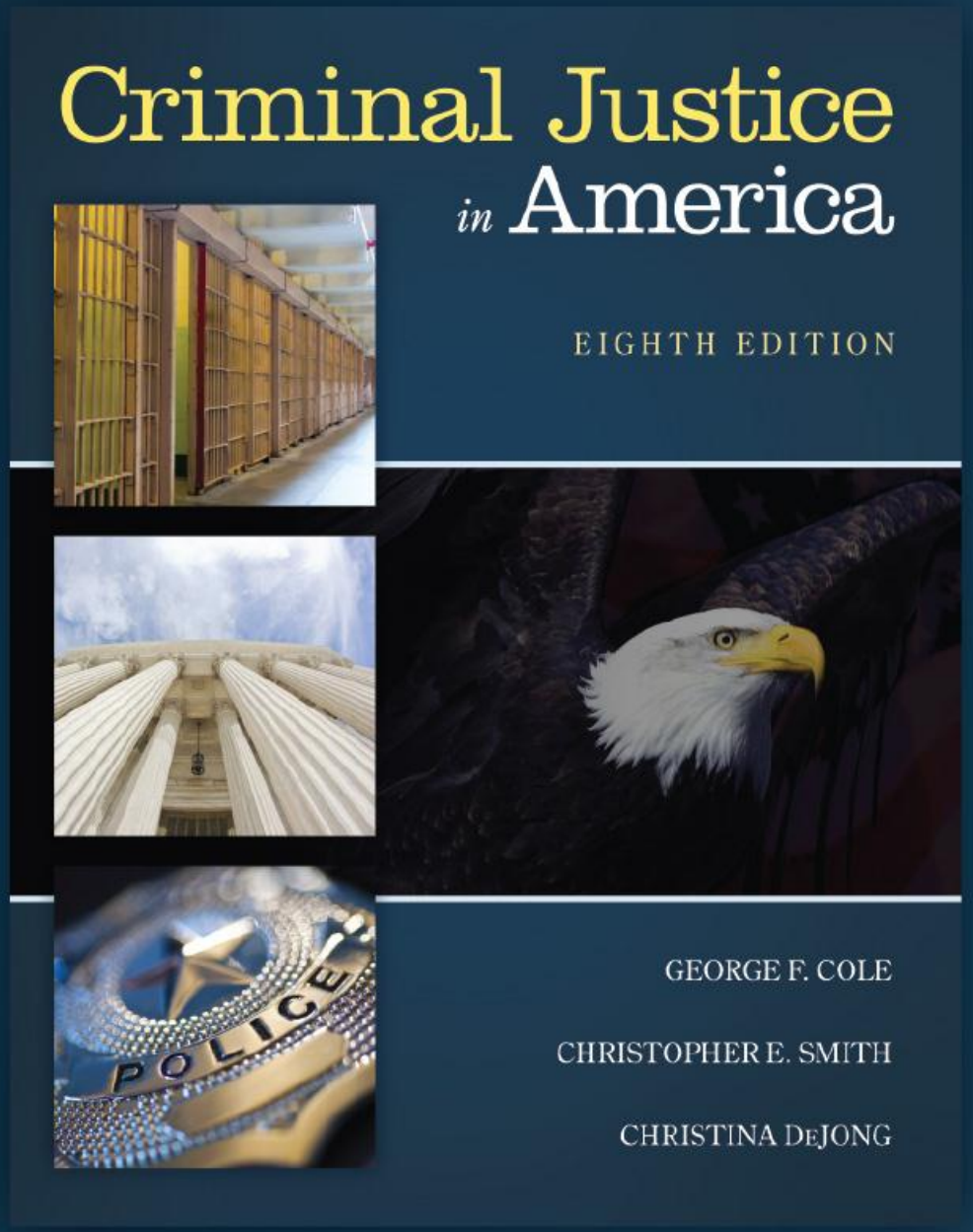


8 Pretrial Procedures, Plea Bargaining, and the Criminal Trial

LEARNING OBJECTIVES

- LO1 – Identify the elements in the pretrial process in criminal cases
- LO2 – Explain how the bail system operates
- LO3 – Describe the experience of pretrial detention
- LO4 – Explain how and why plea bargaining occurs
- LO5 – Give the reasons why cases go to trial, and describe the benefits of juror's participation in trials
- LO6 – Describe the stages of a criminal trial
- LO7 – Explain the basis for an appeal of a conviction

JORDAN JOHNSON

- The star quarterback of the University of Montana football team went to trial in February 2013, and faced a possible sentence of 100 years in prison if the jury were to convict him of the rape charges he faced. His testimony was essential because the verdict hinged on whether his claim that the woman consented to sex undercut the alleged victim's testimony that he had forced himself on her. The 13 day trial captured the attention of the entire community of Missoula, Montana and the nation. The jury deliberated for 2 ½ hours before returning a not guilty verdict.
- Based on competing versions of an event, can jurors really know who is telling the truth?

FROM ARREST TO TRIAL OR PLEA

- At each stage of the pretrial process, key decisions are made that move some defendants to the nest stage of the process and filter others out of the system.

FROM ARREST TO TRIAL OR PLEA

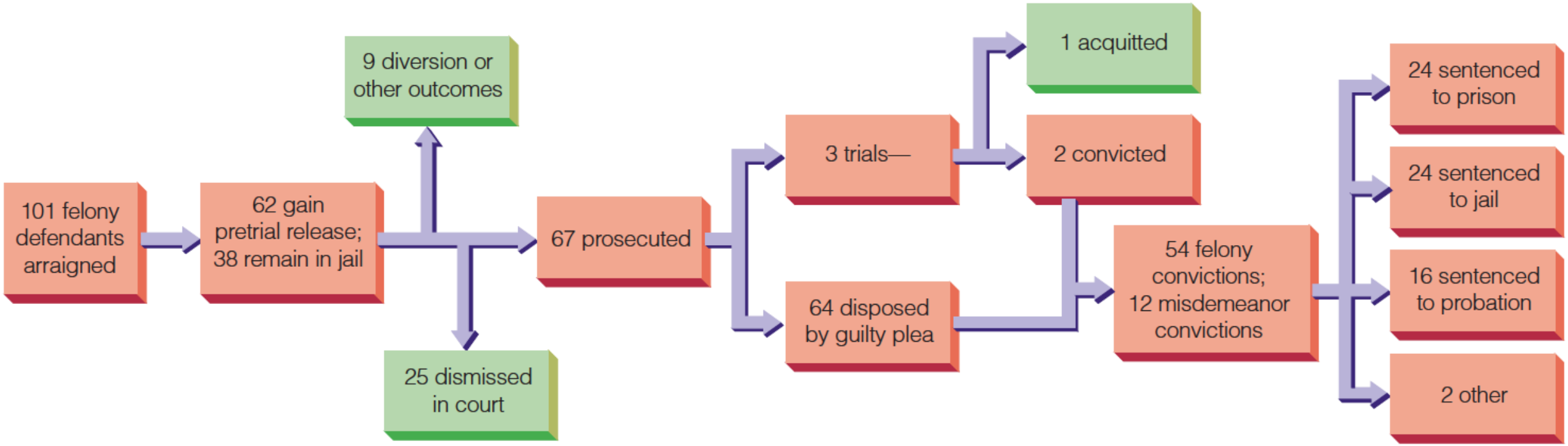


FIGURE 8.1

Typical Outcomes of 100 Urban Felony Cases Prosecutors and judges make crucial decisions during the period before trial or plea. Once cases are bound over for disposition, guilty pleas are many, trials are few, and acquittals are rare.

Sources: Brian A. Reaves, "Felony Defendants in Large Urban Counties, 2009—Statistical Tables," *Bureau of Justice Statistics Statistical Tables*, December 2013, NCJ 228944.

ARRAIGNMENT

- The court appearance of an accused person in which the charges are read and the accused, advised by a lawyer, pleads guilty of not guilty.
  - Often arraignment is the first formal meeting between the prosecutor and the defendant's attorney
  - Arraignment is also an opportunity for a prosecutor to test the strength of the case against the defendant

MOTION

- An application to a court requesting that an order be issued to bring about a specific action
  - Examples of motions:
    - Defense may seek an order for the prosecution to share certain evidence
    - Defense may seek exclusion of evidence based on the claim that it was obtained through improper questioning of the suspect or an improper search

BAIL: PRETRIAL RELEASE

- An amount of money, specified by a judge, to be paid as a condition of pretrial release to ensure that the accused will appear in court as required
  - The Eighth Amendment to the U.S. Constitution forbids excessive bail, and state bail laws are usually designed to prevent discrimination in setting bail
  - They do not guarantee, however, that all defendants will have a realistic chance of being released before trial

MONEY AND BAIL

- In a recent NYC study of bails set at under $1,000
  - 87% could not make bail and remained in jail, typically for 16 days
- Bail is not supposed to be used as punishment, but a de facto system of incarcerating the poor seems to be in practice

- Do poorer people who cannot afford bail feel pressured to plead guilty in order to gain freedom from custody?

REALITY OF THE BAIL SYSTEM

- Critics of the bail system argue that it operates to facilitate discrimination, especially against the poor.
  - Should you be denied a chance at freedom because you are poor?
  - What if you use the little money you have for bail, but then you can't afford to hire an attorney?
  - Should dangerous, wealthy offenders be allowed out on bail, while nonviolent, poor suspects are locked up?

BAIL AGENTS

- Bail bondsmen are private businesspeople who are paid fees by defendants who lack the money to make bail
  - They are licensed by the state and can choose their own clients
    - In exchange for a fee, which may be 5 to 10 percent of the bail amount, the bondman will put up the money (or property) to gain the defendant's release
    - Only two countries in the world use commercial bail bond systems, the United States and the Philippines

BAIL AGENTS

- Brownville, Texas, 2012 – bondsman was convicted of bribing a state judge to reduce a drug trafficker's bail
- Portsmouth, Virginia, 2012 – bondsman went to prison for paying bribes to a judge for referring clients to him
- California, 2011 – bondsman went to jail for referring clients to specific defense attorneys in exchange for their referrals to him

- Should such profit-seeking, private businesses be so deeply involved in the criminal justice process?

SETTING BAIL

- The prosecutor may stress the seriousness of the crime, the defendant's record, and negative personal characteristics
- The defense attorney, if one has been hired or appointed at this point in the process, may stress the defendant's good job, family responsibilities, and place in the community
  - Like other aspects of bail, these factors may favor affluent defendants over the poor, the unemployed, and people with unstable families
  - Yet many of these factors provide no clear information about how dangerous a defendant is or whether he or she will appear in court
- The amount of bail may also reflect the defendant's social class or even racial or ethnic discrimination by criminal justice officials

ALTERNATIVES TO THE BAIL SYSTEM

- Citation
- Release on Recognizance
- Ten Percent Cash Bail
- Bail Fund
- Preventive Detention

CITATION

- A written order or summons, issued by a law enforcement officer, directing an alleged offender to appear in court at a specific time to answer a criminal charge

RELEASE ON RECOGNIZANCE (ROR)

- Pretrial release granted, on the defendant's promise to appear in court, because the judge believes that the defendant's ties to the community guarantee that he or she will appear

TEN PERCENT CASH BAIL

- Defendants may deposit a percentage (usually 10%) of the full bail with the court
  - The full amount of the bail is required if the defendant fails to appear
  - The percentage of bail is returned after disposition of the case, although the court often retains 1 percent for administrative costs

BAIL GUIDELINES

- To deal with the problem of unequal treatment, reformers have written guidelines for setting bail
  - The guidelines specify the standards judges should use in setting bail and also list appropriate amounts

PREVENTIVE DETENTION

- A recent study showed 21% of those released on bail committed another crime
- Preventive detention holds suspects who could endanger the safety of others or are likely flee

UNITED STATES V. SALERNO AND CAFERO (1987)

- Preventive detention provisions of the Bail Reform Act of 1984 are upheld as a legitimate use of government power designed to prevent people from committing crimes while on bail
  - The justices said that preventive detention was a legitimate use of government power because it was not designed to punish the accused
  - Instead, it deals with the problem of people who commit crimes while on bail

PRETRIAL DETENTION

- People who are not released before trial must remain in jail
  - Often called the ultimate ghetto, American jails hold almost 600,000 people on any one day
  - Thus, a "presumed innocent" pretrial detainee might spend weeks in the same confined space with troubled people or sentenced felons

Joe Amon/The Denver Post/Getty Images

PLEA BARGAINING

- Only about 4% of cases go to trial; instead, a negotiated guilty plea arrived at through the interactions of prosecutors, defense lawyers, and judges determines what will happen to most defendants
  - Prosecutors maintain significant control over the outcomes of plea bargains
  - Negotiated guilty pleas became common and the Supreme Court held that when a guilty plea rests on the promise of a prosecutor, the promise must be fulfilled in the 1971 case of Santobello v. New York

BENEFITS OF PLEA BARGAINING

- Plea bargaining has advantages for defendants, prosecutors, defense attorneys, and judges
  - Defendants can have their cases completed quickly
    - The defendant is likely to receive less than the maximum punishment that might have been imposed after a trial
  - Prosecutors may gain an easy conviction
  - Private defense attorneys save the time needed to prepare for a trial and earn their fee quickly
  - Helps public defenders cope with large caseloads
  - Judges avoid time-consuming trials

PLEA BARGAINING: TACTICS OF PROSECUTOR AND DEFENSE

- Plea bargaining between defense counsel and prosecutor is a serious game in which both sides use various strategies and tactics
  - A tactic that many prosecutors bring to plea-bargaining sessions is the multiple-offense indictment
  - Defense attorneys may threaten to ask for a jury trial if concessions are not made

PLEA BARGAINING

- In 2013, Peggy Sue Thomas, a former beauty queen, entered a guilty plea for assisting in the commission of a crime. Her plea came a week before she was scheduled to stand trial for first-degree murder in the killing of a co-workers husband, a crime for which her boyfriend was sentenced to 80 years in prison. She received a sentence of four years.

- Do such reductions hurt the public's confidence in the justice system?

Mike Siegel/The Seattle Times

LEGAL ISSUES IN PLEA BARGAINING

- Boykin v. Alabama (1969)
  - Defendants must state that they are voluntarily making a plea of guilty before a judge may accept the plea
- Missouri v. Frye (2012)
  - 6th Amendment right to counsel includes protection against ineffective assistance of counsel in the plea bargaining process
- North Carolina v. Alford (1970)
  - A plea of guilty by a defendant who maintains his or her innocence may be accepted for the purpose of a lesser sentence
- Ricketts v. Adamson (1987)
  - Defendants must uphold the plea agreement or suffer the consequences
- Bordenkircher v. Hayes (1978)
  - A defendant's rights were not violated by a prosecutor who warned that refusing to enter a guilty plea would result in a harsher sentence

CRITICISMS OF PLEA BARGAINING

- Some argue that plea bargaining is unfair because defendants give up some of their constitutional rights, especially the right to trial by jury
- A second argument stresses sentencing policy and points out that plea bargaining reduces society's interest in appropriate punishments for crimes
- Also comes under fire because it is hidden from judicial scrutiny, and breeds disrespect and contempt for the law

TYPES OF TRIALS

- Bench trials
  - Trials conducted by a judge who acts as fact finder and determines issues of law. No jury participates
- Jury
  - A panel of citizens selected according to law and sworn to determine matters of fact in a criminal case and to deliver a verdict of guilty or not guilty

TYPES OF TRIALS

- In 2013, a Utah jury convicted Dr. Martin McNeill of murder in the death of his wife, Michelle. Mrs. McNeill died shortly after being found unconscious in the bathtub with a variety of powerful prescription drugs in her system. Dr. McNeill had an extramarital affair with a woman that he hired to be his children's nanny.

- What other kinds of cases are likely to be processed through jury trials?

PERCENTAGE OF INDICTED CASES THAT WENT TO TRIAL, BY OFFENSE

TABLE 8.1 Percentage of Indicted Cases That Went to Trial, by Offense

The percentages of cases that went to trial differ both by offense and by jurisdiction. Typically, it seems that the stiffer the possible penalty, the greater the likelihood of a trial. However, a prosecutor may be able to gain guilty pleas even in the most serious cases.

Jurisdiction	Homicide	Rape/Sexual Assault	Robbery	Assault	Drug Offenses
State courts, 75 largest counties	30%	10%	3%	4%	1%
Federal courts	15	—	4	8	3
Mercer County, NJ (Trenton)	10	0	1	1	1

Sources: Adapted from Brian A. Reaves, "Felony Defendants in Large Urban Counties, 2009—Statistical Tables," *Bureau of Justice Statistics Statistical Tables*, December 2013, NCJ 228944; "Mercer County Prosecutor's Annual Report 2012" (2013); *Sourcebook of Criminal Justice Statistics 2014*, Table 5.24.2010.

JURIES PERFORM SIX VITAL FUNCTIONS IN THE CRIMINAL JUSTICE SYSTEM:

- Prevent government oppression by safeguarding citizens against arbitrary law enforcement
- Determine whether the accused is guilty on the basis of the evidence presented
- Represent diverse community interests so that no one set of values or biases dominates decision making
- Serve as a buffer between the accused and the accuser
- Promote knowledge about the criminal justice system by learning about it through the jury duty process
- Symbolize the rule of law and the community foundation that supports the criminal justice system

JURY TRIALS

- Jury in a criminal trial traditionally comprises 12 citizens
  - Unanimity is not required
- Williams v. Florida (1970) – Supreme Court upheld use of small juries of at least 6 jurors
- Burch v. Louisiana (1979) – Court ruled that six-member juries must vote unanimously to convict a defendant

THE TRIAL PROCESS GENERALLY FOLLOWS EIGHT STEPS:

- Selection of the jury
- Opening statements by prosecution and defense
- Presentation of the prosecution's evidence and witnesses
- Presentation of the defense's evidence and witnesses
- Presentation of rebuttal witnesses
- Closing arguments by each side
- Instruction of the jury by the judge
- Decision by the jury

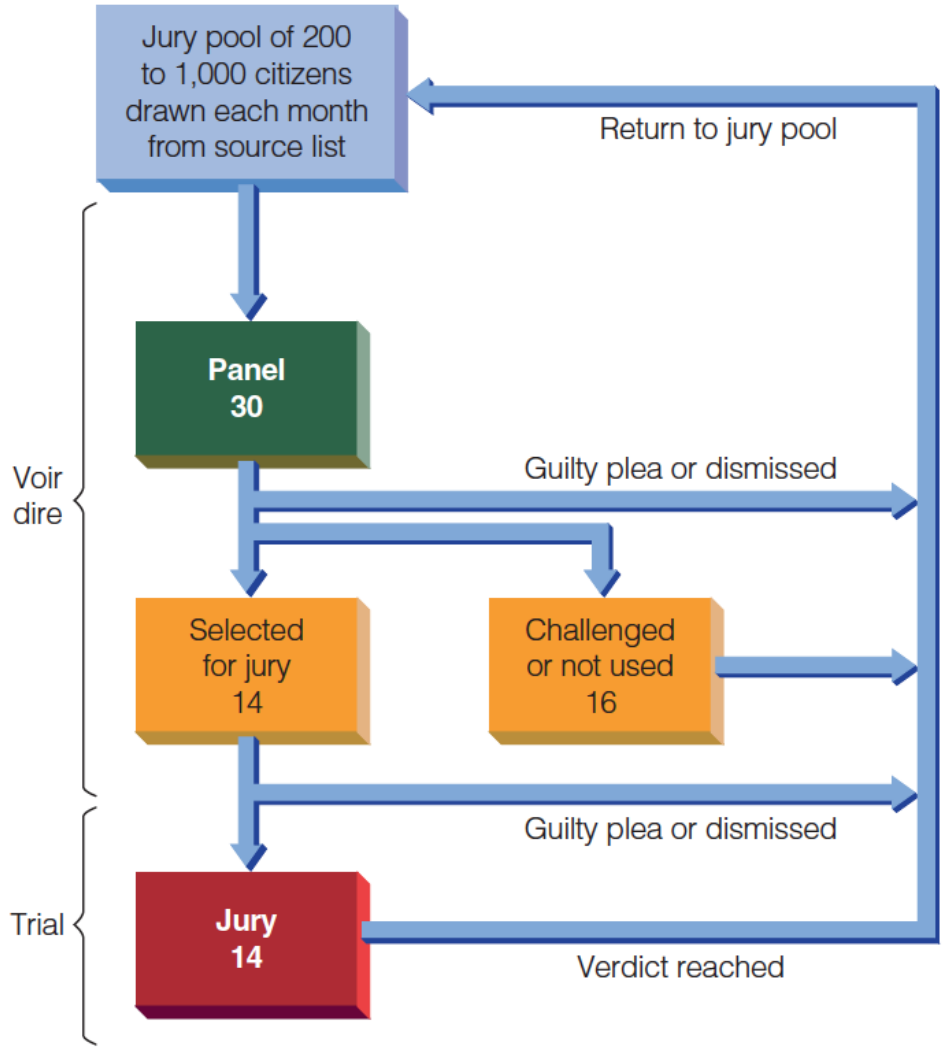
SELECTING THE JURY

- The jury is selected from a Venire or jury pool
- Voir dire – a questioning of prospective jurors to screen out people the attorneys think might be biased or otherwise incapable of delivering a fair verdict

SELECTING THE JURY

FIGURE 8.3

Jury Selection Process for a 12-Member Jury Potential jurors are drawn at random from a source list. From this pool, a panel is selected and presented for duty. The voir dire examination may remove some, whereas others will be seated. The 14 jurors selected include two alternates.



THE PROCESS OF VOIR DIRE

- Challenge for cause Removal of a prospective juror by showing that he or she has some bias or some other legal disability
  - The number of such challenges available to attorneys is unlimited
- Peremptory challenge Removal of a prospective juror without giving any reason
  - Attorneys are allowed a limited number of such challenges
  - Batson v. Kentucky (1986) – Court prohibited using peremptory challenges to exclude potential jurors on the basis of race or gender

THE PROCESS OF VOIR DIRE

- Jimmy Elem faced trial on robbery charges in Missouri. During jury selection, the prosecutor used peremptory challenges to exclude two African American men from the jury. Elem filed a habeus corpus action in federal court claiming prosecutor had used flimsy excuse to cover the fact that exclusions were based on race. U.S. Court of Appeals agreed, and Supreme Court reversed.

- How is a defendant going to be able to meet the Court's burden of proving that a peremptory challenge is based on race or gender?

PRESENTATION OF THE PROSECUTION'S EVIDENCE

- Real evidence - Physical evidence
  - Physical evidence such as a weapons, records, fingerprints, and stolen property—involved in the crime
- Demonstrative evidence
  - Evidence that is not based on witness testimony
  - Demonstrates information relevant to the crime, such as maps, X-rays, and photographs; includes real evidence involved in the crime
- Testimony
  - Oral evidence provided by a legally competent witness
- Direct evidence
  - Eyewitness accounts
- Circumstantial evidence
  - Evidence provided by a witness from which a jury must infer a fact

THE CSI EFFECT

- The CSI Effect
  - The prosecution in some cases has expressed fears that a lack of physical evidence is leading to acquittals
  - Jurors seem more skeptical of eyewitness testimony and want scientific proof of guilt

- Do you think shows like CSI (Las Vegas, Miami, and New York), Bones, and Body of proof causes jurors to expect scientific evidence in a trial, and then causes them find a defendant not guilty if they don't see any in the trial?

PRESENTATION OF THE DEFENSE'S EVIDENCE

- The defense is not required to answer the case presented by the prosecution
- It is the state's responsibility to prove the case beyond a reasonable doubt:
  - Contrary evidence is introduced to rebut or cast doubt on the state's case
  - An alibi is offered
  - An affirmative defense is presented

REBUTTAL WITNESSES

- When the defense's case is complete, the prosecution may present witnesses whose testimony is designed to discredit or counteract testimony presented on behalf of the defendant
- If the prosecution brings rebuttal witnesses, the defense has the opportunity to question them and to present new witnesses in rebuttal

CLOSING ARGUMENTS

- When each side has completed its presentation of the evidence, the prosecution and defense make closing arguments to the jury
  - The attorneys review the evidence of the case for the jury, presenting interpretations of the evidence that favor their own side
  - Each side may remind the jury of its duty to evaluate the evidence impartially and not to be swayed by emotion

REASONABLE DOUBT

- The standard to convict is whether the prosecution has shown beyond any reasonable doubt that the defendant has committed the crime
  - Juries convict about 75% of the time, versus 82% in bench trials

APPEAL

- A request to a higher court that it review actions taken in a trial court
  - Appeals are based on questions of procedure, not on issues of the defendant's guilt or innocence
- The appellate court will not normally second-guess a jury


AP Images/Bob Child

WRITS

- Writs are order from a court
- Writ of Habeus Corpus
  - Requests the release of a person being detained in a jail, prison, or mental hospital
  - If granted, defendant is released
- Writ of Certiorari
  - Requests the records of a trial court
  - If granted an appeal is heard