the balance on the mortgage?
- Who else lives there, and what is their relationship to you?
- If you cannot return to your home, where can you live? With whom? What is their relationship to you and their contact information?

§2:09 Employment Information

- Where do you work and how long have you worked there?
- What are your hours?
- What is your job title?
- Who is your immediate supervisor, and how can he or she be contacted to confirm employment?
- If the job is recent, where did you work before?
- If bailed, will you be able to return to the job?

§2:10 Who Depends on You for Support?

- Are you married? For how long?
- Do you have children?
- Do any members of your extended family depend on you for support?
- If you are divorced or separated or if you have children from other relationships, do you pay child support? If so, how frequently and how much?

§2:11 Your Criminal History

- Have you been arrested previously? Convicted? Sentenced?
- What was your bail status on those prior cases?
- How many court appearances did you make?
- Did you ever fail to appear?
- If you previously have been sentenced to probation or parole, how well did you comply with the conditions?

§2:12 Other

- Have you served in the military?
- If so, in what branch? What was your highest rank? Where were you stationed? What type of discharge did you receive?
- What is your immigration status?
- Is anyone willing to come to court and either post cash or sign a surety bond?

B. At the Hearing

§2:13 Present Facts in Your Favor

At the bail hearing, the overarching questions in the judge's mind will be:

Can you be trusted to return to court, even if it is almost certain that you will be convicted and incarcerated?

- Can you be trusted to refrain from further criminal activity?
- Can you be trusted to leave possible witnesses alone?
- Can you be trusted to abide by any conditions of your release?

If you are represented by a criminal defense attorney, your attorney will answer these questions by presenting facts in your favor, including, as appropriate: your employment history and status; your personal situation; your family's need for your income and health insurance benefits; and your ties to the community. Depending on

the charges against you, your attorney also might point out to the judge that the crime with which you are charged is not a heinous and violent crime, and that the prosecution has a relatively weak case.

More than likely, you will not testify at this hearing.

§2:14 Avoid Common Traps and Pitfalls

In addition to presenting facts in your favor, your attorney will work to ensure that you are able to comply with any conditions set on your release and help you avoid common pitfalls that may make it difficult for you to comply. For example:

- A real property bond may specify that, should you violate the bond's conditions, the property will be forfeited. Your attorney will try to restrict the forfeiture condition to only your failure to appear, rather than your violation of any other conditions often imposed on pre-trial release.
- If you take prescription medication, your criminal defense attorney will either specify which prescription drugs you take or obtain the court's consent, on the record, that you may take prescribed drugs. Without this safeguard in place, you can unwittingly test positive for controlled substances, in violation of the terms of your release.

Moreover, while you may be prohibited from contacting certain people, it is generally understood that your criminal defense lawyer and investigators working for your lawyer are permitted to contact the alleged victim and witnesses. A smart criminal defense lawyer will request that the judge state, in open court, that contact by your lawyer and investigators is permissible. Then, when attempting to interview witnesses, your attorney can assure them that the judge has approved of this form of contact.

Tip from the Trenches: Talk with your attorney about possible conditions of release.

An open and honest conversation will help your attorney assess your ability to comply with certain conditions, and ensure that you know what to expect and what is expected of you during your release.

C. Crime-Specific Examples

A knowledgeable and experienced criminal defense attorney often can devise a creative bail package to present to the court. Let's look at some examples:

§2:15 Minor Offenses

If you have been charged with a misdemeanor, you may be released on stationhouse bail. (See §2:02.) If not, it is likely that you will be released on your "own recognizance" or on a modest cash bail. If you have a drug problem, you may need to enter into an in-patient drug treatment program, with your continued residence in the program being one of the conditions of release. If you have a history of nonappearance or if you do not have a steady residence, a third-party custodian might be a condition of your release or the judge might effectively decide not to release you by imposing a high-dollar bail that you cannot make.

At the initial appearance or bail hearing, your attorney might try making a strong argument as to your innocence or the success of a particular defense. When the charge is a minor crime, laying out a defense early in the case, before your attorney has had time to investigate all the facts, carries less risk than in a more serious case. The prosecution and police usually lack the time and resources to investigate a minor offense. Also, the charge is more likely to be resolved by a plea or dismissal, than by a trial. Your attorney's presentation (which may include an assertion of your innocence) might convince the judge that your continued incarceration is unjust. The judge might find a way to dismiss the charge, or might pressure

the prosecutor to offer a lenient plea, or might release you. In this situation, your attorney can argue that your release poses little risk because, since you know you will be cleared, you have a strong incentive to return to court.

§2:16 Drug Offenses

In a drug trafficking case, agreement to a high monetary bail may backfire, especially if you do not have a high-paying legitimate job. A better approach might be for you to post a real property bond or to bring forward a number of individuals who are willing to stake their own financial well-being on you. Other non-monetary conditions of release might include:

- Frequent in-person reporting to the pre-trial services agency.
- GPS monitoring.
- Home confinement.

§2:17 Violent Crimes

If you have been arrested and charged with a violent crime, the judge's first concern will be to protect the community and alleged victims. The easiest way is to do this is to detain you, either by relying on a law which allows preventive detention for risk to the community, or by setting a high bail that you cannot make. Your criminal defense attorney might suggest bail conditions that, under appropriate circumstances, will address the judge's concerns. These conditions might include:

- Home detention with a monitoring device.
- A curfew.
- A prohibition against contacting witnesses and victims.

The judge may assume, perhaps subconsciously, that denying bail and detaining you does little harm because you will have to serve substantial time if you are found guilty. To rebut this assumption, your attorney may need to challenge the prosecution's evidence of guilt. At this early stage of the case, your attorney is unlikely to present evidence. Rather, your defense attorney would try to attack weaknesses apparent on the face of the charging documents, such as the government's reliance on (unreliable) eyewitnesses or informants who stand to gain from their testimony.

V. Violation of Bail Conditions

Regardless of how you are released on bail, you will face serious consequences if you fail to appear. The court may refuse to release you again. More significantly, failure to appear is a separate crime with its own penalties, which can include imprisonment. Plus, even if you are not prosecuted for the failure to appear, the judge is sure to consider that behavior when determining your sentence for the underlying offense. For example, under the federal sentencing guidelines, failure to appear could merit a twenty-five percent increase in a defendant's sentence. Bottom line: If you are released on bail, comply with all conditions of your release and do not fail to appear for your day in court.

Chapter 3: Resolution Without Trial - Plea Bargains

I. Introduction

A plea bargain is an agreement between the defendant (the person facing criminal charges) and the prosecutor, by which the defendant agrees to plead guilty in exchange for the prosecutor's agreement to drop or reduce the charges or recommend a lesser sentence. Most criminal cases end with a plea bargain, rather than a trial. Therefore, from the very start, you and your criminal defense attorney should be thinking about the possibility of negotiating a plea.

This chapter will explain briefly the law governing plea bargains, and then discuss in more detail the mechanics of a plea agreement and the factors that may influence your decision to make a deal or go to trial.

II. Governing Principles

§3:01 Key Part of the Criminal Justice System

The idea of a plea "bargain" often has negative connotations for the public at large and even for some defendants. These individuals view plea bargains as a weakness in the judicial system. However, without plea bargains the judicial system would be overloaded and

grind to a virtual halt, jeopardizing the rights of defendants and victims. Like it or not, plea bargains as much a part of the criminal justice system as judges and juries.

§3:02 Waiver of Rights

When you agree to plead guilty, you are simultaneously agreeing to give up or "waive" several rights guaranteed to you by the Constitution. Specifically, you agree to forfeit these rights:

- **The right to a public trial, by a jury.** If you are charged with a crime that carries a penalty of more than 6 months' imprisonment, you have a constitutional right to a public trial, by a jury of your peers. When you agree to a plea bargain, in private negotiations with the prosecutor, you waive this right.

- **The right to remain silent.** When you are taken into custody, you have the right to remain silent in the face of police questioning. That right extends to a criminal trial, as well. The Fifth Amendment provides that no one may be "compelled in any criminal case to be a witness against himself." However, if you want to avoid a trial, you cannot remain silent. The prosecutor is not going to negotiate a plea with a defendant who refuses to give up anything in return.

- **The right to confront witnesses.** The Sixth Amendment's "confrontation clause" protects your right to confront and challenge the witnesses against you, by cross-examining them under oath, in court. You give up this right when you agree to a plea bargain.

- **Rights of appeal.** Depending on the terms of your agreement, you also may give up certain rights of appeal.

§3:03 Knowing and Voluntary

Because you are agreeing to forfeit significant constitutional protections, your agreement to plead guilty must be "knowing and voluntary." In other words, your decision to plead guilty must be an intelligent choice, made voluntarily and with an awareness of all the relevant circumstances and the consequences of that choice.

§3:04 Your Decision

The decision to enter into a plea agreement, rather than go to trial, is yours alone. You can and should seek counsel from your criminal defense attorney, but the final decision lies with you. Note, though, that you do not have a legal right to a plea deal. The district attorney has the discretion to extend or refuse a plea deal. Then, it is up to you to decide whether to accept or reject the deal.

III. Factors to Consider in Making Your Decision

A. The Type of Bargain Offered

Criminal plea bargains fall into two broad categories: charge bargains and sentence bargains. These broad categories encompass more specific types of bargains, including a bargain in exchange for cooperation and diversion programs.

§3:05 Charge Bargain or Sentence Bargain

A **charge bargain** is one in which you agree to plead guilty to certain (lesser) charges in exchange for the prosecutor's agreement to drop or not to bring other (more serious) charges.

A **sentence bargain** is one in which you and your criminal defense lawyer negotiate the particular sentence to be imposed. The value of a sentence bargain depends on several factors, including, significantly, whether the judge participates in or accepts the bargain. If the judge participates in the negotiations and promises you a specific

sentence, you can rely on the promise if it is memorialized on the record. If the judge does not promise a sentence, the prosecutor might agree to recommend a particular sentence or sentencing range, but the recommendation does not bind the judge, and you cannot withdraw your guilty plea if the court deviates from the recommendation at the actual time of sentencing. Therefore, the value of this agreement depends largely on the judge's practice in deferring to prosecutors' recommendations.

§3:06 Bargain in Exchange for Cooperation

The prosecutor may offer you a deal, contingent on your cooperation in the prosecution of other defendants. A cooperation agreement carries with it certain advantages and obvious risks.

Advantages of cooperation

The best deals in criminal cases await those who cooperate or turn state's evidence against their confederates. Cooperation is the only way you can avoid imposition of a mandatory minimum sentence in most federal drug cases. If your involvement in a conspiracy is marginal, your cooperation against the others may even convince the prosecutor not to charge you.

Risks of cooperation

Cooperation entails a very real risk of bodily harm. You and your criminal defense attorney should make sure that the prosecutor, government agents and the police take that risk seriously and are capable of protecting you.

Cooperation also may leave you feeling tremendous guilt over betraying your former friends.

Most prosecutors take a "carrot and stick" approach to cooperators. The carrot is a substantial sentence reduction. The stick is your surrender of rights and plea of guilty to a serious charge, so that if you betray the prosecutor, the prosecutor easily can punish you with a recommendation of a crushing sentence. Thus, you may find your-

self forced to plead to more serious charges and stipulate to a potentially harsher sentence if you enter into a cooperation agreement than if you opt for a straight plea agreement. Moreover, the prosecutor will have substantial discretion to assess the truth and value of your cooperation and to decide whether to ask the judge for a sentence reduction.

§3:07 Diversion Program

If you committed a relatively minor criminal offense, and you have no (or a short) criminal history, you may qualify for a diversion program. Under these programs, charges are filed, but then adjourned or suspended by agreement while you undergo a period of probation. The conditions of probation may include reporting, restitution and a treatment program, such as a safe-driving program for DUI arrestees or a drug-treatment program. Although rare, the court or probation office may require you to consent to (random) searches of your home as a condition of diversion. If you successfully fulfill the conditions of probation, the charges are dismissed. The diversion program also might provide for the expungement (or the erasing) of your record on these charges.

B. Timing – When the Prosecutor Makes an Early Offer

The timing of the prosecutor's offer may influence your decision to accept or reject it, especially when the offer is made early in your case. You may tempted to enter an early guilty plea if, for example, you can't make bail and accepting the prosecutor's offer will get you out of jail, home to your family, and back to work. However, as tempting as the prosecutor's offer may be, there may be compelling reasons to reject an early plea agreement.

§3:08 When the Offer Requires You to Plead Guilty to a More Serious Charge

Let's say, for example, that shortly after your arrest, the prosecutor guarantees you relatively little jail time or agrees to your immediate release on probation in exchange for your pleading guilty to a more

serious charge. Be careful. These sorts of early plea bargains may cause you severe problems in the future. Pleading to a more serious charge creates a more serious criminal history that could haunt you if you are arrested in the future. Plus, probation creates obligations that you may not be able to fulfill. Once those obligations are violated, you are likely to be subject to a stiff jail sentence (perhaps even greater than on the original charges against you).

If you or a loved one is thinking about accepting an early plea agreement, consider this: If the prosecutor (and/or the police) had a strong case against you, they probably wouldn't be offering you an early deal. Bottom line: If you can bear to wait, it may be in your best interests to wait. You may find that at your next court appearance, the charges are reduced to a summary offense in exchange for either a small fine or a sentence of time served. At the very least, you should try to wait until you have consulted with an experienced criminal defense attorney.

Having a criminal defense attorney on your side can help you avoid many of the pitfalls inherent in an early plea bargain offer. For example, your attorney may perceive serious weaknesses in the prosecution's evidence that you don't. If the prosecutor sees that his bluff has been called, he may make a second, more acceptable offer. An attorney familiar with the workings of the local criminal justice system also may be able to consult with public defenders and other lawyers who appear regularly in the local criminal court and know how cases similar to yours typically are resolved.

§3:09 When the Offer is Generous

If yours is a routine and straightforward case, the prosecution may offer generous terms if you agree to plead early in the case and your attorney agrees to forego motion practice (e.g., not to file any requests to suppress evidence or make any other pretrial motions). In this instance, the court is likely to enforce the agreement in an effort

to clear cases from its crowded calendar. Just make sure you understand what you are pleading to and that you can comply with any conditions of your release.

§3:10 When Other Defendants are Involved

If other persons (defendants) are involved in your case, the prosecutor might expect that at least one defendant will break ranks and testify against the others. In that instance, the best deal often goes to the first defendant willing to agree. However, when all the defendants stick together, and none offers to cooperate, the prosecutor may be forced to sweeten the deal to avoid a long, drawn out trial with multiple defendants. Caution: If you are holding out for a better deal because you trust in the loyalty of your confederates, understand the risk you are taking. This calculation can backfire if one of those former confidantes loses heart and offers to give you up to buy his or her freedom.

§3:11 When the Government's Case is Built on Shaky or Unreliable Witnesses

If a key government witness is in bad health, he or she may not be available to testify at your trial. If the witnesses are transient (e.g., homeless, college students), they might be lost to the prosecution by the time of trial. If the witnesses have criminal histories or drug habits, they may be arrested and/or convicted by the time of a trial in your case, thereby further undermining their credibility. All of these factors suggest you would benefit from rejecting an early plea deal and holding out for a better offer.

C. Collateral Consequences of a Criminal Conviction

A guilty plea results in a criminal conviction and a sentence for the crimes charged. Your sentence is not, however, the only consequence of a guilty plea. Before you agree to a plea deal, make sure you are aware of all the potential collateral consequences of a criminal conviction. Depending on your situation, those consequences might include:

§3:12 Immigration Consequences

There are several possible immigration statuses:

- Citizen;
- Permanent or temporary resident alien;
- Refugee;
- Non-immigrant visa holder; or
- Undocumented alien.

With regard to criminal convictions, the important dividing line is between citizens and everyone else. A citizen cannot be deported or excluded from the United States, but a non-citizen can be, if he or she is convicted of a "deportable" offense. Certain offenses (e.g., trafficking in controlled substances, crimes of violence, sexual abuse of minors, and many fraud and theft offenses) are classified as "aggravated felonies." A conviction of an aggravated felony results in nearly automatic deportation. Do not assume that a deportable offense will escape the notice of immigration officials. Even if not detected right away, your conviction ultimately may bar your re-entry at the border or your attempt to gain naturalized citizenship.

Make sure you let your attorney know about your immigration status; if you are unsure of your status, tell your attorney. The Sixth Amendment's guarantee of the effective assistance of counsel requires your defense attorney to investigate and advise you of the immigration consequences of a conviction before you enter a guilty plea. In some cases, you and your criminal defense attorney may be able to negotiate with regard to immigration consequences.

§3:13 Employment Consequences

Conviction of certain offenses may have a grievous effect on your present employment status or your hopes of future employment. For example, a drug conviction may bar you from jobs working with

children, but may not matter if you are seeking a job in finance. On the other hand, a bank might turn down a potential employee with a record of theft offenses or fraud. In addition, depending on your profession, a criminal conviction may cause you to lose your license (e.g., your license to practice law or medicine).

§3:14 Suspension or Revocation of Driving Privileges

You probably know that DUI convictions routinely warrant license suspension. You may not know, however, that convictions for other offenses also may result in loss of your license. Federal law (The Motor Carrier Safety Improvement Act of 1999) requires states to suspend a commercial driver's license for a wide variety of convictions.

§3:15 Other Negative Consequences

In addition to the above consequences, a criminal conviction may negatively impact:

- Your right to vote.
- Your right to possess a firearm.
- Your eligibility for government programs, including food stamps or assistance; federal student assistance loans; and federally subsidized housing.
- Your ability to hold a union office.

D. Other Factors to Consider in Making Your Decision

In addition to the type of bargain offered, the timing of the offer, and the far-reaching consequences of a guilty plea, other factors may influence your decision to accept or reject a plea bargain. Those factors include:

§3:16 Potential Advantages to the Bargain

Depending on your situation, the advantages of accepting a plea bargain may include pleading to a lesser charge, which brings a lighter sentence. In most cases, a plea bargain will allow you to put difficult issues behind you and move on with your life. Moreover, just as the courts save time with a plea bargain, so will you; this, in turn, will save legal fees and time lost from work due to trial appearances. Perhaps most significantly, a plea bargain allows you to avoid the uncertainty of a trial. Even if you truly are innocent, and even if you think you have an open-and-shut case, a jury may not see it that way. Juries can be fickle and unpredictable. A plea bargain brings certain closure.

§3:17 Honest Self-Assessment

Consider these questions:

- What is your appetite for risk?
- How old are you? How old are your children?
- Can you endure a stressful trial with an uncertain outcome?
- What is your prior experience with prison?
- What is your family situation?

§3:18 Advice of Family and Loved Ones

You may fear that you will be disappointing your friends and family if you admit guilt and accept a plea bargain. However, those same friends and family members might have a degree of objectivity that you lack, and their advice may surprise you. You may find that they end up assuring you that they will respect you even if you plead guilty, and that they are concerned for your well-being. They may suggest that you give up the fight so that you can do your time and return home as soon as possible.

§3:19 Advice of Your Criminal Defense Attorney

Your defense attorney's experience with the criminal justice system and knowledge of the law is valuable. Draw on this experience. Discuss all of your concerns with your attorney and ask questions so that you can make the best decision under the present circumstances.

IV. Entering Your Plea: How Does it Work?

If you decide to plead guilty, your agreement with the prosecutor must be entered into the official court record and approved by the judge. This process is called a “plea colloquy,” and it takes place at a hearing in open court.

§3:20 Before the Hearing

Your defense attorney will meet with you ahead of the hearing to prepare you for what will happen, the types of questions the judge will ask, and what the judge will expect from you (e.g., how much the judge will expect you to say when asked to admit your guilt).

§3:21 At the Hearing

This hearing may be the trial judge’s only opportunity to size you up face-to-face before sentencing. Accordingly, you should dress appropriately and pay attention to the proceedings. At all times, be respectful and contrite. This is not the time to make excuses or attempt to minimize your wrongdoing.

The judge will ask you questions designed to ensure that your plea is entered knowingly, intelligently and voluntarily. The questions will fall into six categories:

- Questions concerning your mental competence.
- Questions concerning your satisfaction with your legal representation.

- Questions to ensure that you understand the legal rights you surrender by pleading guilty, including trial and appellate rights.
- Questions to ascertain your understanding of the penalties for a conviction.
- Questions about the existence of any plea agreement and any other threats or promises.
- Questions to assure the court that there is a factual basis for your guilt.

Some judges will have the prosecutor summarize the evidence and then ask you, the defendant, whether you agree. A "yes" or "no" answer will suffice. Other judges will recite the charge and ask you if you did it. Again, a simple "yes" or "no" is all you need to say. In these courtrooms, your attorney might discuss with the prosecutor, in advance of the hearing, what he will say, to make sure that you will be comfortable agreeing with the prosecutor's summary of the charges. You do not want to be nitpicking with the prosecutor's statements and annoying the judge. On the other hand, you do not want to admit to unnecessary or untrue aggravating circumstances.

Other judges will ask the defendant to state, in his own words, what he did to make him guilty of the charge. If you find yourself in front of this type of judge, you should state the facts underlying your guilt succinctly, without excuses. Too many excuses may talk the judge out of accepting the plea. Do not say "I know now that what I did was wrong." This suggests that you acted with innocent intent at the time of the offense. The judge wants to hear acceptance of responsibility, not excuses. An articulate and remorseful description of your misconduct can impress the judge and start him thinking that you deserve another chance.

V. Withdrawing Your Plea

Choosing to plead guilty is a big decision – perhaps the biggest decision of your life. You may be wondering: What happens if I change my mind?

§3:22 Before Sentencing

You may seek to withdraw your guilty plea at any time before sentencing for "any fair and just reason." As permissive as this standard may sound, in practice courts treat a guilty plea as a grave and solemn act, and are not inclined to release a defendant from his bargain.

If you change your mind and want to withdraw your guilty plea before sentencing, your attorney will file a motion (a formal written request) with the court. In ruling on the motion, the court will be guided by four factors:

- Whether you established a fair and just reason to withdraw your plea;
- Whether you assert that you are innocent of the charge(s) against you;
- The length of time between the guilty plea and the motion to withdraw; and
- If you can establish a fair and just reason for withdrawal, whether the government would be harmed by the withdrawal.

The truth of and the force behind the reason for your change of heart will be of primary importance.

§3:23 After Sentencing

After sentencing, you can withdraw your plea only if you are able to show that your plea was not entered into knowingly and voluntarily.

Tip from the Trenches: Tread carefully here.

Often, a motion to withdraw a guilty plea results in nothing but trouble. If the judge denies the motion, you may lose any benefit the judge was prepared to grant you for accepting responsibility (which you now have disavowed). Making the motion generally requires your defense lawyer to lay out in detail the theory of your defense. This means that, if your case is now going to go to trial, the prosecutor knows what to expect and can tailor his presentation accordingly; you have lost any element of surprise. Moreover, the prosecutor may reinstate any charges he agreed to dismiss or forego as part of the plea agreement, and he is no longer bound by any sentencing stipulations to which he may have agreed.

Chapter 4: Challenging the Evidence Against You Before Trial

I. Introduction

At trial, your criminal defense lawyer will challenge the evidence against you through cross-examination of the prosecution's witnesses. Before trial, your attorney may be able to raise significant challenges to the evidence against you – perhaps even get the evidence tossed out – by filing a "motion to suppress."

This chapter will (a) answer common questions about motions to suppress and (b) provide detailed examples of when and how your attorney can put this powerful defense tool to work in your case.

II. Governing Principles

If law enforcement violated your constitutional rights in obtaining the evidence that the prosecutor now wants to use against you, your attorney can file a motion to suppress that evidence and keep it out of court.

§4:01 What is a "Motion to Suppress"?

A "motion" is a formal (usually written) request filed with the court. A "motion to suppress" asks the court to toss out or "suppress" certain evidence in a criminal case.

§4:02 What Types of Evidence can be Suppressed?

Any evidence that was unlawfully obtained is subject to suppression. This includes:

- Tangible physical evidence (e.g., a weapon, drugs or drug paraphernalia, clothing); and
- Testimonial evidence (e.g., statements you made to the police, including an alleged "confession"; or statements overheard by the police).

§4:03 What Police Actions Might Result in Evidence Being Unlawfully Obtained?

The United States Constitution establishes your fundamental rights in relation to the criminal justice system. These rights include the right to be free from unreasonable searches and seizures; the right to remain silent; and the right to an attorney to assist in your defense. If those rights are violated, you may have grounds for a motion to suppress unlawfully obtained evidence. For example, evidence may be subject to suppression if it is the product of:

An **unlawful search and/or seizure**, which may occur if:

- Officers had no warrant in a situation in which a warrant was required;
- Officers had a warrant, but it was defective or flawed;
- Officers had a proper warrant, but it was improperly executed;
- Officers were not legally on the premises where the evidence was seized;
- The search exceeded the area specified in the warrant;

- The search went beyond the items specified in the warrant.

An **unlawful out-of-court identification,** which may occur if the process used to identify you as a suspect or perpetrator – e.g., having the witness review mug shot books or a photo array or line-up at the police station – was unfairly prejudiced against you.

A **break in the chain of custody.** Detailed procedures are in place to safeguard evidence and ensure it is not tampered with from the moment it is seized until the moment it is brought to court. If these procedures – referred to as "chain of custody" rules – are not strictly followed, then your right to due process may have been violated and your attorney may have grounds for a motion to suppress.

An **unlawful interrogation**. You may have been subjected an unlawful interrogation if:

- You were not advised of your rights;
- Officers continued to question you after you requested an attorney;
- The conditions of the interrogation rendered your statements unreliable; or
- You were subjected to physical force or threats during an interrogation.

§4:04 How Does it Work?

Regardless of the type of evidence at issue, the motion process typically works like this:

(1) In-depth interview with your criminal defense lawyer

The first step toward a winning motion to suppress is an in-depth interview with your criminal defense lawyer. During this interview, which can be lengthy, your lawyer will ask you detailed questions designed to reveal possible unlawful conduct by law enforcement.

These questions will address how you came into contact with law enforcement; what happened once contact was made; what was said by you and the officers; and whether there were any witnesses to the police encounter.

It is critically important that you tell your lawyer the truth – the whole truth. Motions to suppress are won or lost on specific facts. Your lawyer needs a detailed and accurate account of exactly what happened in your encounter with law enforcement. Remember that your conversations with your lawyer are protected by the attorney-client privilege, so the substance of those conversations is confidential. Be scrupulously honest and tell your lawyer the whole story. Details that may seem unimportant to you may be highly relevant to your lawyer.

(2) Independent investigation

After the interview, your lawyer will conduct an independent investigation of your case. This investigation likely will include:

- Witness interviews. Your lawyer or, more likely, an investigator hired by your lawyer, will speak with the witnesses and find out if they have information in support of your case and your version of what happened during your encounter with the police.
- A visit to the scene of the police encounter. Your criminal defense lawyer will go to the place where the police stopped, arrested or conducted surveillance of you. Frequently the scene is not exactly as the police officer has described it in his report.
- An investigation into past misconduct by the officers involved in your case.
- A review of the police report(s) related to your case and the police department's training manuals and policies.

(3) Draft and file the motion

When all of this preliminary work is complete, your lawyer will draft the motion and file it with the court. Appendix 4-1 is a sample Motion to Suppress.

(4) Hearing

The motion may be decided based solely sworn statements or other supporting evidence filed with motion, but more likely the court will hold a hearing.

At the hearing, the judge will hear testimony from witnesses and legal arguments from the attorneys. The prosecutor will call law enforcement officers to testify about what happened during their encounter with you. Your defense attorney then will have the opportunity to cross-examine these officers. The goal of cross-examination is to show that the officers' testimony is unbelievable because of bias; a motive to lie; an inability to observe what they claim to have observed; or other factors. Your attorney can also undermine an officer's credibility by showing that his testimony at the hearing is inconsistent with what he wrote previously in his police report.

In addition to law enforcement officers, other witness also may be called to testify as to what happened during the police encounter (e.g., persons who were present when officers entered your home, or the passenger in the car with you when you were pulled over). Depending on the particular facts and circumstances of your case, you also may be called to testify at the hearing.

§4:05 What Happens if I Win the Motion to Suppress?

If the judge rules in your favor, then the evidence at issue in the motion will be banned from court ("suppressed"). This means the prosecution cannot use it in court to try to prove its case against you. The prosecution still is allowed to try to prove its case using other evidence. If, however, the evidence that was suppressed is so crucial to the prosecution's case that there is insufficient evidence

remaining to prove the charges against you, the judge might decide to dismiss one or more of the charges or even the entire case. At the very least, winning a suppression motion may result in a better plea offer.

§4:06 What Happens if I Lose the Motion to Suppress?

If you do not win the motion to suppress, then your case will continue moving forward toward trial. However, even if you lose the motion, this process can be valuable to the final outcome of your case. After all, a motion to suppress gives your criminal defense lawyer an opportunity to learn more about the prosecution's case against you; to observe the prosecutor's style and demeanor in court; and to see how the officers involved react to cross-examination. All of this will be of great assistance at trial.

III. Common Fact Patterns and Examples

Let's look at some specific examples of how a motion to suppress can work to your benefit. We'll consider four common situations when evidence may be seized unlawfully: an investigative stop (§4:07); a car search (§4:10); a home search (§4:13); and a police interrogation (§4:17).

A. Evidence Obtained From an Investigative Stop

§4:07 Overview

A police officer cannot stop and detain you unless the officer has a reasonable suspicion that you have committed, are committing, or are about to commit a crime. The officer must be able to articulate specific facts that give rise to his suspicions. A hunch or a guess about criminal activity is not enough to warrant this type of "investigative stop."

Practically speaking, the reasonable suspicion standard is fairly easy for law enforcement to meet. Some factors that might give a police officer a reasonable suspicion sufficient to justify stopping and detaining you are:

- The officer's personal observations;
- Information the officer received from others, including both citizen informants and the police;
- The officer's knowledge of your prior criminal record;
- Your proximity to where a crime was recently committed;
- Your presence in a high crime or drug-dealing neighborhood (when combined with other factors);
- The time of day or night at which you are out;
- Your reaction to the officer (including, e.g., fleeing from the police);
- Dropping or disposing of suspicious items;
- A suspected drug transaction.

In connection with a reasonable suspicion stop, officers are permitted to conduct a pat-down for weapons in order to protect their safety, but only when they have reason to suspect that the person they have stopped is armed and dangerous. This should be a limited pat-down only. Officers may not reach into a suspect's pocket or unzip a jacket.

Officers may not conduct a more intrusive search without a warrant, unless they have probable cause to arrest you (which is a higher standard than a mere "reasonable suspicion").

If you are stopped without any reasonable suspicion of criminal activity, you are free to walk away from any conversation or "casual encounter" with law enforcement. If you are prevented from walking away and you are detained without a reasonable suspicion of criminal activity, this constitutes an unlawful "seizure" under the Fourth Amendment.

Often, the police will conduct a full-blown search and then try to justify their actions by claiming they had probable cause to arrest you. Since the scope of a search permitted under the reasonable suspicion doctrine is much narrower, whether the police had probable cause to arrest you, based on the specific circumstances of the encounter, can be a fruitful (and successful) basis for a motion to suppress.

§4:08 Sample Questions Your Lawyer Might Ask During Your Interview

If you were subjected to an investigatory stop, your lawyer will interview you to find out what the police said or did to initiate the stop, and what happened during the encounter. Your lawyer will ask questions like these:

- Did the police ask if they could ask you a few questions or did they order you to stop?
- What words did the officer use? What was his tone?
- Did any officer display any weapon?
- Were you alone or with other persons?
- What times was it? Was it during daylight or at night?
- Where were you stopped? Describe the neighborhood.
- Were you aware of any ongoing criminal activity at the time and location of the stop?

- Did you believe that you were free to leave or walk away from the encounter?
- Did you attempt to leave? What did the police do?
- When did you first notice the police?
- Did you make any attempt to avoid the police?
- Did you discard (drop or toss away) anything once you saw the police?

If you were subjected to a pat down for weapons or a more intrusive search, your lawyer will ask:

- Did the officer say anything before he patted you down?
- How was the pat down conducted?
- What was seized? Describe the item's shape, size and feel.
- Where it was located?
- How did the police remove it?
- Did the police comment on what they found?
- Were you ever told you were under arrest?
- At what point during the encounter did the police inform you that you were under arrest?
- Were you handcuffed or otherwise physically restrained?
- Were you subjected to a full search of your person (more intrusive than a pat down)?

- If you were not told you were under arrest, what justification, if any, did the officer give for this more intrusive search?
- At what point during the police encounter, did you feel you were not free to leave?
- What specifically led you to believe this?

§4:09 Example: Patrol of a "High Crime" Neighborhood

Let's look at a specific example of how your lawyer might challenge the admissibility of evidence obtained during an investigatory stop:

§4:09.1 A Common Scenario

Police are patrolling a "high crime" neighborhood to investigate drug sales and use. They see a group of four young men on a front porch and decide to investigate whether they possess drugs. They get out of their squad and approach the group. Upon seeing the police, "Joe" walks off the porch and attempts to leave the area. One officer tells Joe he can't leave and orders him to go back on the porch. The police then go up to the porch where, they say, they observed a blunt in a planter. They pat down everyone in the group and find a concealed weapon on Joe, who is charged with possession of a firearm without a permit.

Joe's lawyer files a motion to suppress the gun.

§4:09.2 Sample Cross-Examination

At the hearing on the motion, Joe's lawyer can cross-examine the police officer on the scene as follows:

Q: You saw four people on the porch of a home and decided to talk to them?

A: Yes. We were investigating drug possessions and sales and were asking residents for information.

Q: You stopped your squad and approached the people on the porch?

A: Yes.

Q: At this time you had not observed any of these people in possession of drugs?

A: We saw a blunt, which is a cigar that is emptied and commonly filled with marijuana, in a planter on the porch.

Q: You had not seen that though at the time you approached the porch?

A: Not yet. We saw it once we were on the porch.

Q: Before you were on the porch you saw my client, Joe, leave the porch, right?

A: Yes. He began walking away from the home when our squad pulled up. After I exited the squad, I told him to stop.

Q: At the point you told him to stop he was no longer on that property, correct?

A: He was in front of the house immediately to the north.

Q: Then you ordered him to stop?

A: I told him to stop, and he complied.

Q: Can you please tell the court the words you used?

A: I said something to the effect of, "Stop. You have to stay here."

Q: When you ordered him to stop, you were sure to speak loudly enough so you could be heard over the voices of the other people there?

A: Yes.

Q: So it's fair to say that you were speaking in a louder tone of voice than what you are using here to testify in court?

A: Yes.

Q: When you and other officers approach a group of people, you are always mindful of your safety?

A: Yes, of course.

Q: One way to do this is to draw your weapon before approaching a group of people?

A: Yes, but I didn't have my gun pointed at anyone.

Q: But even though you didn't have it pointed, it was out of the holster?

A: It was not fully holstered.

Q: By not fully holstered, you mean you had partly lifted it so you were ready to use it if need be?

A: Yes.

Q: You had your hand on the gun's stock for rapid access?

A: Yes.

Q: My client complied with the order and didn't try to run?

A: Yes.

Q: You directed him to return to the porch?

A: Yes.

Q: He complied with that order as well?

A: Yes.

Q: You only saw the blunt after that occurred?

A: I observed it within moments of being on the porch.

Q: And that was after you ordered my client to stop and return to the porch, right?

A: Yes.

§4:09.3 Sample Argument

Based on this cross-examination, Joe's lawyer could argue to the judge that the gun must be suppressed as evidence because it was seized illegally:

> *"Your Honor, the police decided to approach a group of people to question them about drug possession and usage. What the police did was the equivalent of a "knock and talk," without the knocking. While police can choose to walk up to a group of citizens and ask them questions, they do not have the right to detain those citizens without reasonable suspicion that they are committing a crime. Here, there were no specific and articulable facts upon which the police suspected my client was involved in criminal activity. They had not seen him using or possessing drugs. They did not observe an exchange of objects. They did not have any specific information from a citizen or other informant regarding any involvement with drugs by my client. All they knew was that he was spending time with three other persons on a porch*

in this neighborhood. That is not illegal. It also is not illegal for a person to choose to remove himself from contact with the police. My client walked away; he didn't run. He was not seen tossing any objects. When the police ordered him to stop and return to the porch, he did. He did not act in any unusual or evasive manner, nor did he attempt to run. The police could have asked my client if he would mind answering questions or why he chose to leave upon their arrival; this would have been permissible, but this is not what happened. What did happen is that the police unlawfully seized my client in violation of the Fourth Amendment. Certainly no reasonable person in his position would have felt free to go. The officers observed the blunt after this unlawful seizure; therefore, the gun they seized must be suppressed."

B. Evidence Obtained From a Car Search

§4:10 Overview

Your right to privacy does not evaporate the moment you climb into a car. However, your privacy rights are limited (and, conversely, the scope of law enforcement's authority is broadened) because a motor vehicle is mobile, and evidence could be lost in the time it took officers to obtain a search warrant. In general, the rules governing car searches are as follows:

As with an investigative stop (see §4:07), officers may stop a car if they have reasonable suspicion to believe the driver and/or a passenger has committed a crime or is in the process of committing a crime. Police also may stop a car for a non-criminal traffic or ordinance violation, no matter how minor. Thus, valid reasons for a stop include anything from a moving violation to failure to wear a seatbelt to littering to vehicle defects (e.g., a burnt-out headlight or faulty brake lights).

The police cannot pull you over for no reason, but It isn't hard for officers to find some minor infraction to justify a stop. Often, stops like these are a pretext for officers to search the occupants or the car for guns and drugs. In fact, this is bread-and-butter police work for a lot of departments: stop the car; view the slightest movement as an attempt to conceal a weapon; and claim there is now a reason to search the car. Many times there are no weapons, but police find drugs, and the occupants are charged with drug crimes. Drivers and passengers who are traveling in minority communities, communities deemed to be "high crime," and college campus areas are at great risk of being subjected to this police practice.

This type of traffic stop is not unlawful. What happens after the stop, though, may be. Reasonable suspicion to stop a car does not automatically confer on police the right to frisk or search the driver, the passengers or the vehicle.

When a car is stopped, all persons in the car may be questioned, ordered out of the car, and temporarily detained. However, officers cannot frisk everyone in a traffic stop unless they have a reasonable suspicion that the occupants are armed. In that instance, officers may conduct a limited pat-down for weapons to ensure their safety. Likewise a "frisk" of the car (a search of the interior passenger compartment for weapons) is allowed only if officers believe there are weapons in the car that may be accessed by the occupants.

Officers may conduct a more extensive search of the occupants and the car if an arrest is made. Incident to an arrest, officers may search the passenger compartment and all containers inside that compartment, if the person being arrested is within reaching distance of the car or the police reasonably believe the car contains evidence related to the arrest.

Law enforcement also may conduct a more intrusive full-scale search of a car when the officers have probable cause to believe there is contraband or evidence of a crime in the vehicle. Contain-

ers (bags, backpacks, boxes, suitcases, etc.) in the car or the trunk may be searched when officers have probable cause to believe the container holds evidence of a crime.

§4:11 Sample Questions Your Lawyer Might Ask During Your Interview

If your encounter with law enforcement occurred during a motor vehicle stop, your lawyer will ask you questions similar to these during your interview:

- Were you a driver or passenger?
- Who owns the vehicle?
- How many people were in the car?
- Where was the car when it was stopped?
- What type of neighborhood did the stop take place in?
- What time was it?
- Was it during daylight, dusk or dark?
- What reason did the officer give for stopping you?
- If the stop was for a traffic violation, did the officer say it was for a moving violation, such as speeding, or an equipment citation, such as an unregistered vehicle or deeply tinted windows?
- Were you given a ticket (traffic citation)? How long were you detained after being issued the citation?
- Did the officer stop the car by use of red lights, sirens or a roadblock?
- How many officers approached the car and where?

- What tone of voice did the police use?
- What do you remember about the exact words the officer used?
- Did officers have their weapons drawn?
- Did you feel that you were you free to leave?
- If there were others in the car, were they free to leave?
- Was anyone asked to step out of the car?
- Who was asked to step out? Was he/she placed in a squad car, by the curb, or told to remain a certain distance from the vehicle?
- Aside from the driver, were other persons told to produce identification?
- Did you or anyone in the car engage in any unusual behavior or make any unusual movements once it was apparent the police were near the car or about to stop it?
- Was everyone in the car wearing his/her seat belt?

If your vehicle was searched, your lawyer will ask additional questions to determine the scope of the search. For example:

- Was there anything unlawful (any contraband) observable in plain view?
- Was the search limited to the passenger compartment or was the trunk searched as well?
- Did officers search closed or locked containers?
- Did law enforcement dismantle the vehicle in order to conduct the search?

§4:12 Example: Stop for Equipment Violation; Search of Car Uncovers Drugs

§4:12.1 A Common Scenario

A police officer stops a car for driving with a loud muffler. The driver's license is revoked so the officer is going to arrest him. However, the officer does not place the driver under arrest immediately; instead, he tells him to wait at the curb while he searches the car. The officer rummages through the car and inside the glove compartment finds a bag of marijuana. (A common variation on this fact pattern occurs when the officer tells the driver he is under arrest and either tells him to wait at the curb while he searches the car or places him, uncuffed, in the police squad.)

The driver's lawyer files a motion to suppress the marijuana.

§4:12.2 Sample Cross-Examination

An officer cannot search a car when the individual being arrested is handcuffed and/or is not in an area where he can gain access to a weapon or destructible evidence, unless the offense of the arrest provides a basis for the search. In this (all too common) example, the officer is deliberately trying to get around the rule of law by not arresting the driver immediately. At the hearing on the motion to suppress, the driver's lawyer can expose this kind of game-playing with a cross-examination like this:

On the certainty of arrest

Q: You pulled the car over for a loud muffler?

A: Yes.

Q: That is a non-criminal equipment violation?

A: Yes.

Q: You then determined that the driver's license was revoked?

A: Yes.

Q: That is a crime?

A: Yes.

Q: It is standard police practice in this situation for you to arrest the driver?

A: Yes.

Q: As soon as you knew that my client had a revoked license your plan was to arrest him?

A: Yes.

On safety procedures when making an arrest

Q: When you arrest a person, there are practices you follow to ensure your safety and the safety of others?

A: Yes.

Q: One of these practices is to pat down the arrestee to make sure he doesn't have a weapon?

A: Yes, we do that.

Q: And you did it in this case?

A: Yes I did.

Q: Another is to call for a backup squad?

A: Yes.

Q: You called for a backup squad?

A: I did, but at the time I asked your client to get out of the car it hadn't arrived yet.

Q: So when you asked my client to get out of the car and patted him down, you were the only officer present?

A: Yes.

Q: There weren't any passengers in my client's car?

A: No.

Q: So the situation was one on one: one officer and one driver?

A: Yes, that's why I didn't want to arrest him yet; I was worried he might become agitated, and I didn't have any backup.

Q: He wasn't acting agitated when you pulled him over?

A: No, he was cooperative at that time.

Q: He wasn't acting agitated when you found out his license was revoked?

A: No.

Q: Or when you asked him to step out of the car?

A: No.

Q: Or when you patted him down?

A: No, he wasn't.

On the availability and security of handcuffs

Q: You carry handcuffs?

A: Yes.

Q: You have handcuffed many persons in the past?

A: Yes.

Q: Your handcuffs were on your belt and readily accessible?

A: Yes.

Q: When you handcuff someone, it is more secure than leaving his hands free?

A: Yes, but I didn't think it was necessary until my backup arrived.

Q: You felt more secure having him uncuffed, even though you were alone?

A: Yes, because sometimes people get agitated when told they're under arrest and cuffed.

Q: But he never gave any sign that he would act out?

A: No, nothing that I can specifically recall.

Q: It's department policy to handcuff all persons who are under arrest?

A: Yes, but I didn't place your client under arrest until my backup arrived.

Q: He was going to be arrested because he had committed a crime?

A: Yes, but I was waiting for my backup.

Q: You were delaying the arrest?

A: I wasn't delaying; I was just following my normal procedure.

Q: We can agree that it is safest for an officer when a suspect is in a position where he cannot assault the officer?

A: Yes.

Q: And handcuffs are a tool at your disposal to help ensure your safety?

A: Yes.

Q: And as a law enforcement officer you also want to ensure that a suspect or arrestee does not flee from you?

A: Yes.

Q: When you are arresting someone and you handcuff him, you can place him in a squad while cuffed?

A: I can, but I didn't do that in this case.

Q: But you can decide to do it?

A: Yes.

On the availability and security of a squad car

Q: Your squad was right behind the car you stopped?

A: Yes.

Q: You are able to place suspects or arrestees in your squad?

A: I can, but your client wasn't under arrest yet.

Q: You can ask someone to sit in the back seat of your squad even when they haven't been officially arrested?

A: Yes.

Q: The rear squad car doors are locked from the inside?

A: Yes.

Q: A person in the rear of the squad cannot get out on his own?

A: The doors have to be opened from the outside.

Q: And their freedom of movement is even further restricted if they are cuffed?

A: Yes.

Q: You could have placed my client in your squad while waiting for your backup?

A: I didn't think it was necessary.

Q: But he was not free to leave, was he?

A: No, he wasn't.

On how the officer's actions violated training and department procedures

Q: Your department has trained you concerning the actions to take when a person is arrested?

A: Yes.

Q: And you've been provided notice of the standard procedures to undertake when someone is arrested?

A: Yes.

Q: In your training you were taught to immediately cuff a person after making an arrest?

A: Yes.

Q: And it's fair to say this is standard practice in the department?

A: Actual practice varies. I do what I have found to be most effective.

Q: You were given a copy of the department's procedures regarding handcuffing an arrestee.

A: Yes.

Q: I'm showing you what has been marked as Exhibit ##. This is a copy of the department's procedures concerning securing persons under arrest.

A: Yes.

Q: And on page 2, it notes that an arrestee should be handcuffed immediately for officer safety?

A: Yes.

§4:12.3 Sample Argument

"Your Honor, regardless of how this officer's actions are analyzed, this was an illegal search and the evidence must be suppressed.

First, the search of the car was not due to any reasonable suspicion that my client was armed so it cannot be justified under the law.

Second, the law is clear, that police may search a car incident to the arrest of the driver, but only if the driver is within reaching distance of the car or the police reasonably believe the car contains evidence related to the offense of arrest. A car cannot be searched incident to an arrest when the person being arrested is handcuffed and is not in an area where he can gain access to a weapon or destructible

evidence, unless the offense of the arrest provides a basis for the search. Here, my client was stopped for a loud muffler. The officer determined that my client's driver's license was revoked and was going to arrest him for that. The search of the car was not related to the loud muffler or the revoked license.

The officer cannot play games to justify a search incident to arrest by deliberately not handcuffing my client. This officer planned to arrest my client. Despite this, he did not follow department policy, which calls for an officer to immediately handcuff an arrestee. The officer had handcuffs, but he chose not to use them. His squad car was available and he could have placed my client in the car, but he chose not to. My client was told to wait, and he was not free to go. Given these facts, my client was clearly under arrest, but the officer did not inform him of the arrest, cuff him or place him in the squad – all in an attempt to circumvent the law.

Finally, even if my client was not under arrest, the law is clear that an officer cannot search a car when he issues a traffic citation and does not place a driver under arrest.

So, no matter which way this officer's actions are analyzed – whether he claims my client was under arrest or not – this was an illegal search, and the evidence must be suppressed."

C. Evidence Obtained During a Home Search

§4:13 Overview

Of all the places in which a search can be conducted, the home is considered the most sacred. The general rule is that police must have a warrant to enter and search a home. However, there are

many exceptions to this general rule. If law enforcement entered and searched your home without a warrant, your lawyer will review the situation to see if one of the many exceptions to the warrant requirement applies. If no exception applies, then any evidence obtained may be subject to suppression.

The exceptions to the search warrant rule – circumstances under which police may enter and search a home without a warrant include:

- **Consent.** Police may enter and search if you or another person with authority to consent freely and voluntarily allows them to do so.
- **Search incident to arrest.** When police arrest an individual in his home, officers may conduct a full-scale search of that person and the area within his immediate control (that is, the area within which he might gain possession of a weapon or destructible evidence). Police also may conduct a "protective sweep" of a larger area of the home to ensure their safety.
- **Plain view.** If police officers are lawfully in your home, they may seize contraband or obvious evidence of a crime when it is in plain view.
- **"Exigent" circumstances.** When officers have probable cause to enter a home, but the immediate circumstances make it impractical to obtain a warrant, offers may enter without a warrant. There are four different types of "exigent circumstances":
  1. A threat to the safety of a suspect or others (known as the "emergency doctrine");
  2. An arrest made in "hot pursuit";
  3. A risk that evidence will be destroyed; and
  4. A likelihood that the suspect will flee.

(Note: Even if the police had a warrant, all is not lost. The warrant can be challenged as defective or the search can be challenged as exceeding the scope of the warrant.)

Consent is the ultimate warrant exception. If the police have no other legal grounds to enter a home, they will ask for permission; more often than not, permission is granted. The police version will be that the consent was freely and voluntarily given, without any intimidation or pressure on their part. Frequently, this is not the case. Rather, an individual will consent, not because he wants to, but because he is unaware of his right to refuse, intimidated by the police and fearful of worse consequences if he declines.

Simply because consent was granted does not mean that the prosecution has an open and shut case. Consent to enter and search must be given freely and voluntarily. Voluntariness is determined by a review of all the circumstances surrounding the alleged consent. A judge will consider, for example:

- The number of officers on the scene;
- The time of day or night at which consent was requested;
- The mental condition and capacity of the person who consented;
- Whether weapons were drawn or the officers made some other show of force;
- Whether officers obtained consent by means of violence, threats, promises, deception or trickery.

Consent is not given voluntarily when it is obtained by an outright lie (e.g., if police claim to have a warrant when they don't or claim that a warrant is not required to enter). Consent is not given voluntarily when a person only consents out of fear, due to a police show of force. Law enforcement must ask for consent to search before it

can be given; when a person simply gives in to an officer's stated intent to search (e.g., "We're going to search your son's bedroom"), this does not constitute free and voluntary consent.

A person who consents to a search can limit its scope (e.g., to one room). Moreover, consent can be revoked, by words (e.g., "I want you to stop what you are doing and leave my house.") or by unequivocal acts, such as physically blocking a search.

§4:14 Sample Questions Your Lawyer Might Ask During Your Interview

If your encounter with law enforcement occurred at your home (or another residence), your lawyer will ask you a series of questions similar to these, to root out potential unlawful conduct by the police:

- Did you live at the residence?
- Were you an overnight guest? If so, how frequently did you visit? What was the purpose of these visits? Did you have a private space in the residence?
- Did the police knock and announce their entry? If they knocked, did they wait for someone to answer the door?
- Did the police have a warrant and, if so, did they read it to you?
- If there was no warrant, did the police say anything to justify the search?
- Were you restrained in any way or told to remain in a particular location?

If the police claim that you granted them consent to enter and search, your lawyer will ask:

- Did the police ask for consent to search or just inform you that they were going to conduct a search?

- Did you affirmatively give consent by words or gestures?
- Did you want to agree to let police into the home?
- Why did you agree to open the door?
- Why did you let police inside?
- Did the police identify themselves immediately?
- How many police officers were there?
- How were they dressed?
- Did you see their guns or other weapons?
- Were their hands on their guns?
- Were guns drawn?
- If guns were drawn, where were they pointed?
- Did the police say you had to let them in?
- Did the police advise you that you could refuse to allow them in?
- What did police tell you gave them the right to enter?
- What did they say would happen if you didn't let them in?
- Did you ask if they had a warrant?
- Did they say anything regarding a warrant?
- Did they tell you they didn't need a warrant?
- Did they tell you they would get a warrant if you wouldn't let them in?

- When they spoke to you, what was their tone of voice?
- Did they say anything you felt was threatening?
- Did they threaten to arrest you for anything?
- Were any threats made to remove your children from the home?
- Were you fully clothed at the time the police came and if not, did they allow you to dress before opening the door?
- When they came in the home, were you free to leave or go anywhere in the house you wanted?

If you were arrested in your home, your lawyer will ask:

- Was the area searched within your reach, or did it extend further?
- Did the police open closets, cabinets, drawers, crawl spaces, vents and other locations during the course of the search?
- Was contraband, firearms or evidence of a crime in plain view?

§4:15 Example 1: Consent Coerced by Police Lie

§4:15.1 A Common Scenario

Police observe an unidentified male driving a car and smoking a hand-rolled cigarette, which they believe to be marijuana. They follow the car. The driver parks and runs into a home, shutting the door. Police knock on the door and a woman asks who is there. Police tell her they followed someone whom they believe was in possession of marijuana to the house and they want to enter and talk to that person. The woman, "Jane," refuses entry, and police tell her if she doesn't let them in they will get a warrant. Police are then allowed in and see marijuana on the living room coffee table. They arrest

Jane. The police report states that Jane gave consent to police to enter the home. (Jane says she only gave consent to enter because police told her she had to let them in or they would wait outside her door until they got a warrant.)

Jane's lawyer moves to suppress the marijuana.

§4:15.2 Sample Cross-Examination

At the hearing on the motion to suppress, Jane's lawyer will question the arresting officer as follows:

Q: You say you saw Mr. Driver smoking a hand rolled cigarette?

A: I observed him smoking a blunt, which is a hand rolled marijuana cigarette.

Q: You didn't see the contents of this cigarette?

A: No, based on my training and experience, I knew it to be marijuana.

Q: You never tested the contents of the cigarette?

A: No.

Q: The wrappers that are used for these hand rolled cigarettes or blunts are sold legally in gas stations and other retail locations, right?

A: Yes, and then persons fill them with marijuana.

Q: So your answer is yes, the wrappers are sold legally?

A: Yes.

Q: You then saw the driver enter the home?

A: Yes.

Q: You and your partner then went to the home?

A: Yes.

Q: You were in uniform?

A: Yes.

Q: You had guns visible?

A: Our guns were on our belt.

Q: You knocked on the door?

A: Yes.

Q: You were then answered by a woman?

A: Yes, I heard a female ask what I wanted.

Q: She did not open the door at that time?

A: Not immediately. I told her we saw someone enter the home that we wanted to talk to and asked to come in.

Q: She did not open the door for you at that point?

A: Not then, but eventually she opened the door voluntarily and gave us consent to enter the home.

Q: At that point the woman asked if you had a search warrant?

A: Yes.

Q: You did not have a warrant, correct?

A: Correct.

Q: You told her you did not have a warrant, but you could get one?

A: Yes.

Q: After you told her this, she opened the door?

A: Yes.

§4:15.3 Sample Argument

Based on this cross-examination, Jane's lawyer can argue to the judge:

> *"Your Honor, the prosecutor claims that police were entitled to enter my client's home without a warrant because she gave consent for them to do so. Consent must be given freely and voluntarily. That was not the case here. My client refused entry to the police. She only allowed them to come in when they said that if she refused, they would get a warrant.*
>
> *The police did not have probable cause to get a warrant to enter my client's home. They observed another individual smoking a hand-rolled cigarette in a car. They suspected the cigarette contained marijuana, but they had no idea what the contents were. They did not observe what was inside the cigarette or smell it burning. They did not have probable cause to arrest the person they saw smoke it or to enter into a home in hot pursuit of that person. As trained police officers, they certainly knew that no judicial officer would issue a warrant to search my client's home based on those circumstances. They made a false claim that they could obtain a search warrant. This is clearly impermissible under the law. My client's consent to enter was coerced by a police lie; it was not free and voluntary. Therefore, the court must suppress the evidence found as a result of the unlawful entry."*

§4:16 Example 2: Scope of Consent Limited; Consent Revoked

§4:16.1 A Common Scenario

"Joe" is charged with possession with intent to deliver marijuana and cocaine. The police report states that officers see several persons enter a home and leave after a brief period of time and suspect that drug sales are taking place in the home. They knock on the door, and when Joe answers they ask if they can come in and ask questions about the visitors and look in his living room. Joe allows them entry into the living room; from there, police can see a small gram scale and a box of plastic baggies in the kitchen. There is no visible contraband. Police ask if they can look in the kitchen cabinets, and Joe agrees; they open the cabinets and drawers, but find nothing illegal. Joe then says he needs to leave for work and would like them leave immediately. An officer then enters the bathroom without asking permission, opens the medicine chest and observes several ounces of marijuana, which he seizes. At the hearing on the motion to suppress, the officer testifies that he had consent to search Joe's home.

§4:16.2 Sample Cross-Examination

At the hearing, Joe's lawyer will cross-examine the officer on the scene as follows:

Q: You saw several persons enter and leave my client's apartment?

A: Yes, and we believed there were drug sales taking place there.

Q: You did not observe anyone coming and going in possession of narcotics?

A: No but based on the traffic, I had reason to believe that was what was occurring.

Q: You did not see anyone exchange packages or money?

A: No.

Q: You did not get a warrant to search my client's home?

A: No, I approached the residence for a "knock and talk" and your client invited us in.

Q: You knocked on the door and asked permission to come in and talk to him and he said yes.

A: Yes.

Q: Once inside you conversed with him while in the living room?

A: Yes and from the living room I was able to observe a gram scale and a box of plastic baggies in plain view in the kitchen which I know from my training and experience are used to weigh and package narcotics.

Q: You asked my client for permission to search his kitchen?

A: We asked if we could look around and he gave us consent to search.

Q: What you asked was if you could look in his living room and kitchen and he agreed to allow you to look into those rooms?

A: He gave us consent to search his home.

Q: I'm showing you what's been marked as Exhibit 1, this is your report written after the search?

A: Yes.

Q: You wrote this the same day as the search while the events were fresh in your mind?

A: Yes.

Q: Please look at this report. (Officer reviews it). What you stated in your report was that my client gave you permission to search his living room and kitchen, correct?

A: That's what I wrote but my recollection is that he gave us consent to search his home.

Q: You looked inside drawers and cabinets in the kitchen?

A: Yes.

Q: You did not find any drugs or contraband in the kitchen?

A: I did not see anything other than the scale or baggies.

Q: You also didn't see anything unlawful in the living room, right?

A: I did not.

Q: After you searched the living room and kitchen, my client told you that he had to go to work and asked you to leave his home?

A: He stated he was going to have to leave and wanted us to leave with him.

Q: But instead of immediately leaving, you went into the bathroom and opened up the vanity?

A: Pursuant to his consent to search, I also looked in the bathroom and I observed marijuana and cocaine in the bathroom vanity drawer.

Q: You did this after he told you he had to leave and wanted you to leave as well?

A: Right after he stated he had to go to work, I told him I would just be a minute, I went into the bathroom to continue my search. I found the drugs and at that time placed him under arrest.

§4:16.3 Sample Argument

Based on this cross-examination, Joe's lawyer will argue to the judge:

> *"Your Honor, when a person consents to the warrantless entry of his home, the law is clear that this does not imply consent to a full-scale warrantless search of his property. The U.S. Supreme Court held that even when a person consents to a warrantless search, he can limit its scope. Here, my client agreed to let the police come into his living room, and when they asked to look in that room and the kitchen, he allowed it. At the time, my client made it clear that they could only look for a few minutes, and he specifically agreed only to a search of those two rooms. Moreover, consent to search is revocable; a person is entitled to reassert his Fourth Amendment rights. My client unequivocally withdrew his consent; he told the police that he had to go to work, and he asked them to leave his home. At that point, police had not found any contraband or unlawful items. They saw a common kitchen scale of the type that is sold at department stores, and baggies which any person can buy at the grocery store. These are*

common household kitchen items used for perfectly lawful reasons by millions of people. Observing these items in a home does not create any basis for a warrantless, non-consensual search, which is exactly what occurred here. Therefore, the court must suppress the evidence seized as a result of this unlawful search."

D. Evidence Obtained During a Police Interrogation

§4:17 Overview

You may fear that if you confessed or made other incriminating statements to law enforcement, that all is lost. Not so. There are numerous possible grounds to challenge the admissibility of statements made to law enforcement.

Possible grounds for challenging the admissibility of a confession or other incriminating statement include:

- Whether you were advised of your constitutional rights (your so-called Miranda rights –"You have the right to remain silent . . . .");
- The timing and the circumstances under which you were advised of your rights;
- Whether you freely, voluntarily and intelligently waived those rights;
- Whether police respected your assertion that you didn't want to answer questions;
- Whether you asked for a lawyer;
- Whether and when the questioning stopped once you asked for a lawyer;
- Whether your confession was obtained as a result of an unlawful arrest;

- Whether your "confession" was so tainted by the interrogation techniques used by the police that it must be deemed unreliable; and
- Whether your "confession" was coerced by police interrogation techniques. Courts have found the following interrogation techniques to be coercive:
  - Physical force/threats
  - Lengthy and/or multiple interrogations during which a suspect is deprived of sleep; held incommunicado; and/or questioned by a relay of interrogators
  - threatening unlawful consequences
  - Making Suspect Physically Uncomfortable
  - Promising Leniency
  - Fabricating evidence

Let's take a closer look at one of these grounds: violation of your Miranda rights.

"You have the right to remain silent. . . ." This refrain, made popular in countless police and legal television dramas, can probably be recited by most seventh-graders. These Miranda warnings (named for the Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966)), are a restatement of your constitutional rights. The classic Miranda warnings are:

- You have the right to remain silent.
- Anything you say can be held against you in a court of law.
- You have the right to have an attorney before or during any questioning.
- If you cannot afford an attorney, one will be appointed for you at public expense.

The purpose of the Miranda warnings is to protect against the overwhelming coercive power of a custodial interrogation. Accordingly, law enforcement must give Miranda warnings to any person who is in custody prior to questioning that person. If, on the other hand, a suspect is not in custody, law enforcement can question him without advising him of his Miranda rights.

This raises the question: When is a person "in custody"? A person is "in custody" when he is deprived of his freedom of action in any significant way. You do not have to be arrested or confined to a jail cell to be in custody. Rather, in determining whether a person is "in custody," the question is whether, given all the circumstances, a reasonable person in the same situation would have felt that he was not free to go. In other words, if you are being questioned by law enforcement, and a reasonable person in your shoes would not feel free to end the questioning and walk away, then you are in custody (regardless of where the questioning takes place).

§4:18 Sample Questions Your Lawyer Might Ask During Your Interview

If you made incriminating statements or gave a confession to law enforcement, your lawyer will ask you a series of questions like these to determine if the officers violated your rights:

- How many police officers approached you (and others present)?
- What did the police tell you to do?
- Did the police order you to remain where you were?
- What tone of voice did the police use?
- Did you try to leave or ask to leave?
- Did the police block you from doing so?
- Were you asked to put your hands in the air, on a squad, or some other location?

- Did anyone not comply with the police and, if so, what happened?
- Did the police have their weapons pointed at anyone?
- Did the police have their weapons drawn or their hands on their firearms?
- Were you handcuffed?
- Were you made to sit in the rear of a locked squad car?
- Were flashlights shone on anyone?
- Were you subjected to a pat down?
- Did the police take custody of your driver's license or other paperwork?
- Did you feel free to refuse a police request? Why or why not?
- Were you questioned in a police vehicle?
- Were you ever told you were free to leave?

If you were questioned at the police station:

- Were you escorted into the police building at the entrance for the general public?
- Did you use the public elevators or stairwell?
- What were you doing in the 24 hours prior to the interrogation? (Be specific. When did you last eat? When did you last sleep? Did you consume medications or drugs or alcohol? These details will help your attorney gauge whether your ability withstand a psychologically coercive interrogation.)

- Describe the interrogation room.
- What furniture was in the room?
- What was the lighting like?
- Was the room at a comfortable temperature?
- Was the door to the interrogation room open, closed or locked during questioning?
- Were you left alone in the room and unable to leave because the door was locked? For how long?
- During the questioning, did the officers move around the room?
- Did they move closer to you at any point?
- Did they touch you in any manner (even in a comforting kind of way)?
- Did they place themselves between you and the door and act as if you couldn't leave without their consent?
- Did you have access to water, food or a bathroom?
- Were you allowed to go to the bathroom on your own, or were you escorted to and from the bathroom?
- Were you allowed to use a phone?
- Were you allowed to keep your cellphone with you?
- Did you ask to make a phone call?
- Did you ask for a lawyer?
- How did the police respond?

- Were you told there would be negative consequences if you talked to a lawyer?
- At any time, did you tell police you didn't want to talk anymore?
- What words did you use? How did the police respond?
- If you did not assert your right to remain silent and to have an attorney right at the outset of the interrogation, why did you initially agree to talk and then decide to try to stop the questioning at that particular point?
- When did you make your first admission to the crime and why?

§4:19 Example: Interrogation at Police Station; No Miranda

Challenges to the admissibility of a confession or other incriminating statement generally arise in two settings, and in both the police most often will claim that they did not advise a suspect of his Miranda rights because he wasn't "in custody." If the statement took place in connection with a motor vehicle stop or in a home or business, the claim will be that the arrest had not yet occurred. If the statement was given at a police station, the claim will be that the suspect came in "voluntarily" and had not yet been arrested. Consider this example:

§4:19.1 A Common Scenario

The police suspect "Joe Jones" of involvement in a homicide. The victim is an employee of a liquor store who was shot just outside the store after closing.

Four police officers come to Joe's home; they are given permission to enter by his parents. The officers tell Joe to come downtown for questioning about a shooting. They do not tell him that he can refuse

to go. They drive him downtown in the back of a squad car whose back doors can only be opened from the outside. Two officers sit in the front of the squad and the other squad with two officers follows. They enter the police station from a non-public entrance and take an elevator that is not available to members of the public to an interrogation room. The interrogation room is in a secured area of the police station; only officers with keys can enter the interrogation area and the locked interrogation room.

Detectives question Joe for four hours without reading him Miranda warnings. During the questioning they take two breaks. During both breaks, Joe is left alone, locked in the interrogation room. The first break lasts 60 minutes, during which time the detectives conduct an updated review of the case and learn that Joe is seen on the liquor store time-stamped tape just minutes before the store closing, acting in a suspicious manner. Joe has denied any involvement in the shooting and claimed an alibi. Upon return from the first break, the detectives tell him that he was seen on the videotape and they have strong proof he was the shooter. He continues to deny involvement.

The second break is taken an hour later for Joe to use the bathroom. There is a public bathroom in the unsecured hallway, but two detectives take Joe to a bathroom in the lockup area. They immediately return him to the locked interrogation room. Upon return they tell him they know he did the homicide and if he doesn't tell them the truth they will not be able to tell the DA that he is cooperative and remorseful, and this will look bad for him. Joe admits to being at the liquor store, but says he witnessed an unknown person commit the shooting. The detectives tell him he is not being truthful because they have a witness who identifies him as being the shooter. He tells them the witness is wrong; he was only the lookout. At that point, the detectives tell Joe he is under arrest and read him the Miranda warnings. Joes tells them he doesn't want to answer any more questions and wants a lawyer. Questioning stops and he is placed in the lockup area.

At the suppression hearing, the police testify that Joe came in voluntarily to answer questions and was not placed under arrest until after he admitted to being the lookout in the murder; thus, they didn't advise him of his Miranda rights until the arrest was made.

§4:19.2 Sample Cross-Examination

At the suppression hearing, Joe's lawyer will question the detectives with the goal of showing that, regardless of what they claim, Joe was in custody at the time he made the incriminating statements.

On the importance of an arrest

Q: You were investigating a homicide?

A: Yes.

Q: A serious crime?

A: Yes.

Q: This was a homicide against a business employee?

A: Yes.

Q: And it is very important to locate and arrest the perpetrator so that person can't continue to pose a threat to the community?

A: It's important to arrest all persons who commit dangerous criminal acts.

Q: You agree that in the case where an innocent person is killed in an armed robbery, that it is a high priority to make an arrest of the perpetrator.

A: If we think we have the correct person, yes.

Q: In a case like this you would want to make an arrest as soon as possible?

A: If we have probable cause to arrest the person, yes. But not if we don't have probable cause, counsel.

Q: So you agree if you had probable cause you would make an arrest as soon as possible?

A: Yes.

On probable cause to arrest

Q: There was an eyewitness to the homicide?

A: Yes.

Q: That person gave a description of a person they saw shoot the victim?

A: Yes.

Q: The witness saw the shooter leave the scene?

A: Yes.

Q: The witness gave a description of the shooter?

A: Yes.

Q: Of their height?

A: Yes.

Q: Their body build?

A: Yes.

Q: Race?

A: Yes.

Q: All parts of the description matched Mr. Jones?

A: Yes, but that wasn't sufficient for an arrest.

Q: They stated this person was alone?

A: Yes.

Q: That the person got into a car that you found matches Mr. Jones' car?

A: Yes.

Q: The witness saw two letters of the car's license plate and Mr. Jones' license plate contains those two letters?

A: Yes.

Q: Based on the information you received, you had a strong suspicion that Mr. Jones was the shooter?

A: A suspicion yes, but not enough for an arrest.

On the location of questioning

Q: You went to Mr. Jones' house?

A: Yes.

Q: To question him about the homicide?

A: Yes.

Q: You were allowed into the home?

A: Yes.

Q: The home had several rooms in which a person can sit down and talk to someone?

A: I don't understand what you mean.

Q: There is a living room, dining room, and kitchen?

A: Yes.

Q: All of which have seating where an interview could be conducted?

A: Yes, but it wasn't a private setting, there were other people in the home.

Q: Mr. Jones' parents were the other people at the home?

A: Yes.

Q: They were cooperative?

A: Yes.

Q: You did not ask them if you could meet with their son privately at the home?

A: No, we thought it best to have him come to the police station to a private room.

Q: You chose not to question him at his home?

A: We asked him to come to the police station where there is a better environment for interviewing someone.

Q: You chose not to question him in the squad?

A: No, a room at the department is a better environment.

Q: Witnesses are sometimes questioned in squad cars?

A: Occasionally.

Q: You've questioned witnesses in squad cars?

A: Yes, but I don't consider that ideal.

Q: So your answer is yes?

A: Yes.

On transporting the suspect to interrogation

Q: You took Mr. Jones to the police station in your squad?

A: We had a uniformed officer drive him in another squad.

Q: You did not ask him if he wanted to drive his own car to get there?

A: No. We were concerned there was evidence in that car and we were not going to allow him to drive it.

Q: Because of this concern, you kept this car under observation?

A: Yes.

Q: He rode in the back of the squad he was transported in?

A: Yes.

Q: The back of the squad is automatically locked from the outside?

A: Yes.

Q: So a person riding in the back cannot get out until he is let out?

A: He was not locked in against his will.

Q: My question is whether a person riding in the back can let themselves out or if an officer is required to open the door. An officer is required, right?

A: Yes.

Q: When you told him to come downtown for questioning, you told him he was going to be given a ride in a squad, right?

A: Yes.

Q: You didn't inform him at that time that he would be locked in the back?

A: That didn't seem necessary.

Q: So your answer is no, you didn't?

A: I didn't.

On a "better" environment for questioning

Q: A better environment for you is an interrogation room at the police department?

A: Yes, the rooms are private and conducive to interviewing.

Q: The rooms are small with cinder block walls?

A: Yes.

Q: With a florescent light overhead?

A: Yes.

Q: No windows?

A: The rooms do not have windows.

Q: Each room has a metal ring on the wall that you can handcuff a person to?

A: We didn't handcuff Mr. Jones to the wall. He was never handcuffed.

Q: But the room has the metal ring for cuffing, true?

A: It does, but we didn't use it.

Q: The door automatically locks when it's closed?

A: Yes.

Q: You have a key?

A: Yes.

Q: The door was closed when you were interrogating Mr. Jones?

A: Yes, but Mr. Jones was free to go.

On "free to go"

Q: You never specifically told him he was free to go?

A: We asked him to come downtown with us to be interviewed. He was not under arrest.

Q: My question is, once he was in the room with you, you never told him he was free to go?

A: It didn't come up.

Q: Mr. Jones didn't have a key to the room?

A: No he didn't.

Q: The only people with keys are police personnel?

A: Yes.

On suspect's entry into police department

Q: After he was removed from the squad car he was transported in, he was taken into the police department interrogation floor?

A: Yes.

Q: He was taken from the squad which was parked in the garage under the building?

A: Yes.

Q: Up the elevator?

A: Yes.

Q: Only police personnel have access to this entrance?

A: Yes.

Q: He wasn't taken to the entrance that the public uses?

A: This entrance is more convenient.

Q: He wasn't dropped off at the public entrance and met there by you or another detective?

A: No.

Q: He was taken up in the elevator that arrested persons are taken up in?

A: Yes, but he was not under arrest.

Q: At the time, to your knowledge, neither you nor anyone else told him that he was not under arrest while being taken in the prisoner elevator?

A: No.

On suspect being locked in during breaks

Q: During the interrogation, you took breaks?

A: Yes.

Q: During the first break, Mr. Jones remained in the room while you and your partner reviewed some additional evidence about the case?

A: Yes.

Q: During this break, the door to the room was closed?

A: Yes.

Q: During this break he was locked in the room.

A: The door was locked, but he knew we were returning shortly.

Q: The door was locked and he had no way to leave while you were gone?

A: The door was locked and he never asked to leave or wait elsewhere.

Q: You never offered him a choice of waiting somewhere else did you?

A: We didn't. We told him we needed to take a break and we'd be back shortly. He didn't ask to leave or go elsewhere.

Q: There's no phone in the room?

A: No, there isn't.

Q: No access to a bathroom?

A: Before the break we asked him if he had to use the bathroom and he said no, he didn't.

Q: When a person is alone and locked in an interrogation room they don't have access to a phone or a bathroom, right?

A: Correct.

Q: You took a break in order to do something that would help you in the interrogation?

A: We did not believe your client was being truthful and we wanted to obtain further case information on how the investigation was proceeding.

Q: You just told him you'd take a break and be back later?

A: Yes, but before doing so we asked if he needed anything and he said no.

Q: So during this time you wanted to get further information, you left him alone and locked in the interrogation room.

A: He stayed in the room voluntarily while we took the break.

Q: You didn't take him out to sit in a waiting room that is open to the public?

A: He didn't ask to leave.

Q: You didn't offer to take him there?

A: No.

Q: You asked him if he wanted anything to eat or drink?

A: Yes, we offered both.

Q: He wanted a soda?

A: Yes.

Q: You didn't take him to the soda machine in the public hallway to get the soda?

A: No, we asked him what he wanted and brought it to him.

Q: So you didn't allow him to leave the room and look at the choices in the machine?

A: It wasn't necessary, we found out what he wanted.

Q: You didn't let him leave the room, correct?

A: It wasn't necessary.

Q: You brought him the soda at the end of your break?

A: Yes.

Q: The break was for an hour?

A: Yes.

Q: So he sat alone locked in a room for 60 minutes?

A: He remained there until the end of the break.

On not allowing the suspect to use the public bathroom

Q: Later in the interrogation, he had to use the bathroom?

A: Periodically when we were talking to him, we asked him if he needed a break or to use the restroom. At one point he said yes, and we allowed him to use the bathroom.

Q: You escorted him to the bathroom?

A: Yes.

Q: To the bathroom in the lockup?

A: Yes.

Q: This is inside the secured and locked interrogation area?

A: We took him to the lockup bathroom.

Q: There is a public bathroom outside the secured and locked area, correct?

A: Yes.

Q: It's on the same floor?

A: Yes but the bathroom in the lockup is close.

Q: The public bathroom is also pretty close, correct?

A: It was more convenient to use the one in the back area.

Q: So during this second break you kept him in the secured locked area as well?

A: He used the lockup bathroom.

Q: You never took him outside of the locked area?

A: No, we didn't.

On coercive nature of interrogation

Q: When you questioned Mr. Jones, you wanted to get him to admit he was the shooter in this case?

A: We wanted him to tell the truth.

Q: You believed he was involved in the homicide?

A: Yes.

Q: You told him that you had a witness who saw him do the shooting?

A: Yes.

Q: You told him that you had a strong case against him?

A: I never used those words.

Q: But you told him that someone had seen him do the shooting?

A: Yes.

Q: You told him that you'd seen a videotape from the store taken just before the homicide?

A: Yes.

Q: You told him that you identified him as being present on that videotape?

A: Yes.

Q: So this was strong evidence that he was lying to you?

A: We told him that we needed him to be truthful.

Q: You also told him that the district attorney would be reviewing this case and deciding what to do?

A: He asked us what was going to happen with the case and we told him that we don't make decisions about cases; that the district attorney decides if a person is going to be charged with a crime.

Q: You also told him that the district attorney would look more favorably on him if he admitted involvement in the crime?

A: I told him that it would be in his best interests to cooperate and that if he was truthful and cooperative, that we would bring this to the district attorney's attention.

On probable cause to arrest

Q: When you began questioning Mr. Jones about the homicide, he denied being present at the scene?

A: Yes.

Q: He maintained this denial for a lengthy period of time?

A: Yes.

Q: He said more than just the mere fact that he wasn't there; he also said he had an alibi?

A: Yes.

Q: You told him you didn't believe him?

A: We told him that he was not being truthful.

Q: You told him you had a witness who placed him at the scene?

A: Yes.

Q: Eventually he changed his version of what occurred?

A: Yes.

Q: He told you he was present at the shooting but only as a witness, not a participant?

A: Yes.

Q: At this point he told you he saw an unknown person do the shooting?

A: Yes.

Q: You again told him that he was not being completely truthful?

A: Yes.

Q: You continued to question him?

A: Yes.

Q: You told him that the witness said he was the shooter?

A: Yes we told him there was a witness who saw him do the shooting.

Q: This part of the conversation took place after he claimed he'd witnessed the unknown person shoot the victim?

A: Yes.

Q: So, at this point he had changed his story from being nowhere near where the crime occurred to being a witness to the crime?

A: Yes, he'd changed his version concerning his whereabouts but had not admitted to participating in the offense.

Q: This part of the interrogation took place before you read him Miranda rights?

A: Yes.

Q: When he changed his version of his whereabouts you had already spent several hours interrogating him?

A: Yes.

Q: Interrogating him and getting nowhere?

A: I wouldn't say we had gotten nowhere; we were making progress, but he hadn't yet admitted participation in the crime.

Q: After he told you that he was in fact present at the time of the shooting, you had probable cause to arrest him for obstructing an officer?

A: Yes, but we did not arrest him. Our purpose was to focus on obtaining the truth about the homicide.

Q: But clearly, he had told two different stories, which could form the basis for an obstructing arrest?

A: Yes.

§4:19.3 Sample Argument

Mr. Jones' lawyer can now make this argument to the judge:

"Your Honor, the police clearly had Mr. Jones in custody at the time he was being questioned at the police station. A person is in custody for purposes of Miranda when he is deprived of his freedom of action in any significant way. There does not have to be formal arrest. The crucial question for the court is whether, under the totality of the circumstances, a reasonable person in the defendant's position would have felt "at liberty to terminate the interrogation and leave," and how a reasonable person in the suspect's position would have understood his situation.

Clearly, anyone in Mr. Jones' position would reasonably believe that he was in custody. The detectives testified that they requested Mr. Jones come to the police station for an interview, but they never informed him that he could refuse to go.

Several armed officers came into his residence. This was a show of force on the part of the police and, in the absence of being told that one didn't have to go downtown for questioning, no reasonable person would think he was free to refuse to comply.

Mr. Jones is then transported to the police department not by the detectives who want to question him, but by a uniformed officer, in the rear of a locked squad. He can only get out of the squad if allowed out by an officer. The squad is parked in a secure area, and he is taken into the building not through an entrance open to the public, but through the same entrance and up the same elevators in which prisoners are transported. Once there, he is placed in a locked interrogation room. He has no access to a phone or the outside world. When the police take a break, he is left unattended in the locked room for an hour. He is not offered the choice of waiting in a public area. When he wants something to drink, he is not permitted to go to the soda machine; he is kept in the locked room. When he needs to use the bathroom, he is taken not to the public restroom, but to the bathroom in the lockup within the secured area.

This interrogation went on for several hours. During this time, although he repeatedly denied involvement in the crime, the detectives did not let up; they pressed him to change his version, telling him over and over that he was not being truthful. No matter how much he denied being present and participating in the crime, he was not driven home or let go; he was told, in so many words, that he is a liar. Clearly, under the totality of the circumstances, any reasonable person would believe that he was under arrest. There is no question that the police believed Mr. Jones had

committed the homicide and they had no intention of releasing him. Clearly the police conveyed the idea to Mr. Jones that they believed him to be guilty of a homicide. They not only told him that he was lying; they told him they had an eyewitness who said Mr. Jones was the shooter. They told him that if he didn't tell them the truth, they would not be able to tell the prosecutor that he was cooperative and remorseful and this would look bad for him. No reasonable person, under this set of circumstances, who is being told that there is a strong case against him for a homicide and that things will look bad if he doesn't admit involvement, would think that the police were just going to let him go home.

Furthermore, even if the detectives thought they lacked probable cause for an arrest on the homicide, they clearly had the basis to arrest Mr. Jones for obstructing an officer the minute he told them that he had not been truthful about the alibi and that he was present at the scene. Certainly, they were not going to release him from custody at that point.

The police were doing everything they could to circumvent the protections of Miranda. This was a high pressure, psychologically coercive interrogation. Here, the police did not read my client his Miranda rights because they thought he might exercise those rights and they would not be able to get a confession. Law enforcement cannot be permitted to ignore the dictates of Miranda by taking actions that any reasonable person would interpret as an arrest, and then claim that the person was free to go. Thus, the court should suppress Mr. Jones' statements to the police."

Appendix 4-1 Sample Motion to Suppress

MOTION TO SUPPRESS
NO REASONABLE SUSPICION FOR SEARCH OF PERSON OR VEHICLE

NOTICE IS HEREBY GIVEN that on the ___ day of ________, ______, at 1:30 p.m., or as soon thereafter as counsel may be heard, Attorney ____________ will move the court in the above entitled matter to suppress as evidence marijuana, drug packaging materials, statements allegedly made by the defendant, and all leads and evidence derived therefrom.

AS GROUNDS THEREFORE THE DEFENDANT ASSERTS:

1. On [date] at 9:02 p.m., [City] Police Officers _________________, stopped Mr. (Defendant)'s vehicle for a defective passenger side lamp. Mr. (Defendant) stated he did not know the light was out. Officers asked Mr. (Defendant) for a driver's license, and Mr. (Defendant) produced his valid driver's license. Officers asked Mr. (Defendant) if he had any drugs or weapons on him and Mr. (Defendant) stated he did not. Mr. (Defendant) was removed from the vehicle and told to stand at the rear of his vehicle. Police then began searching the car. Officer ________ searched under the driver's seat and allegedly found a bag of marijuana.

2. Mr. (Defendant) possessed a reasonable expectation of privacy in the vehicle and its contents, and thus may challenge the stop of the vehicle and its subsequent search, State v. Guzy, 139 Wis.2d 663 (1986), State v. Howard, 176 Wis.2d 921 (1993), as well as any search of his person and prolonged detention.

3. An automobile may be searched without a warrant if there is probable cause to search the vehicle and the vehicle is readily mobile. Chambers v. Maroney, 399 U.S. 42 (1970); Thompson v. State, 83 Wis.2d 134(1978); State v. Marquardt, 2001 WI App 219. However, police officers lacked probable cause to search the vehicle.

4. Law enforcement may conduct a "Terry" search for weapons in a vehicle when police who conduct the stop have reasonable suspicion to believe that the vehicle may contain weapons potentially dangerous to the officers that an occupant can access. The permissible area of this type of search encompasses the car's passenger compartment, Michigan v. Long, 463 U.S. 1032 (1983).

5. Mr. (Defendant) was only accused of committing a minor traffic violation, not a crime. He did not engage in any conduct which gave rise to reasonable suspicion that he possessed a weapon. Mr. (Defendant) was not observed engaging in any threatening or illegal activity either before or after he was stopped by police. Mr. (Defendant) did not flee when officers stopped him; he made no suspicious movements; he followed the officers' commands. Officers can point to no

"specific and articulable facts" which would have reasonably led them to believe that Mr. (Defendant) presented a risk of harm to themselves or others. Given the lack of any of these specific and articulable facts, police lacked reasonable suspicion to believe that Mr. (Defendant) had a weapon in his vehicle. In Michigan v. Long the court noted that its decision "did not mean that the police may conduct automobile searches whenever they conduct an investigative stop." Id. at 1049.

6. Nor can this search be justified by any claim that Mr. (Defendant) made any furtive movements or exhibited nervous behavior or that the stop occurred in a "high crime" neighborhood. So-called furtive movements alone, without anything further, are insufficient to justify a search of the car or passenger. In State v. Johnson, 729 N.W.2d 182 (Wis. 2007), the Wisconsin Supreme Court held that police were not justified in conducting a "Terry" search of a person who was in a car stopped for a minor traffic violation just because they saw movement of the head and shoulders. Similarly, police were not permitted to frisk a passenger in a car stopped at 8:45 p.m. in a high crime neighborhood for operating a car without headlights after dark simply because the passenger exhibited nervous behavior and twice put his hands in his pockets after being asked to remove his hands by police. State v. Kyles, 675 N.W.2d 449 (Wis. 2004).

7. Presence in a high-drug area, standing alone, does not constitute reasonable suspicion. Brown v. Texas, 443 U.S. 47 (1979); United States v. Hughes, 517 F.3d 1013, 1017 (8th Cir. 2008), McCain v. Commonwealth, 659 S.E.2d 512 (Va. 2008).

FURTHER Mr. (Defendant) alleges that the search of the vehicle and recovery of the alleged marijuana are all contrary to his rights under the Fourth and Fourteenth Amendments of the United States Constitution and corresponding sections of the ___________ State Constitution. Defendant requests an evidentiary hearing, where the State must prove the lawfulness of the stop, seizure of Mr. (Defendant)'s person, search, arrest and seizure of the alleged controlled substance.

THIS MOTION is brought subject to jurisdictional objections.

Dated this ___________________, at _____________________.

Respectfully submitted,

____

Defense Attorney
State Bar No.________

Attorney for (Defendant)

Chapter 5: Trial

I. Order of Proceedings

Now that your case has been set for trial, you may be wondering what happens next. How does a criminal trial work? Regardless of the specific crime or crimes with which you are charged, your trial will unfold in stages. Here is the usual order of the proceedings:

- Jury Selection
- Opening Statements
- Prosecution's Case-in-Chief
- Defense Case
- Rebuttal
- Closing Arguments
- Jury Instructions
- Jury Deliberations and Verdict

Let's discuss each stage of the trial in more detail.

II. Jury Selection

§5:01 Governing Principles

On the day your trial is scheduled to begin, a group of prospective jurors will be summoned to the courthouse. From this group (called a "venire"), the prosecutor and your defense attorney and/or the judge will select the jurors who will decide your case.

Jury "selection" is something of a misnomer. In reality, the task is not to select the "ideal" jurors, but to weed out those individuals whose biases are harmful to your case and whose beliefs are so entrenched that they could not deliver an impartial verdict.

So, how does it work? How do the judge and the lawyers uncover juror biases and separate the "good" jurors from the "bad" jurors? The answer is to get the jurors talking. The judge and/or the attorneys will question the prospective jurors, as a group and individually, in open court. Below are some samples of questions your criminal defense lawyer might ask:

§5:02 Sample Questions

Questions that reveal jurors' attitudes toward the burden of proof and the presumption of innocence

The purpose of these questions is to find out if jurors will hold the prosecution or your defense lawyer to a higher or lower standard of proof than is required by law.

- In our system of justice, a defendant is presumed innocent, until proven guilty. How do you feel about that?
- Because the defendant is presumed innocent, the defendant in a criminal trial is not required to testify or present any evidence at all. How do you feel about that?

- Do you agree or disagree with this statement: "A defendant who does not testify is probably guilty"?

- Do you agree or disagree with this statement: "It is better for ten guilty men to go free than for one innocent man to be wrongly convicted and punished"?

Questions that reveal jurors' attitudes toward the criminal justice system

- Jurors who agree with these statements have authoritarian tendencies – that is, they favor strict rules and obedience to authority. In criminal trials, authoritarian jurors are likely to favor the prosecution.

- Do you agree or disagree with this statement: "The rights of people accused of committing a crime are better protected than the rights of victims"?

- Do you agree or disagree with this statement: "Too many guilty people escape punishment because of legal technicalities"?

- In general, does the criminal justice system treat criminals too harshly, about right, or too leniently?

- Are you a member of any victim's-rights organization?

Questions that reveal jurors' attitudes toward crime

Jurors who view society as a contributing factor to crime and who believe the solution to crime is complex are more likely to be open to the defense than jurors who hold the individual responsible and propose simplistic or punitive solutions to the problem of crime in society.

- How serious a problem do you think crime is today in our society? in your neighborhood?

- In your opinion, what are the major causes of crime?
- What are some solutions to the problem of crime?

Questions about jurors' experience with crime and interactions with the police

- Have you ever witnessed a crime or been questioned by a police officer about a crime?
- Have you ever filed a complaint against someone with the police?
- Have you ever called 911 to report a crime?
- Have you, or has anyone close to you, ever been the victim of a crime?
- Do you have confidence in police officers' ability to do their jobs?
- Do you think police officers are more or less credible than other witnesses?

Case-specific questions

Depending on the facts of your case, the attorneys or the judge also might question jurors about the following topics:

- In a drug case, jurors' feelings toward the drug "crisis" and their personal experiences with family members or friends who have had drug problems.
- In a gun case, attitudes toward firearms and gun control.
- Attitudes toward particular defenses you might raise or personal experiences that might bear on those defenses. For example, if your defense will involve a challenge to an eyewitness identification, your attor-

ney might ask: "Have you ever had the experience of waving at someone you thought you knew, and then realizing it was the wrong person?"

- "Bad" evidence the jury will hear (e.g., evidence of your prior criminal record or the emotional nature of the crime).

§5:03 Weeding Out the Jury Pool

A prospective juror's answers to all these questions may give your defense attorney or the prosecutor reason to want that individual removed from the jury pool. Both your defense attorney and the prosecutor have an unlimited number of "for cause" strikes. That is, both sides can remove or "strike" any juror whom they feel cannot be fair and impartial and decide the case on the law and the evidence presented in court. In addition to "for cause" strikes, both sides have a limited number of "peremptory" strikes. These are, essentially, "no cause" strikes; the party challenging the juror does not have to give a reason for exercising a peremptory strike. However, neither the prosecutor nor your defense attorney may exercise a peremptory strike on the basis of a juror's race, gender, ethnicity or religion.

Tip from the trenches: Don't skip jury selection.

You have a right to be present during jury selection, and you should exercise that right. Be present in the courtroom to observe and to assist in your defense. You may sense a juror's empathy or hostility when your attorney does not. Moreover, any time you spend in close proximity to the jurors – making eye contact, nodding in agreement and generally showing interest in what the jurors say – will work to humanize you in the eyes of the jurors. Caution: This is so only if you behave appropriately and respectfully while you are in the courtroom. You must not, under any circumstances, snicker, sneer, leer or stare at the jurors. Remember their role and your role in these proceedings.

Tip from the Trenches: Present your best self.

Two simple rules will help you prepare for trial and present your best self to the jury:

1. Dress appropriately. Do not give the jurors any reason to jump to a negative conclusion about you. No sweatpants. No jeans. No visible tattoos or piercings, except for small earrings. (Consider tongue piercings to be visible piercings, and remove them.) No excessive showing of cleavage or bare skin.

2. Behave appropriately. Assume that the jury is always watching. At all times, whether you are in the courtroom, waiting in the hallway, or walking or riding to the courthouse, you must be polite and respectful of everyone you encounter. Do not use vulgar language, even in private conversations in the hallway. Do not laugh excessively, giving the appearance that you don't take the charges against your seriously. These rules apply inside and outside the courtroom. You never know when a juror or potential juror is standing next to you.

III. Opening Statements

§5:04 What is an Opening Statement?

Once jury selection is complete, the trial begins with opening statements. The opening statement is the first opportunity for the lawyers – the prosecutor and your defense lawyer – to speak directly to jurors and provide them with an introduction to the case they are about to hear. It is each lawyer's chance to make a strong first impression and plant the seeds for success.

§5:05 Prosecution's Opening Statement

The prosecution always gets the first word, so the prosecutor will give his or her opening statement first. You and your defense attorney should listen carefully and note whether:

- The prosecutor omits or downplays mention of any witnesses or evidence. This may signal that the witness recanted or proved unreliable or that certain anticipated evidence against you failed to emerge.
- The prosecutor makes any promises about what the evidence will show. This way, if the evidence is not forthcoming, your defense attorney can remind the jurors of this broken promise at the conclusion of the trial.

§5:06 Your Defense Attorney's Opening Statement

After the prosecutor's opening statement, your defense attorney will have an opportunity to make an opening statement.

The opening statement is critically important because it lays the foundation for your defense and for successful cross-examination of the prosecution's witnesses later in the trial. An effective opening statement by your defense attorney will do more than just concisely summarize and preview the evidence; it will tell a compelling story that shapes the jury's perception of the evidence before they hear from a single witness.

Your defense attorney's goals for the opening statement are:

Connect with the jurors. Your lawyer will speak to the jurors face-to-face, without relying on notes or leaning on a podium. This body language shows confidence in you and your case, and helps to build a rapport with the jurors.

Tell a story. Often, the story will be about the process that led to the prosecution, and its unfairness. For example, your attorney may attack some aspect of the prosecution's evidence and explain why it is unfair for the prosecution to seek a conviction on such evidence.

Plant the defense themes. The opening statement is the time to introduce the jurors to the theme(s) of your defense. You lawyer will begin to seed the catch-phrases that you want jurors to remember, e.g., informants "sell their testimony"; the prosecutor "holds the jailhouse key"; you were simply "in the wrong place at the wrong time."

Introduce you as a person, not as a defendant. While the prosecutor will refer to you as "the defendant," your lawyer will always call you by name. The opening statement also will include facts about you, your life story, or your family that might engender sympathy and/or respect with the jurors. For example, your attorney may mention your job or your work in the community. He may remind jurors that you have a mom and a wife and child. If this is your first run-in with the law, that too might be resonate with some jurors.

End on a high note. The opening statement will end on a positive note, e.g., a confident statement that the evidence will not support the prosecution's case and that the only fair verdict will be "not guilty."

IV. Your Defense Attorney's Role in the Prosecution's Case-in-Chief

When both parties have given their opening statements, it is time for the prosecution to present its case-in-chief. Your defense attorney will have two important jobs during this phase of the trial: to object to inadmissible evidence or tactics, and to cross-examine the prosecution's witnesses.

A. Objections

There are a number of objections your defense attorney could make during the course of the prosecution's case-in-chief: objections to questions by the prosecutor, to the relevance of a particular line of testimony, to the introduction of certain physical evidence, etc. Here is an overview of a few of the more common and meaningful grounds for objection:

§5:07 Irrelevant; Prejudicial

Relevant evidence is evidence that tends to make the existence of an important fact in the case more or less likely; essentially, it is evidence that bears a logical relationship to the fact it is supposed to prove. For example, if Joe Jones is charged with drunk driving, a bar receipt showing that Joe purchased four drinks within two hours of the time he was pulled over would be relevant evidence that tends to prove Joe consumed alcohol. On the other hand, the fact that Joe has a couple of outstanding parking tickets likely would not be relevant because it is not related to the DUI charge and does not help to prove or disprove the elements of that crime.

Even if evidence is relevant, it may be excluded if it is unduly prejudicial and would serve only to inflame or unfairly bias the jurors. For example, your attorney might object to the admission of particularly gruesome crime scene photos for this reason.

§5:08 Hearsay

"Hearsay" refers to a statement made outside of the courtroom, by a person who is not present to be cross-examined about the truth or accuracy of the statement. For example, prosecutors often will ask a police witness to describe what an eyewitness or informant told him. The officer's recounting of this testimony is hearsay. Similarly, the prosecution often will attempt to introduce testimony related to the victim's state of mind (e.g., that the victim stated that you threatened her in the past or that she was fearful of you). This, too, is objection-

able hearsay (and, usually, irrelevant too). Lab reports and other scientific tests, as well as reports submitted by forensic psychologists also may be challenged as hearsay (and/or irrelevant).

§5:09 Prior Bad Acts

Evidence that you committed similar crimes in the past is not admissible to show a propensity or inclination to commit the crime for which you are currently on trial.

§5:10 Prosecutorial Misconduct

If, for example, the prosecutor elicits evidence he knows to be false or fails to correct statements when a witness testifies falsely, your defense lawyer will object.

B. Cross-Examination

1. Governing Principles

§5:11 What Is the Role of Cross-Examination in Criminal Trials?

The Sixth Amendment to the U.S. Constitution provides that criminal defendants have the right to confront the witnesses against them. This is done by cross-examination. Cross-examination is the process by which the opposing attorney asks questions of the witness, with the goal of poking holes in the witness' version of events; challenging the accuracy of the witness' memory; undermining the witness' credibility; and creating reasonable doubt in the minds of the jurors.

§5:12 Cross-Examination Is a Key Part of Your Defense

Even though cross-examination takes place during the prosecution's case-in-chief, it plays a key role in your defense. You have a constitutional right to remain silent, and you may be limited in the evidence you can present through other witnesses due to those witness-

es' prior convictions, or other misconduct or issues that make them less than ideal. Thus, in many criminal cases, you must present your defense through cross-examination of the prosecution's witnesses.

2. Common Cross-Examination Techniques

§5:13 Controlling the Difficult Witness

Some witnesses, e.g., victims, police officers, and experts, will go out of their way to avoid answering your lawyer's questions on cross-examination. However, the law bestows upon your lawyer a powerful tool for controlling witnesses: the witness must answer the question asked, not the one he wishes were asked. By using the following tactics, your lawyer will, ultimately, get an answer to the question asked and, more importantly, expose the difficult witness for what he is: someone whose goal in testifying is not to play by the rules and tell the truth, but to sell his side of the case.

Repeat the question, word for word.

Where the witness is being particularly recalcitrant, your lawyer might say: "My question was ...," or write out the question on an easel.

Repeat the question, framed as a negative.

Q: You stood in the doorway to prevent my client from leaving?

A: We just wanted to ask your client a few questions.

Q: Are you telling us that you did not stand in the doorway?

Ask the witness to admit the opposite.

When a witness refuses to admit the obvious after repeatedly being questioned in an affirmative manner (e.g., "The sky was cloudy?"), your defense lawyer can reverse course and ask the witness to admit the opposite:

Q: The sky was clear?

Q: Not a cloud in the sky?

Q: Never saw a sky so blue?

This type of question will catch the witness off guard and he likely will reverse course and blurt out the admission your defense lawyer was seeking in the first place.

Repeat the question, with the answer the witness is trying to evade.

Q: So the answer to my question is, "No. Nowhere in your report does it state that Mr. Jones said he threw the gun under the car"?

Apologize for the "misunderstanding" and restate the question.

Q: I'm sorry, but you seem to have misunderstood my question. My question was...Do you understand that question? And the answer is...?

Let the witness finish his "answer," and then point out that he answered a different question, one of his own creation.

Q: Sir, I didn't ask you [your opinion about the informant or whatever else the witness is addressing]. My question was . . . .

or

Q: Are you finished? Do you have anything else to add? Good. Now can you answer my question, please?"

§5:14 Challenging the Witness' Credibility with Prior Inconsistent Statements

Showing that the witness told a different story on a prior occasion is a standard form of impeachment. Typically, it's a three-step process known by the acronym "RAC": Recommit, Accredit, Confront.

For example, imagine a situation in which the defendant is on trial for drug possession and related charges. At trial, the arresting officer testifies that as he approached the driver's side of the car, the defendant made a furtive movement toward the floor.

First, the defense attorney will recommit the officer to his in-court testimony:

> "Today in court you said that you saw my client make a furtive movement when you approached his car?"

Next, the defense attorney will accredit this statement by asking a series of questions designed to build up the circumstances under which the prior statement was made and to subtly demonstrate that the prior statement is more worthy of belief than the in-court testimony. In our example, the defense lawyer would ask a series of questions to allow the officer to testify that:

- His report was accurate at the time it was written.
- Written reports are a very important part of police work.
- Written reports are regularly relied upon by other officers and the prosecution.
- He received extensive training in report writing at the police academy.
- Reports are written right after an event.
- He wrote a good report, worthy of belief.

The final step occurs when the defense attorney confronts the witness with his prior statement and forces him to acknowledge that he made that previous statement. In our police officer example, the confrontation would go like this:

Q: I'm showing you what's been marked as Exhibit One. This is your report concerning this incident, correct?

A: Yes.

Q: Take a minute to review it. (Cop reads report.) In your report you wrote, "As I approached the vehicle, the driver had his hands on the steering wheel"?

A: Yes.

§5:15 Exposing a Motive to Lie: Deals with the Prosecution

Often, if a witness is facing criminal charges of his own, he will strike a deal with the prosecutor – for immunity, or a plea to lesser charges or the promise of some good word from the prosecutor at sentencing -- in exchange for his testimony against you. When this happens, the witness' deal with the prosecutor can be a fruitful ground for cross-examination. Through skilled questioning, your defense attorney can reveal the witness' incentive to color his testimony in order to satisfy the prosecutor. Your attorney will ask the witness questions to reveal for the jurors:

- The severity and possible penalties on any pending charges the witness faces;
- The witness' expectations of leniency in sentencing;
- That the witness has a written agreement with the same prosecutor who has brought the charges against you;

- That under the agreement, only the prosecutor can ask for a reduced sentence;
- The prosecutor has sole discretion on whether or not to request a sentence reduction;
- That the agreement says that the witness must give full and truthful testimony, but the prosecutor, and only the prosecutor, decides whether the witness has fulfilled this obligation (and other obligations under the agreement) and whether the witness gets what was promised;
- The witness knows that the prosecutor's sentencing recommendation carries great weight;
- The prosecutor will condition his recommendation on hearing a version of events that helps to convict you; and
- The witness expects that if he delivers damning testimony against you, the prosecutor will do what he can to lessen the witness's sentence.

3. Cross-Examining Specific Witnesses

a. The Expert Witness

Experts testify in nearly every criminal trial and range from police officers, whose expertise stems from their experience on the job, to highly-trained scientists, such as pathologists who testify as to the cause of death or biochemists who draw conclusions from DNA evidence. Your defense attorney may take one or more of the following approaches in cross-examining the prosecution's expert witnesses:

§5:16 Challenge the Factual Basis for the Opinion

An expert's conclusion is only as good as the data on which it rests. Think, "Garbage in, garbage out." Most experts lack any personal knowledge of the case facts and must rely on summaries provided by the prosecutor or assumptions that the prosecution's evidence is true. On cross-examination, your defense attorney can challenge the expert by asking him to accept contrary facts developed in your case or to assume that the prosecution's evidence is wrong. If a particular fact is important to the expert's analysis, then he should agree that his conclusion may change.

§5:17 Attack the Expert's Conclusion

Your defense attorney may use cross-examination to challenge the expert's ultimate conclusion. This challenge may be based on one of two broad theories: (1) the expert's science is sound, but he did not follow proper procedures in analyzing the evidence and reaching his conclusions; or (2) the expert's science or his area of expertise is unsound, in that it lacks a basis in empirical testing and is otherwise not reliable or generally accepted in the scientific community.

§5:18 Attack the Expert's Credibility

Your attorney may seek to undermine the expert's credibility by cross-examining him with questions about:

- Prior inconsistent statements (such as testimony in prior cases or statements in the expert's report).
- Prior convictions or other bad acts (e.g., fraud)
- Falsified credentials. Resume puffery runs rampant among experts. With pointed questions about statements on the expert's resume, your defense attorney may be able to raise significant doubt in the minds of the jurors as to whether the "expert" is in fact an expert.
- Bias.

Cross-examinations about an expert's bias will leave an impression on the jurors. Does the expert always testify for the prosecution? If so, is he really impartial? The expert is being paid for his testimony; is he really impartial? Your attorney will use cross-examination to develop the basis for the expert's fee step-by-step, because the very facts that the expert believes show that he earned his fee –i.e., the tremendous amount of out-of-court time he put into his one hour of testimony– will suggest to the jury that he is milking this case for his own enrichment. Your attorney will ask questions along the lines of:

Q: Are you being paid by the time you spent on this case, or a flat fee?

Q: How much per hour is your rate?

Q: You use your office at the University to do your work on this case?

Q: You don't pay any rent for that office, do you?

Q: And the secretary who typed your report is the same one the university provides to you?

Q: The University pays her, not you?

Q: Did you have the assistance of any students on this case?

Q: Are you billing for them?

Q: Do you pay them or does the University?

Q: So the $300 per hour you are charging on this case is pure profit to you–by that I mean you have no overhead expenses like staff or rent or supplies?

Q: As of today, how many hours have you billed on this case?

Q: How many hours do you ultimately anticipate billing for?

Q: So the prosecutor owes you $15,000 for your work on this case?

Q: Don't you have some worry that he may not pay you the $15,000 if your testimony does not help his case?

b. The Arresting Officer

§5:19 Governing Principles

A police report is not an objective recitation of the facts from a disinterested witness. Rather, it is a summary of events written by the arresting officer post-arrest. Most officers write a report not with the goal of helping the person arrested obtain an acquittal, but to make the arrest stick; to safeguard the fruits of a constitutionally suspect search; to satisfy a supervisor that the arrest was justified; or to provide the prosecutor with a summary of the "facts." To achieve these goals, the officer will carefully select his words. He may twist the words of witnesses, misrepresent what the suspect said or how he said it, and deliberately leave out exculpatory evidence. Few jurors will have considered what factors motivate a detective or officer in drafting his reports. Your defense attorney can use cross-examination to expose those motives and to educate the jury about them.

It is not uncommon, for example, for an officer or detective to testify at trial to an important "fact" not included in his report. If questioned on his failure to note the "fact" in his report, an experienced officer will typically shrug it off with, "This is only a summary, Counselor. It doesn't include every detail or every observation." On cross-examination, your defense attorney can show how the officer is playing fast and loose with the "facts" by highlighting the pressures on the officer to make his report as comprehensive as possible.

§5:20 Sample Cross-Examination – Contents of Police Report

Your defense lawyer's cross-examination will go something like this:

Officer was taught at the Academy to draft comprehensive reports

Q: Officer, you attended the Police Academy?

A: That's correct.

Q: At the Academy, you were taught the importance of drafting police reports?

A: Yes.

Q: You were taught that a report should include all important facts?

A: It's only summary, as I've said.

Q: Okay. The Academy actually gives a course in drafting a police report?

A: Yes.

Q: At the Academy, you were taught that other officers or detectives might rely on your report in conducting their investigations?

A: That's correct.

Q: That these detectives or officers require all the important information to do a proper investigation?

A: Yes.

Q: And for that reason, your report should be comprehensive?

A: Well, my report includes the necessary information.

Q: For that reason, your report should be comprehensive?

A: Ah . . . yes.

Officer drafts his report for the benefit of the prosecutor

Q: You were taught that the prosecutor will be provided with your report?

A: Yes.

Q: To familiarize himself with the case?

A: Yes.

Q: And rely on that report to make a bail argument?

A: Right.

Q: To assess the likelihood of securing a conviction?

A: Yes.

Q: To, perhaps, negotiate a plea with the defense attorney?

A: Yes.

Q: To prepare for trial?

A: Yes.

Q: Which includes preparing a direct examination?

A: That's right.

Q: Of you?

A: Yes.

Q: And you've learned that, prior to the trial, you may have little or no contact with the prosecutor?

A: Unfortunately, that's true.

Q: You might meet with the prosecutor for the first time the morning of the trial?

A: Yes.

Q: And in such a case, much of what a prosecutor learns about your arrest he will glean from your report?

A: Yes.

Q: To make sure that the prosecutor is properly prepared, you've learned that your report should be comprehensive?

A: Yes.

Q: When drafting your report, you make sure you include everything you want the prosecutor to know about your case?

A: Well, I try.

Q: And you've learned that sometimes six months, a year or more might pass between the arrest and the trial?

A: Correct.

Q: And during that six months or more, you'd expect to make additional arrests?

A: Yes.

Q: To testify in other cases?

A: Yes.

The report is drafted when events and the officer's memory are fresh

Q: And like all of us, your memory immediately following an event is better than it is six months or more after the event?

A: That's true.

Q: You were outside the courtroom this morning?

A: Yes.

Q: You were seated on the bench just outside this courtroom?

A: Yes.

Q: Reading your report?

A: Ah, yes.

Q: Reading your report to refresh your memory?

A: Yes.

Report is "complete summary" of all important facts

Q: You wrote the report yourself?

A: Yes, of course.

Q: You had the time necessary to draft the report?

A: Yes.

Q: You're not given a time limit?

A: No.

Q: You take all the time you need to draft the report?

A: Within reason.

Q: When you finished the report, you read it to yourself?

A: Yes.

Q: You were satisfied that it included every important fact?

A: As I said, it's a summary.

Q: You were satisfied that your report included every important fact?

A: It was a summary.

Q: A summary that did not include every important fact?

A: Yes.

Q: So, you provided the prosecutor with an incomplete summary?

A: No.

Q: In preparation of your testimony here today, you re-read an incomplete summary to refresh your memory?

A: Ah, no.

Officer made report as accurate as possible.

Q: You attempted to make the report as accurate as possible?

A: I write a lot of reports.

Q: You made this report as accurate as possible?

A: I don't know which section you are referring to.

Q: I'm referring to the entire report. You made it as accurate as possible?

A: Without knowing which section, I can't answer that.

Q: Okay. You wrote this report?

A: Yes.

Q: In this report, you record your observations?

A: Ah, yes.

Q: When you record your observations, sometimes you try to be accurate?

A: Well, yes.

Q: And sometimes, you're less interested in recording your observations accurately?

A: I'm sorry, I'm not following you.

Q: Sometimes, when drafting your report, you are less interested in recording your observations accurately?

A: No, that's not true.

Q: So, you made this report as accurate as possible?

A: Yes.

The officer is now committed to his report. He has told jurors that he carefully drafted his report; was under no time pressure; did his best to fairly depict the events; reviewed his report before printing it; and was satisfied that it accurately portrayed the facts. As the cross examination continues, however, he tries to backpedal from his report. On direct examination by the prosecutor, the officer testified – in stark contrast to what he wrote in his report – that at the time of his arrest the defendant had understood what the officers asked him and

had been deliberately "evasive" when answering. The defense lawyer will use the precise language of the report to tie the officer to the report and further undermine his credibility with the jurors.

Q: Thank you. In your police report, you describe Mr. Jones as "intoxicated"?

A: What I meant by that -- I meant that he had been drinking. He was mildly intoxicated.

Q: You did not describe him as "mildly" intoxicated; you described him as intoxicated?

A: I could have been more specific.

Q: After you finished drafting your report, you reviewed it?

A: Yes.

Q: You reviewed it to make sure it was accurate?

A: Well . . . yes.

Q: As you read it, you were free to edit it?

A: As I read it, yes.

Q: When editing your report, you did not see the need to insert "mildly" before "intoxicated"?

A: "Intoxicated" is a very broad term.

Q: You did not see the need to insert "mildly" before "intoxicated"?

A: No.

Q: He was mildly intoxicated?

A: Yes.

Q: His speech was not clear, but he was mildly intoxicated?

A: His speech was clear.

Q: [Reading from the report] You wrote, "His speech was not clear"?

A: I'm not sure.

Q: Please read the top two lines of page three of your report to yourself. Finished? You wrote, "His speech was not clear"?

A: I did not mean he was slurring. I meant he was being evasive.

Q: You never used the word "evasive" in this report?

A: I don't know.

Q: You did not write, "He answered evasively"?

A: I'll take your word for it.

Q: Here's your report. Take all the time you need to review it. Done?

A: Yes.

Q: You did not use the word "evasive" or describe Mr. Rodriguez as answering "evasively"?

A: Not in those words.

Q: Well, let's examine what you actually wrote. On page three, you write "English being a second language for him along with his intoxication made it somewhat difficult to communicate with him"?

A: I'd have to check my report.

Q: Here. Done?

A: Yes.

Q: You wrote, "English being a second language for him along with his intoxication made it somewhat difficult to communicate with him"?

A: Yes, that's what I wrote. But, you have to understand how I meant that.

Q: You noted that it was "difficult" to communicate with Mr. Jones?

A: In that part of the report.

Q: You noted that it was "difficult" to communicate with Mr. Jones?

A: Yes.

Q: You noted that it was "difficult" to communicate with him because English was his second language?

A: Well, that and he was nonchalant. He wasn't taking this matter very seriously.

Q: You noted that it was "difficult" to communicate with him because English was his second language?

A: As I said, he was very nonchalant and he wasn't addressing the situation.

Q: Okay, you did not write that one reason it was "difficult" to communicate with him was because English was second language?

A: I wrote that.

Q: And, you also wrote that it was "difficult" to communicate with him because of his "intoxication"?

A: You are misrepresenting what I wrote. I did not say he slurred, sir.

Q: Judge, can we have the court reporter read back the last sentence, since my memory of what I said is at odds with the witness's memory?

COURT: Yes.

Court Reporter: "Mr. Defense Attorney: And, you also wrote that it was 'difficult' to communicate with him because of his 'intoxication'?"

Q: Did you understand my question, Officer, as read by the court reporter?

A: I did. That's what I wrote.

c. The Eyewitness

§5:21 Governing Principles

Jurors place great importance on eyewitness testimony, particularly if that witness has no obvious axe to grind. For the jury, this is appetizing evidence – if they believe that the eyewitness has correctly identified the assailant or robber, they simply return a guilty verdict; they need not fit this type of testimony into an evidentiary puzzle. In reality, eyewitness testimony is not so simple. Indeed, it may be the most complicated and least trustworthy of all the evidence the jury hears or sees.

One effective means of cross-examining an eyewitness is to attack the conditions under which the initial observations/identification were made. Eyewitness testimony is the product of the conditions under which the eyewitness made the observation and his ability to recall what he observed. External conditions include lighting, rain,

fog, and obstacles. Internal conditions also affect a person's ability to perceive, understand or even see an event. An event may trigger memories of a past event (similar or not), fears real and imagined, ambitions, obligations, and self-doubts. A thousand inner voices, images, and thoughts may flood the eyewitness' mind, competing with each other and overriding his ability to make sense of what his eyes and ears tell him. After the event, visually unsettling images – ambulances, blood, angry police officers, crying victims – bombard the eyewitness, interfering with his ability to process the event and thereby obscuring and blurring the images. As the witness sees a crime being committed, especially a violent crime, his mind may race: "Should I interfere?" "Should I try to stop him?" "Is that a gun?" "He's awfully big." "Will he kill me?" "Am I a coward?" "I'm not a police officer." A witness's inner struggle and inner demons may prevent him from really seeing what is happening right before his eyes.

What a witness sees will not be enhanced by his memory; instead, it will only be further compromised. The mind does not store complete digital images that it can reproduce on command. A memory may grow hazy over time or it may be altered – by the pressures or desire to recall it and, perhaps, to make that recollection fit "the facts." Many eyewitnesses' memories magically improve over time. An unrealistic conviction in the accuracy of their memory gradually replaces the uncertainty they felt following the incident. During cross-examination, the eyewitness is unlikely to admit that he could be incorrect.

§5:22 Sample Cross-Examination – Eyewitness to a Robbery

Robbery was a terrible ordeal for witness

Q: In broad daylight, an individual pulled out a sawed-off shotgun?

A: Yes.

Q: And pointed it at Mrs. Webster?

A: Yes.

Q: You saw the gun?

A: Yes.

Q: You stared at the gun?

A: Yes.

Q: Mrs. Webster was a frail, elderly woman?

A: Yes.

Q: She let out a yelp?

A: That's right.

Q: The robber reached out and grabbed her pocketbook?

A: Yes.

Q: But Mrs. Webster wouldn't let go?

A: No.

Q: The robber screamed at her to let go?

A: Yes.

Q: He said, "If you don't let go, I'm gonna blow your f***ing head off?"

A: Yes.

Q: You believed he might do it?

A: That's right.

Q: You wanted Mrs. Webster to let go of the bag?

A: Right, I didn't want to see her shot.

Q: You thought she was being pretty stupid?

A: I did.

Q: The robber knocked her to the sidewalk?

A: Yes.

Q: She fell hard?

A: Yes.

Witness was immobilized with fear

Q: You wondered if you should come to her aid?

A: Well, I . . . didn't know what to do.

Q: You didn't want to be shot?

A: No.

Q: You didn't want to do anything that would upset the robber?

A: No.

Q: He was a maniac?

A: Yes.

Q: He might just shoot you?

A: Right.

Q: You did not rush to her aid?

A: No.

Q: You made no move?

A: No.

Q: You did not tell the robber to leave her alone?

A: No.

Q: You did not yell out "Help!"?

A: No, I didn't.

Q: At that moment, you did not call 911?

A: No.

Q: You did not run?

A: No.

Q: Your mind was racing?

A: Yes, it was.

Q: You were immobilized with fear?

A: Well, I . . . I was scared.

Q: You were terrified?

A: Yes.

Q: You neither intervened nor fled?

A: No.

Q: You were too scared to do either?

A: Yes.

Q: You were immobilized with fear?

A: Yes.

Witness did not look the robber in the eye

Q: You did not look the robber in the eyes?

A: No, but I saw his face.

Q: You did not look the robber in the eyes?

A: No.

Q: You were unable to tell responding police officers his eye color?

A: No, I wasn't. It happened so fast.

Q: You were too intimidated to look the robber in the eyes?

A: I was scared, yes.

Q: Too scared to look him in the face?

A: Well, yes, I guess.

Q: You did nothing more than glance at his face?

A: I saw him. It's your client.

Q: You did nothing more than glance at his face?

A: I looked long enough.

Q: Even though you were too scared and intimidated to look him in the eyes?

A: I know what I saw.

Witness had little time to observe

Q: The robber grabbed the pocketbook?

A: Yes.

Q: And fled down the street on foot?

A: Yes.

Q: And entered a car?

A: Yes.

Q: Then drove off?

A: Yes.

Q: The entire incident lasted only a few seconds?

A: About ten seconds.

Q: During that ten seconds, you looked at the shotgun?

A: Yes.

Q: It was a real shotgun?

A: Yes.

Q: Not just a couple of pipes?

A: No, a real shotgun.

Q: You watched the robber and Mrs. Webster struggle over the purse?

A: Yes.

Q: That lasted a few seconds?

A: About that.

Q: You watched her fall?

A: Yes.

Q: You wished you could catch her?

A: Yes.

Q: And you watched the robber run away?

A: Yes.

Q: All in ten seconds?

A: Yes.

Q: Of those ten seconds, you spent less than two seconds looking at the robber's face?

A: I saw his face.

Q: Of that ten seconds, you spent less than two seconds looking at the robber's face?

A: Two or three seconds. Maybe more.

Q: And during that two to three seconds, your mind was racing?

A: Well, kind of.

Q: Your eyes darted between the robber, the shotgun, and Mrs. Webster?

A: Yes.

Q: You didn't focus on the robber's face?

A: No.

Q: So when you say you spent two to three seconds looking at the robber's face, you're really saying you looked at his face for a total of two to three seconds?

A: Well, I mean, I looked at his face.

Q: You looked at his face more than once?

A: I believe I did.

Q: You're adding together the time, on those two or three occasions, that you spent looking at his face?

A: Yes.

Q: So, if you looked at his face on two to three occasions and spent a total of two to three seconds looking at his face, you looked at his face on each occasion for no more than a second?

A: I guess. It's difficult to say.

Q: At two to three seconds you could do no more than glance at the robber?

A: I . . . did more than glance.

Q: And during these two to three seconds, Mrs. Webster was trying to wrestle the shotgun from the robber?

A: Yes.

Q: She was jerking the gun back and forth?

A: Yes.

Q: And jerking the robber along with her?

A: Somewhat.

Q: And he was trying to jerk the shotgun away from Mrs. Webster?

A: Yes.

Q: They were twisting and turning?

A: Yes.

Q: Twisting and turning violently?

A: Yes.

Q: This was a life and death struggle?

A: Yes, very much so.

Q: It was during this life and death struggle that you looked at the robber's face?

A: Mostly.

Q: It was this death struggle that drew your attention to Mrs. Webster and this maniac?

A: Yes.

Q: You didn't see the robber approach Mrs. Webster?

A: No.

Q: You didn't see him point the shotgun at her?

A: No.

Q: When the robber wrestled the gun from Mrs. Webster, he turned and fled?

A: Yes.

Q: Running away

A: Mostly.

Q: So, for the entire time that you observed the robber, his face was jerking back and forth?

A: I guess.

Q: And all this time, you're trying to decide what to do?

A: Well, yes.

Chaos ensued after robbery

Q: As soon as the robber was gone, you ran over to Mrs. Webster?

A: Yes.

Q: She was bleeding?

A: Yes.

Q: She was breathing rapidly?

A: Yes.

Q: She was emotionally overwrought?

A: She seemed to be, yes.

Q: Then you called 911?

A: Yes.

Q: You were speaking rapidly?

A: Yes.

Q: Trying to hold it together?

A: Yes.

Q: You yelled for a doctor?

A: Yes.

Q: People began congregating around you?

A: Yes.

Q: Crowding you?

A: Yes.

Q: You said, “Give us some room?”

A: Yes.

Q: Mrs. Webster was nearly hysterical?

A: Yes.

Q: You were afraid for her?

A: Yes.

Q: You stayed with her until the ambulance arrived?

A: Yes.

Q: You were stressed?

A: Yes, I was.

Q: Your heart was beating rapidly?

A: Yes.

Q: The EMTs examined you?

A: Yes.

Q: During the minutes that followed the robbery, you didn’t have time to reflect on what the robber looked like?

A: Not immediately, no. But I did after.

V. The Defense Case

When the state has presented all its evidence against you, the prosecution will "rest." Now it is your attorney's turn to present your defense. Your attorney may or may not call witnesses to testify on your behalf. You may testify in your defense or you may choose to exercise your right to remain silent. This is a tactical decision you and your defense attorney will make together. The bottom line is this: You do not have to prove your innocence; the prosecution must prove your guilt beyond a reasonable doubt.

A. Potential Defenses

Depending on the facts of your case, your attorney may call witnesses and present evidence in support of one or more of these defenses.

§5:23 SODDI ("Some Other Dude Did It")

If available to you, this defense has the advantage of diverting the focus of the trial from you to the real perpetrator, who is not there to defend himself. It also enables you to put the police investigation on trial by appealing to a narrative that resonates with many jurors, i.e., once the police and prosecutors settled on you as the prime suspect and arrested you, those lazy bureaucrats ignored all the clues pointing elsewhere.

§5:24 Consciousness of Innocence

If your defense is lack of intent or lack of knowledge, your defense attorney can turn evidence of non-action, or even harmful evidence, into helpful evidence by arguing that it shows that you believed you had done no wrong. For example:

- You freely consented to a search of your backpack and agreed to talk about who gave you the package stowed within your backpack because you had no idea it contained drugs.

- You did not run from the police because you had done no wrong; or
- You turned down a generous plea offer because you believe in your innocence.

§5:25 Good Faith

If the charges against you require the prosecutor to prove that you acted with the intent to defraud your victims, your attorney may be able to present evidence in your defense that you acted in good faith and with a sincere belief in the honesty of your enterprise and the truth of your representations.

§5:26 Advice of Counsel

Are you facing criminal charges in connection with a business venture? If, before undertaking your business enterprise, you consulted with a lawyer to determine the legality of your actions and followed the lawyer's advice, then you may be able to rely on that advice in your defense. One note of caution: This defense only works if you fully disclosed all relevant facts to your business lawyer and faithfully followed that lawyer's advice.

§5:27 Alibi

Evidence that you were somewhere else at the time of the crime can be a strong defense, provided that your alibi is airtight. If you have to rely on friends, lovers or family member for your alibi, the jury will see these individuals as biased, especially if they provide no corroborating details in support of their claims. Even though the prosecution must disprove your alibi and still must prove your guilt beyond a reasonable doubt, juries tend to flip that burden when they hear the defendant has an alibi. Thus, if the jurors believe the alibi, they will acquit; if not, then a conviction is likely. Consequently, you should rely on an alibi defense only if you can corroborate it with records from a disinterested source, for example, a time-clock record

from work; a highway electronic toll record; or an ATM receipt for a withdrawal on your account and time-stamped video footage of you at the ATM.

B. Should You Testify?

The Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination means that you cannot be forced to testify at your criminal trial. You may choose, instead, to remain silent. In weighing whether to exercise your right to remain silent, you can, and should, consult with your criminal defense attorney about the wisdom of testifying given the specific facts of your particular situation. The final decision, though, rests with you alone.

While conventional wisdom dictates that, in most cases, the smart decision is to remain silent, your criminal defense lawyer will discuss the following factors with you to help you make an informed choice:

§5:28 No Inference of Guilt

Should you decide to exercise your right to remain silent, the prosecutor may not comment on your refusal to testify and jurors may not infer guilt based on your silence.

§5:29 Presumed Innocent Until Proven Guilty

Fundamental to our system of criminal justice is the principle that every defendant is presumed innocent, until proven guilty beyond a reasonable doubt. This means that you do not have to prove your innocence; rather, the prosecution must prove your guilt and must do so beyond a reasonable doubt. This is a heavy burden.

In the abstract, the concept of "beyond a reasonable doubt" is difficult to define. One way to think about it is to consider what it does not mean. "Beyond a reasonable doubt" does not mean be-

yond all doubt, as that standard is impossibly high. Nor does it mean "more likely than not," as that standard is too low, given all that is at stake in a criminal case. Practically speaking, "beyond a reasonable doubt" means that, after hearing all the evidence, the jurors must be truly and steadfastly convinced that the defendant is guilty of the crimes charged.

If the prosecution has not proved its case, or your attorney has succeeded in creating reasonable doubt through cross-examination, then it is likely in your best interests to remain silent.

§5:30 The Rigors of Cross-Examination

If you choose to testify, then you must submit to cross-examination by the prosecutor. Cross-examination is not for the weak of heart. The prosecutor will take advantage of every opportunity to impeach your testimony, undermine your credibility, and poke holes in your story.

§5:31 Otherwise Inadmissible Evidence

Generally speaking, the scope of cross-examination is limited to the scope of the witness' testimony on direct examination. If you decide to testify, you might inadvertently "open the door" to questions about evidence that otherwise would have been inadmissible (e.g., prior convictions or prior inconsistent statements).

§5:32 Your Theory of Defense

Certain defenses (e.g., self-defense; entrapment; good faith) are more likely to carry the day if the defendant testifies. If you are relying on one of these defenses, you may want to testify, especially if you have no prior convictions or allegations of dishonesty on your record, and you are able to offer a clear and plausible explanation for your actions.

§5:33 Jurors Want to Hear from the Defendant

Jurors generally want the accused to take the stand and proclaim his innocence or, at the very least, explain his side of the story. Even so, jurors know how much a criminal defendant stands to lose if he is convicted, and tend to view the defendant's testimony with some skepticism.

§5:34 Your Credibility as a Witness

If the jury does not believe your testimony, they will convict you. A defendant's testimony becomes the main event at trial, and the jury may decide the case based on whether or not they believe you, regardless of the shortcomings in the prosecution's case, the weight of other evidence, or the judge's instructions on reasonable doubt.

VI. Closing Arguments

Because the prosecution bears the burden of proving your guilt, the prosecutor gets the last word. The prosecutor will make the final closing argument, but practice varies as to whether the prosecutor goes first and then has time for a rebuttal closing after your defense attorney makes closing remarks, or whether the defense starts and the prosecution follows.

A. Your Defense Attorney's Role During the Prosecutor's Closing Argument

For the most part, improper comments in a prosecutor's summation will be overlooked unless they are so egregious as to render the trial fundamentally unfair and warrant a mistrial or a reversal on appeal. Your defense attorney must object in open court to preserve the issue for appeal.

The following types of improper argument are most likely to draw a trial court's ire (and embarrass the prosecutor). They are also the most likely to attract the attention of an appellate court. Your defense attorney will object if the prosecutor makes a closing argument along any of the following lines:

§5:35 Appeals to Passion

This can take many forms, such as:

- Sympathy for the victim (e.g., "If you don't believe (the alleged victim), and you think she's lying, then you've probably perpetrated a worse assault on her than did the defendant.");
- Name-calling (e.g., referring to the defendant as an "executioner");
- Invoking a war on crime and the need to protect the community (e.g., urging jurors to view a drug-trafficking case as part of war on drugs and defendants as enemy soldiers);
- Urging jurors to "send a message";
- Predicting that dire consequences will flow from an acquittal; or
- Relying on overly dramatic PowerPoint displays or other visual aids (e.g., slides that superimpose the word "Guilty" over a picture of the defendant].

§5:36 Comments on the Defendant's Silence

The prosecutor cannot ask the jury to draw a negative conclusion from your failure to testify at trial. Doing so penalizes you for standing on your Fifth Amendment privilege against self-incrimination. Your defense attorney will be listening for subtle comments like these:

- References to your post-arrest (out of court) silence.
- Comments on your "failure to show remorse" or apologize for your actions.

§5:37 Reliance on Racial or Ethnic Stereotypes

Besides obvious racial and ethnic slurs, you and your defense attorney should listen for:

- Comparisons drawn between the fair victim and the swarthy perpetrator.
- Comments on your status as an illegal alien.
- Arguments that intra-racial eyewitness identifications are more reliable.
- Arguments based on sexual orientation.

§5:38 Misuse of Evidence Admitted for Limited Purposes

For example, if you are on trial for being a "felon in possession of a firearm," then your status as a convicted felon is admissible during the trial to prove an element of that offense; it is improper, though, for the prosecutor to harp on that fact during closing argument in the context of arguing that jurors need to protect their community from convicted felons carrying guns.

§5:39 Misstatements of the Evidence

Prosecution misstatements of the evidence violate a defendant's right to be judged only on the evidence presented at trial. While the prosecutor properly may ask the jury to draw reasonable inferences from the evidence, the prosecutor may not flatly misstate the evidence. For example, imagine a drug conspiracy case in which the defendant's role was to translate for her nephew during drug negotiations. The nephew admits on cross-examination that he was deported years ago for dealing drugs, but he never was asked if the defendant knew he was deported, much less the reason why. The prosecutor cannot argue, in closing, that the defendant knew her nephew was deported for prior drug activity and that her nephew testified that she knew it.

B. Your Defense Attorney's Closing Argument

Your defense attorney's closing argument is an opportunity to make inferences and draw conclusions from the evidence; to apply the law to the evidence; and to equip the jurors with arguments to make on your behalf during deliberations. The best defense closing arguments will:

§5:40 Tell a Story

Every criminal defendant has a story to tell in closing. Even if your defense rests entirely on the prosecution's failure to meet its burden of proving you guilty, you have a story: The prosecution was reckless and its witnesses are unreliable.

§5:41 Show Jurors How to Apply "Beyond a Reasonable Doubt"

Your defense attorney will remind the jurors that in every criminal case the prosecution bears the burden of proving that the defendant is guilty beyond a reasonable doubt. Then, your attorney will show the jurors how to apply that standard to the evidence (or lack of evidence) presented in your case.

Left to their own devices, the jurors may simply stack the evidence and measure the height. That is not good enough. Your attorney will explain to the jurors that they must apply the "reasonable doubt" standard to each individual piece of evidence and to the testimony of each individual prosecution witness. . It may be, for example, that a prosecution witness generally was truthful, but lied about one crucial piece of evidence; that is the piece of evidence your attorney will attack in closing argument.

§5:42 Educate Jurors on Their Role

Contrary to what many jurors may believe, they are not obligated to collectively piece the evidence together until they arrive at "the truth." It is not their job to "solve" the case. Rather, the jurors'

only job is to determine whether the government, represented by its prosecuting attorney, has met its burden of proving guilt beyond a reasonable doubt.

§5:43 Use Physical Exhibits and Demonstrative Aids

Using blow-up boards or electronic visual displays of the evidence or testimony will enhance the persuasiveness of your attorney's closing argument. It breaks the monotony, and jurors tend to remember better what they are shown rather than what is described to them. It also sends a subtle message that your attorney has "concrete proof" to back up the courtroom testimony, and builds credibility.

VII. Jury Instructions, Deliberations and Verdict

When all the evidence has been presented and closing arguments completed, the judge will instruct the jurors on the law that is to govern their deliberations. The jury then will be excused to the jury room, where they may talk in private. The jurors will select a foreperson to act as their representative to the court. The jurors will then discuss the evidence and the governing law, as set forth in the instructions, and vote on the outcome of the case. Once the jury has reached a unanimous verdict, the foreperson will deliver the decision to the court.

If the jury finds you not guilty, then the case is over and you will be released from the criminal justice system. If the jury finds you guilty, then the trial is over, but your journey through the criminal justice system is not. You and your criminal defense lawyer must now prepare for post-trial proceedings, including sentencing.