7: Courts

Learning Objectives

This section examines the structure and function of the criminal courts in America. It examines the concept of jurisdiction and describes the dual court system (the federal court system and the various state court systems). This section also examines the role and function of the various courtroom participants–the people who work in the courts. After reading this section, students will be able to:

- Differentiate between what happens at trial and what happens on appeal and identify the procedural history of a criminal case by reading appellate opinions written in the case.
- Describe how a crime/criminal case proceeds from the lowest level trial court up through the U.S. Supreme Court. (i.e., students should understand the hierarchy of the federal and state courts).
- Discuss the function and selection of state and federal trial and appellate judges in the American criminal justice system.
- Discuss the function and selection of state and federal prosecutors in the American criminal justice system.
- Discuss the importance of the criminal defense attorney in the American criminal justice system.
- Identify at what stages of the criminal justice process a defendant is entitled to the assistance of a court-appointed attorney.

Critical Thinking Questions

1. Knowing what happens at trial and what happens on appeal, would you be more interested in being a trial judge or an appellate judge? Why?
2. Why is there a different standard of review for questions of fact and questions of law?
3. Do you agree that cases should be overturned only when there was a fundamental or prejudicial error

that occurred during the trial?

4. Do you think it is easier to be a defense attorney than a prosecutor believing the defendant is guilty but knowing that the justice system has violated the defendant's rights?
5. Should the defendant ever waive the assistance of counsel?
6. Is there any position as a court staff that particularly interests you? Why?

7.1. Introduction to the U.S. Court System

LORE RUTZ-BURRI

What follows is an examination of the structure and role of the courts in the American criminal justice system and the requirement of **jurisdiction**. As you read this chapter, pay attention to the context when you see the word "court" because it is used in a variety of ways. "Court" can mean a building—it is short for "courthouse" (for example, "he went to the court"); one judge (for example, "the trial court decided in his favor"); a group of judges (for example, "the Supreme Court unanimously upheld the conviction"), or an institution/process generally (for example, "courts hopefully resolve disputes in an even-handed manner"). Courts (the institution and processes) determine both the facts of a crime (did the defendant do the crime?) and also the legal sufficiency of the criminal charge (can the government prove it?). Courts ensure that criminal defendants are provided **due process of law**, or the procedures used to convict the defendant are fair. Courts are possibly more important in criminal cases than in civil cases because, in civil matters, the parties have the option of settling their disputes outside of the court system, but all criminal prosecutions must be funneled through the criminal courts.

After reading this chapter, you will be able to project the trajectory of a criminal case from the filing of criminal charges in a local courthouse through all final appeals processes. This requires an understanding of the **dual court system,** the structure of typical state court systems and the federal court system. This chapter explores the differences between a trial court and an appellate court, and you will learn how trial judges and juries decide (determine the outcome of) a case by applying the legal standards to the facts presented during trial and how appellate judges decide if the case was rightly decided after examining the trial record for legal error. Appellate courts make known their decisions known through their written opinions, and this chapter introduces the types of opinions and rulings of appellate courts.

This chapter also examines the selection, roles, and responsibilities of the participants in the criminal courts frequently referred to as the **courtroom workgroup.** You will become familiar with who the players are during each of these steps of the process.

7.2. Jurisdiction

LORE RUTZ-BURRI

In order to understand the courts, it is essential to understand the many facets of the word **jurisdiction**. Jurisdiction refers to the legal authority to hear and decide a **case** (legal suit).

Jurisdiction Based on the Function of the Court

Trial Courts versus Appellate Courts

Jurisdiction may be based on the function of the court, such as the difference between trial and appellate functions. The federal and state court systems each have court hierarchies that divide trial courts and appellate courts. Trial courts have jurisdiction over pretrial matters, trials, sentencing, probation, and parole violations. Trial courts deal with facts. Did the defendant stab the victim? Was the eyewitness able to clearly see the stabbing? Did the probationer willfully violate terms of probation? As a result, trial courts determine guilt and impose punishments.

Appellate courts, on the other hand, review the decisions of the trial courts. They are primarily concerned with matters of law. Did the trial judge properly instruct the jury about the controlling law? Did the trial court properly suppress evidence in a pretrial hearing? Does the applicable statute allow the defendant to raise a particular affirmative defense? Appellate courts correct legal errors made by trial courts and develop law when new legal questions arise. Appellate courts do not hold hearings in which evidence is developed, but rather they only review the record, or "transcript", of the trial court. In some instances, appellate courts determine if it is legally sufficient, or enough, evidence to uphold a conviction.

Jurisdiction Based on Subject Matter

Jurisdiction can also be based on the subject matter of the case. For example, criminal courts handle criminal matters, tax courts handle tax matters, and customs and patent courts handle patent matters. Regarding "subject matter jurisdiction" Kerper (1979, 34) noted,

> "The [subject matter] jurisdictional distinction . . . tends to be utilized primarily in distinguishing between different trial courts. Appellate courts ordinarily can hear all types of cases, although there are several states that have separate appellate courts for criminal and civil appeals. At the trial level, most states have established one or more specialized courts to deal with particular legal fields. The most common areas delegated to specialized courts are wills and estates (assigned to courts commonly known as probate . . . courts), divorce, adoption or other aspects of family law (family or domestic relations courts), and actions based on the English law of equity (chancery courts). The federal system also includes specialized courts for such areas as customs and patents. While significant, the specialized courts represent only a small portion of all trial courts. Most trial courts are not limited to a particular subject but may deal with all fields. Such trial courts are commonly described as having general jurisdiction since they cover the general (i.e., non-specialized) areas of law. Criminal cases traditionally are assigned to courts with general jurisdiction." [1]

Jurisdiction Based on the Seriousness of the Case

The jurisdiction of trial courts may also be based on the seriousness of the case. For example, some courts, called **courts of limited jurisdiction** only have authority to try infractions, violations, and petty crimes (misdemeanors) whereas other trial courts, called **courts of general jurisdiction**, have authority to try serious crimes (felonies) as well as minor crimes and offenses.

Jurisdiction Based on the Court's Authority over the Parties to the Case

Jurisdiction also refers to the court's authority over the parties in the case. For example, juvenile courts have jurisdiction over dependency and delinquency cases involving youth. Other courts have jurisdiction that is based on the special nature of the parties are the military tribunals, including courts-martial, Courts of Criminal Appeals, and the United States Court of Appeals for the Armed Services.

1. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed.). West Publishing Company.

Jurisdiction based on State and Federal Autonomy (Geography)

Finally, jurisdiction is also tied to our system of federalism, the autonomy of both national and state governments. State courts have jurisdiction over state matters, and federal courts have jurisdiction over federal matters. Jurisdiction is most commonly known to represent geographic locations of the court's oversight. For example, Oregon courts do not have jurisdiction over crimes in California.

7.3. Structure of the Courts: The Dual Court and Federal Court System

LORE RUTZ-BURRI

Separate Federal and State Court Systems

Each state has two complete parallel court systems: the federal system, and the state's own system. Thus, there are at least 51 legal systems: the fifty created under state laws and the federal system created under federal law. Additionally, there are court systems in the U.S. Territories, and the military has a separate court system as well.

The state/federal court structure is sometimes referred to as the **dual court system**. State crimes, created by state legislatures, are prosecuted in state courts which are concerned primarily with the applying state law. Federal crimes, created by Congress, are prosecuted in the federal courts which are concerned primarily with applying federal law. As discussed below, it is possible for a case to move from the state system to the federal system when a defendant challenges the conviction on direct appeal through a **writ of certiorari,** or when the defendant challenges the conditions of confinement through a **writ of habeas corpus**.

Dual Court System Structure

Highest Appellate Court	**U.S. Supreme Court** (Justices) (NoteCourt also has original/trial court jurisdiction in rare cases) (Note: Court will also review petitions for writ of certiorari from State Supreme Court cases).	**State Supreme Court** (Justices)
Intermediate Appellate Court	**U.S. Circuit Court of Appeals** (Judges)	**State Appellate Cour**t (e.g., Oregon Court of Appeals) (Judges)
Trial Court of General Jurisdiction	**U.S. District Court** (Judges) (Note: this court will review petitions for writs of habeas corpus from federal and state court prisoners)	**Circuit Court, Commonwealth Court, District Court, Superior Court** (Judges)
Trial Court of Limited Jurisdiction	**U.S. Magistrate Courts** (Magistrate Judges)	**District Court, Justice of the Peace, Municipal Courts** (Judges, Magistrates, Justices of the Peace)

The Federal Court System

Article III of the U.S. Constitution established a Supreme Court of the United States and granted Congress

discretion as to whether to adopt a lower court system. It states the "judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Fearing that the state courts might be hostile to congressional legislation, Congress immediately created a lower federal court system in 1789. [1] The lower federal court system has been expanded over the years, such as when Congress created the separate appellate courts in 1891.

View the authorized federal judgeships at http://www.uscourts.gov/sites/default/files/allauth.pdf

Trace the history of the federal courts at https://www.fjc.gov/history/timeline/8276

Trace the history of the subject matter jurisdiction of the federal courts here https://www.fjc.gov/history/timeline/8271

View cases that shaped the roles of the federal courts at https://www.fjc.gov/history/timeline/8271

Trace the administration of the federal courts at https://www.fjc.gov/history/timeline/8286

United States Supreme Court

The United States Supreme Court (Court), located in Washington, D.C., is the highest appellate court in the federal judicial system. Nine justices sitting ***en banc,*** as one panel, together with their clerks and administrative staff, make up the Supreme Court. [View the biographies of the current U.S. Supreme Court Justices here: https://www.supremecourt.gov/about/biographies.aspx]. The Court's decisions have the broadest impact because they govern both the state and federal judicial system. Additionally, this Court influences federal criminal law because it supervises the activities of the lower federal courts. The nine justices have the final word in determining what the U.S. Constitution permits and prohibits, and it is most

1. (The Judiciary Act of 1789 (Ch. 20, 1 Stat 73)

influential when interpreting the U.S. Constitution. Associate Justice of the Supreme Court, Robert H. Jackson stated in *Brown v. Allen*, 344 U.S. 433, 450 (1953), "We are not final because we are infallible, but we are infallible only because we are final." Although it is commonly thought that the U.S. Supreme Court has the final say, this is not one hundred percent accurate. After the Court has read written appellate briefs and listened to oral arguments, it will "decide" the case. However, it frequently refers or sends, the case back to the state's supreme court for them to determine what their own state constitution holds. Similarly, as long as the Court has interpreted a statute and not the constitution, Congress can always enact a new statute which modifies or nullifies the Court's holding.

Writs of Certiorari and the Rule of Four

The Court has a discretionary review over most cases brought from the state supreme courts and federal appeals courts in a process called a **petition for the writ of certiorari**. Four justices must agree to accept and review a case, and this only happens in roughly 10% of the cases filed. (This is known as the **rule of four**.) Once accepted, the Court schedules and hears oral arguments on the case, then delivers written opinions. Over the past ten years, approximately 8,000 petitions for writ of certiorari are filed annually. It is difficult to guess which cases the court will accept for review. However, a common reason the court accepts to review a case is that the federal circuits courts have reached conflicting results on important issues presented in the case.

Take a virtual tour of the U.S. Supreme Court building: https://www.oyez.org/tour

The United States Supreme Court Building

"The United States Supreme Court occupies a majestic building in Washington, D.C., with spacious office suites and impressive corridors and library facilities. With enhancements and attributes similar to those of appellate courts, the elegance and dignity of the facilities comport with the significant role of the Court as the final arbiter in the nation's judicial system. There is a sparse crowd at most state and intermediate federal appellate courts; at the Supreme Court, by contrast, parties interested in the decisions that will result from arguments, a coterie of media persons, and many spectators fill the courtroom to hear arguments in cases that often significantly affect the economic, social, and political life of the

nation. Photography is not allowed, and the arguments and dialogue between counsel and the justices are observed silently and respectfully by those who attend."[2]

Take a tour of the U.S. Supreme Court with CNN: https://www.youtube.com/watch?v=Unyswl36q8w

Original (Trial Court) Jurisdiction of the Supreme Court: A Rarity

When the Court acts as a trial court it is said to have **original jurisdiction**, and it does so in a few important situations, such as when one state sues another state. The U.S. Constitution, Art. III, §2, sets forth the jurisdiction of the Court. It states,

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make."

Original jurisdiction cases are rare for several reasons. First, the Constitution prohibits Congress from increasing the types of cases over which the Supreme Court has original jurisdiction. Second, parties in an original jurisdiction suit must get permission by petitioning the court to file a complaint in the Supreme Court. In fact, there is no right to have a case heard by the Supreme Court, even though it may be the only venue in which the case may be brought. The Supreme Court may deny petitions for it to exercise original jurisdiction because it finds that the dispute between the states is too trivial, or conversely, too broad, and complex. The Court does not need to explain why it refuses to take up an original jurisdiction case. Original jurisdiction cases are also rare because, except in suits or controversies between two states, the Court has increasingly permitted the lower federal courts to share its original jurisdiction.

2. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 45). Belmont, CA: Cengage.

United States Courts of Appeal

Ninety-four judicial districts comprise the 13 intermediate appellate courts in the federal system known as the U.S. Courts of Appeals, sometimes referred to as the federal circuit courts. These courts hear challenges to lower court decisions from the U.S. District Courts located within the circuit, as well as appeals from decisions of federal administrative agencies, such as the social security courts or bankruptcy courts. There are twelve circuits based on geographic locations and one federal circuit which has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims. The smallest circuit is the First Circuit with six judgeships, and the largest court is the Ninth Circuit, with 29 judgeships. Appeals court panels consist of three judges. The court will occasionally convene *en banc* and only after a party who has lost in front of the three-judge panel requests review. Because the Circuit Courts are appellate courts which review trial court records, they do not conduct trials and, thus, they do not use a jury.

The U.S. Courts of Appeal, like the U.S. Supreme Court, trace their existence to Article III of the U.S. Constitution. These courts are busy, and there have been efforts to both fill vacancies and increase the number of judgeships to help deal with the caseloads. For example, the Federal Judgeship Act of 2013 would have created five permanent and one temporary circuit court judgeships, in an attempt to keep up with increased case filings. However, the bill died in Congress. Fortunately, in recent years, fewer cases have been filed.

Click on this link to see the geographical jurisdiction of the U.S. Courts of Appeals: http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

United States District Courts

The U.S. District Courts, also known as "**Article III Courts**", are the main trial courts in the federal court system. Congress first created these U.S. District Courts in the Judiciary Act of 1789. Now, ninety-four U.S. District Courts, located in the states and four territories, handle prosecutions for violations of federal statutes. Each state has at least one district, and larger states have up to four districts. Each district court is described by reference to the state or geographical segment of the state in which it is located (for example, the U.S. District Court for the Northern District of California). The district courts have jurisdiction over all prosecutions brought under federal criminal law and all civil suits brought under federal statutes. A criminal trial in the district court is presided over by a judge who is appointed for life by the president with the consent of the Senate. Trials in these courts may be jury trials.

Link to a number of cases filed in U.S. District Courts http://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables

Although the U.S. District Courts are primarily trial courts, district court judges also exercise an appellate-

type function in their review of **petitions for writs of habeas corpus** brought by state prisoners. Writs of habeas corpus are claims by state and federal prisoners who allege that the government is illegally confining them in violation of the federal constitution. The party who loses at the U.S. District Court can appeal the case in the court of appeals for the circuit in which the district court is located. These first appeals must be reviewed, and thus are referred to as **appeals of right**.

United States Magistrate Courts

U.S. Magistrate Courts are **courts of limited jurisdiction** in the federal court system, meaning that these legislatively-created courts do not have full judicial power. Congress first created the U.S. Magistrate Courts with the Federal Magistrate Act of 1968. Under the Act, federal magistrate judges assist district court judges by conducting pretrial proceedings, such as setting bail, issuing warrants, and conducting trials of federal misdemeanor crimes. There are more than five hundred Magistrate Judges who disposed of over one million matters.

In the News: https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2017.pdf)

U.S. Magistrate Courts are "**Article I Courts"** as they owe their existence to an act of Congress, not the Constitution. Unlike Article III judges who hold lifetime appointments, Magistrate Judges, formerly referred to as "Magistrates" before the Judicial Improvement Act which took effect December 1, 1990, are appointed for eight-year terms.

For a comprehensive review of the U.S. Magistrate Courts and U.S. Magistrate Judges see: http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System

Court Assignment

Watch season two of the popular Netflix series, Making a Murder which covers the appeals of the murder convictions of Steven Avery and his nephew Brendan Dassey. Pay attention to the discussions among Brendan Dassey's appellate team from Northwestern School of Law concerning the appeals process from the state courts through the federal Seventh Circuit Court of Appeals, which convened *en banc* after a 2-1 panel decision finding Brendan Dassey's confession was inadmissible.

See also, http://involuntary.http://www.abajournal.com/news/article/en_banc_7th_circuit_reinstates_brendan_dasseys_conviction_in_making_a_murde?icn=most_read

- Write a 500-word response about what you saw during the appeals process and how it made you feel. Did you agree with it or disagree with it? Is this justice?

Click on this link to see the number of filings: http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018

7.4. Structure of the Courts: State Courts

LORE RUTZ-BURRI

State Court Systems

Each state has its own independent judicial system. State courts handle more than 90 percent of criminal prosecutions in the United States. Although state court systems vary, there are some common features. Every state has one or more level of trial courts and at least one appellate court. Although there is no federal constitutional requirement that defendants be given the right to appeal their convictions, such a right is arguably implicit in the due process clause of the Fourteenth Amendment. Moreover, every state has some provision, usually within its own constitution or statutes, that provides defendants at least one appeal. Most state courts have both courts of general jurisdiction, which conduct felony and major misdemeanor trials, and courts of limited jurisdiction, which conduct violations, infractions, and minor misdemeanor trials. Similar to the U.S. Magistrate Courts, states' courts of limited jurisdiction will also handle pre-trial matters for felonies until they are moved into the general jurisdiction court. Most states have intermediate courts of appeals and some have more than one level of these courts. All states have a **court of last resort,** generally referred to as the Supreme Court. Some states court systems are streamlined, and some are complex, with most states fall between the two extremes.

Hierarchy of State Courts

State trial courts tend to be busy, bustling places with lots of activity. Appellate courts, on the other hand, tend to be solemn and serene, formal places. Scheb noted,

"Appellate courts are different than trial courts, both in function and 'feel.' Unlike a trial court, which is normally surrounded by a busy atmosphere, an appellate court often sits in the state capitol building or its own facility, usually with a complete law library. The décor in the building that house appellate courts is usually quite formal, and often features portraits of former judges regarded as oracles of the law. When a panel of judges sits to hear oral arguments, they normally emerge from behind a velvet curtain on a precise schedule and to the cry of the court's marshal. When not hearing oral arguments, appellate judges usually occupy a suite of offices with their secretaries and law clerks. It is in these individual chambers that appellate judges study and write their opinions on cases assigned to them." [1]

Kerper describes the flow of a case through the hierarchical structure of the courts as follows:

1. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 43). Belmont, CA: Cengage.

"When the specialized courts are put to one side, we find that a judicial system typically has three or possibly four levels of courts. This will be the hierarchy commonly applicable to criminal cases.

At the bottom level in the typical hierarchy will be the magistrate court. Judges on that level will try minor civil and criminal cases. They will also have some preliminary functions in the more serious felony cases that will eventually be tried in the general trial court. Thus a person arrested on a felony charge initially will be brought before a magistrate who will inform the arrestee of the charge against him, set bail, and screen the prosecution's case to ensure that it is sufficient to send on to the general trial court.

At the next court level is the general trial court, which will try all major civil and criminal cases. While this court is predominantly a trial court, it also serves as an appellate court for the minor cases tired in the magistrate court. Thus, if a defendant is convicted on a misdemeanor charge in a magistrate court, his natural route of appeal is to the general trial court as the next highest court. The appellate review in the general trial court will take a special form where the magistrate court is one described as a court "not of record." In most instances, however, the general trial court will review the record in the magistrate court for possible error in the same way that the appellate court at the next tier will review the trial decisions of the general trial court in major cases.

The court at the next level may be either the first of two or the only general appellate court in the judicial hierarchy. In almost half of the states and the federal system, there are two appellate tiers. The first appellate court, which would be at the third level in the hierarchy, is commonly described as the intermediate appellate court. The next level of appellate court is the appellate court of last resort; it is the highest court to which a case can ordinarily be taken. These highest appellate courts frequently are titled, "supreme courts." . . . Where a judicial system has two tiers of appellate courts, the supreme court will be at the fourth level of the hierarchy. In those states that have only one tier, there is no intermediate appellate court. The supreme court is the court at the third level of the hierarchy.

In most jurisdictions, the losing party at trial is given an absolute right to one level of appellate review, but any subsequent reviews by a higher appellate court are at the discretion of that higher court. Thus, in a system that has no intermediate appellate court, a defendant convicted of a felony in a general trial court has an absolute right to have his conviction reviewed by the next highest court, the supreme court. In a system that has an intermediate appellate court, the felony defendant's absolute right to review extends only to that intermediate court. If that court should decide the case against him, the defendant can ask the supreme court to review his case, but it need do so only at its discretion. The application requesting such discretionary review is called a petition for certiorari. If the court decides to review the case, it issues a writ of certiorari directing that the record in the case be sent to it by the intermediate appellate court. Those supreme courts having discretionary appellate jurisdiction commonly refuse to grant most petitions for certiorari, limiting their review to the most important cases. Consequently, even where a state judicial hierarchy has four rather than three levels, most civil or criminal cases will not get beyond the third level.

Our description of the hierarchy of the courts has assumed so far that all trial courts are "courts of record," and appellate review accordingly will be on the record. There is one major exception to that assumption which we should note—the court "not of record." The division between courts of record and courts not of the record originally was drawn when many trial courts lacked the mechanical capacity to maintain a complete record of their proceedings. If a court could provide such a record, the losing party could readily gain an appellate review of the trial decision before the next highest court. If the record was not available, however, the higher court had no way of examining the proceedings

below to determine if an error was committed. Without a court of record, a second look at the case could only be provided by the higher court giving the case de novo consideration (i.e., fresh consideration). This was done by conducting a new trial called a trial de novo. The trial de novo was not in fact appellate review, since it did not review the decision below, but proceeded as if the case had begun in the higher court. The trial de novo simply was a substitute for appellate review, necessitated by the absence of a record." [2]

2. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 38-39). West Publishing Company.

7.5. American Trial Courts and the Principle of Orality

LORE RUTZ-BURRI

At trial, the state will present evidence showing facts demonstrating that the defendant committed the crime. The defendant may also present facts that show he or she did not commit the crime. The **principle of orality** requires that the **trier of fact** (generally the jury, but the judge when the defendant waives a jury trial) considers only the evidence that was developed, presented, and received into the record during the trial. As such, jurors should only make their decision based upon the testimony they heard at trial in addition to the documents and physical evidence introduced and admitted by the court. The principle of orality would be violated if, for example, during deliberations, the jury searched the Internet to find information on the defendant or witnesses. Similarly, if the police question the defendant and write a report, the jury cannot consider the contents of the report unless it has been offered in a way that complies with the rules of evidence and the court has received it during the trial. The principle of orality distinguishes the functions of a trial court, developing the evidence, and the function of the appellate courts, reviewing the record for legal error.

The principle of orality is one major difference between the **adversarial system** generally followed by the United States and the **inquisitorial system** generally followed in most other countries. Frequently in **civil law countries** (for example, most European nations), the police, prosecutors, or investigating magistrates question witnesses prior to trial and write summaries of their statements called a **dossier**. In determining guilt, the trier of fact is presented with just the summaries of the witness statements. The trial in civil law countries is less about the presentation of evidence establishing the defendant's guilt and more about the defendant's presentation of mitigation evidence which assists the court in giving an appropriate **sentence**, or sanction.

7.6. The Appeals Process, Standard of Review, and Appellate Decisions

LORE RUTZ-BURRI

The Appeals Process

The government cannot appeal a jury's decision by **acquitting** the defendant, or finding the defendant not guilty. Thus, most criminal appeals involve defendants who have been found guilty at trial. The government may appeal a court's pretrial ruling in a criminal matter before the case is tried, for example a decision to suppress evidence obtained in a police search. This is called an **interlocutory appeal**. Although the defendant is permitted to appeal after entering a guilty plea, the only basis for his or her appeal is to challenge the sentence given. When the defendant appeals, he or she is now referred to as the **appellant**, and the State is the **appellee**. (Note that often the court will use the words **petitioner** and **respondent**. The petitioner is the party who lost in the last court who is petitioning the next level court for review; the respondent is the party who won in the last court). In routine appeals, the primary function of appellate courts is to review the record to discern if errors were made by the trial court before, during, or after the trial. No trial is perfect, so the goal is to ensure there was a fair, albeit imperfect, trial. Accordingly, the appellate courts review for **fundamental, prejudicial or plain error**. Appellate courts will reverse the conviction and possibly send the case back for a new trial when they find that trial errors affected the outcome of the case. A lower court's judgment will not be reversed unless the appellant can show that some prejudice resulted from the error and that the outcome of the trial or sentence would have been different if there had been no error. By reviewing for error and then writing opinions that become case law, appellate courts perform dual functions in the criminal process: error correction and lawmaking.

Appellate judges generally sit in panels of three judges. They read the **appellant's brief** (a written document filed by the appellant), the **reply brief** (a written document filed by the the appellee), and any other written work submitted by the parties or **friend of the court amicus curiae briefs.** Amicus curiae are individuals or groups who have an interest in the case or some sort of expertise but are not parties to the case. The appellate panel will generally listen to very short oral arguments, generally twenty minutes or less, by the parties' attorneys. During these oral arguments, it is common for the appellate judges to interrupt and ask the attorneys questions about their positions. The judges will then consider the briefs and arguments and the panel will then meet and deliberate and decide based on majority rule. If the appellate court finds that no error was committed at trial, it will **affirm** the decision, but if it finds there was an error that deprived the

losing party of a fair trial, it may issue an **order of reversal**. When the case is reversed, in most instances, the court simply will require a new trial during which the error will not be repeated. This is called a **remand**. In some cases, however, the order of reversal might include a direction to dismiss the case completely, for example when the appellate court concludes that the defendant's behavior does not constitute a crime under the law in that state. When reading an opinion, also known as decisions, from an appellate court, you can tell the **procedural history** of a case (i.e., a roadmap of where the case has been: what happened at trial, what happened as the case was appealed up from the various appellate courts).

Standards of Review

You have just learned that one function of the appellate courts is to review the trial record and see if there is a prejudicial or fundamental error. Appellate courts do not consider each error in isolation, but instead, they look at the cumulative effect of all the errors during the whole trial. Appellate court judges must sometimes let a decision of a lower court stand, even if they personally don't agree with it. Sports enthusiasts are familiar with the use of instant/video replay, and it provides us a good analogy. Officials in football, for example, will make a call, a ruling on the field, immediately after a play is made. This decision, when challenged, will be reviewed, and the decision will be upheld unless there is "incontrovertible evidence" that the call was wrong. When dealing with appeals, how much deference to show the lower court is the essence of **the standard of review**. Sometimes the appellate courts will give great deference to the trial court's decision, and sometimes the appellate courts will give no deference to the trial court's decision. How much deference to give is based on what the trial court was deciding—was it a question of fact, a question of law, or a mixed question of law and fact.

The appellate court will allow a trial court's decision about a factual matter to stand unless the court clearly got it wrong. The appellate court reasons that the judge and jury were in the courtroom listening to and watching the demeanor of the witnesses and examining the physical evidence. They are in a much better position to determine the credibility of the evidence. Thus, the appellate court will not overturn findings of fact unless it is firmly convinced that a mistake has been made and that the trial court's decision is clearly erroneous or "arbitrary and capricious." The arbitrary and capricious standard means the trial court's decision was completely unreasonable and it had no rational connection between the facts found and the decision made. The lower courts finding will be overturned only if it is completely implausible in light of all of the evidence. One court noted, "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." [1]

Sometimes the law requires, or at the parties' request, that a trial judge or jury make a special finding of fact. Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations that are better made by the trial judge sitting in the courtroom listening to the evidence and observing the demeanor of the witnesses. It is not enough that the appellate court may have weighed the evidence and reached a different conclusion unless the decision was clearly erroneous, the appellate court will defer to the trial judge.

Trial judges often make discretionary rulings., for example, whether to allow a party's request for a continuance or to allow a party to amend its pleadings or file documents late. In these **matters of discretion**, the appellate court will only overturn the trial judge if they find such a decision was an abuse of discretion. The lower court's judgment will be termed an **abuse of discretion** only if the judge failed to exercise sound, reasonable, and legal decision-making skills. A trial court abuses its discretion, for example, when: it does not apply the correct law, erroneously interprets a law, rests its decision on a clearly inaccurate view of the law,

1. *United States v. Yellow Cab Co.*, 338 U.S. 338. 342 (1949).

rests its decision on a clearly erroneous finding of a material fact, or rules in a completely irrational manner. Abuse of discretion exists when the record contains no evidence to support the trial court's decision.

When it comes to questions of law, the appellate courts employ a different standard of review called **de novo review.** De novo review allows the appellate court to use its own judgment about whether the trial court correctly applied the law. Appellate courts give little or no deference to the trial court's determinations and may substitute its own judgment on questions of law. Questions of law include interpretation of statutes or contracts, the constitutionality of a statute, the interpretation of rules of criminal and civil procedure. Trial courts presume that laws are valid and do not violate the constitution, and the burden of proving otherwise falls on the defendant. Trial courts sometimes get it wrong. De novo review allows the court to use its own judgment about whether the court correctly applied the law. Appellate judges are perhaps in a better position to decide what the law is as the trial judge since they are not faced with the fast-pace of the trial and have time to research and reflect.

Sometimes the trial court must resolve a question in a case that presents both factual and legal issues. For example, if police stop and question a suspect, there are legal questions, such as whether the police had reasonable suspicion for the stop or whether the questioning constituted an "interrogation", and factual questions, such as whether police read the suspect the required warnings. Mixed questions of law and fact are generally reviewed *de novo*. However, factual findings underlying the lower court's ruling are reviewed for clear error. Thus, if the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error.

In reviewing the trial court record, the appellate court may discover an error that parties failed to complain about. Generally, appellate courts will not correct errors that aren't complained about, but this is not the case when they come upon **plain error**. Plain error exists "[w]hen a trial court makes an error that is so obvious and substantial that the appellate court should address it, even though the parties failed to object to the error at the time it was made." [2] If the appellate court determines that the error was evident, obvious, clear and materially prejudiced a substantial right (meaning that it was likely that the mistake affected the outcome of the case below in a significant way), the court may correct the error. Usually, the court will not correct plain error unless it led to a miscarriage of justice.

The selection of the appropriate standard of review depends on the context. For example, the de novo standard applies when issues of law tend to dominate in the lower court's decision. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters tend to dominate or control the court's decision. The controlling standard of review may determine the outcome of the case. Sometimes the appellate court can substitute its judgment for that of the trial court and overturn a holding it does not agree with, but other times, it must uphold the lower court's decision even if it would have decided differently.

Appellate Decisions

In most appeals filed in the intermediate courts of appeal, the appellate panel will rule but not write a supporting document called a **written opinion** stating why it ruled as it did. Instead, the appellate panel will **affirm** the lower court's decision **without an opinion** (colloquially referred to as an AWOP). Sometimes, however, appellate court judges will support their decisions with a written opinion stating why the panel decided as it did and its reasons for **affirming** (upholding) or **reversing** (overturning) the lower court's decision. The position and decision by the majority of the panel (or the entire court when it is a supreme court case), is, not surprisingly, called the **majority opinion.** Appellate court judges frequently disagree with

2. (http://www.law.cornell.edu/wex/plain_error.)

one another, and a judge may want to issue a written opinion stating why he or she has a different opinion than the one expressed in the majority opinion. If a particular judge agrees with the result reached in the majority opinion but not the reasoning, he or she may write a separate **concurring opinion**. If a judge disagrees with the result and votes against the majority's decision, he or she will write a **dissenting opinion**. Sometimes opinions are unsigned, and these are referred to as **per curium** opinions. Finally, if not enough justices agree on the result for the same reason, a **plurality opinion** will be written. A plurality opinion controls only the case currently being decided by the court and does not establish a precedent which judges in later similar cases must follow.

7.7. Federal Appellate Review of State Cases

LORE RUTZ-BURRI

Through petitions for writ of certiorari, the U.S. Supreme Court will be in a position to review cases coming to it from the state courts. Because the review is discretionary, the Court will generally accept review only when these cases appear to involve a significant question involving the federal constitution. As a case works its way through the state appeals process, the state courts may have made rulings about both the federal constitution and its own state constitution. Depending on the case and how the state opinions were written, the U.S. Supreme Court may find it difficult to determine whether the state interpreted its own constitution, in which case the Court will not accept review, or whether it interpreted the federal constitution, in which case the Court may accept review. The U.S. Supreme Court in *Michigan v. Long*, 463 U.S. 1032, at 1040–1041 (1983), explained when the Court will "weigh in" on a state court matter. [1] It held,

> "When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.
>
> This approach obviates [*does away with*] in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that

1. *Michigan v. Long*, 463 U.S. 1032, at 1040–1041 (1983)

ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action' (Citations omitted)."

7.8. Courtroom Players: Judges and Court Staff

LORE RUTZ-BURRI

In their 1977 book, *Felony Justice: An organizational analysis of criminal courts,* James Eisenstein and Herbert Jacob, coined the term "courtroom workgroup." [1] They specifically referred to the cooperative working relationship between prosecutors, defense attorneys, and judges in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The **accusatory phase** (the pre-trial phase) and **adjudicatory phase** (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either **an information** or **an indictment**, and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed upon rules for achieving those goals.

Trial judges: Misperceptions and Realities

1. Eisentstein, J., & Jacob, H. (1977). Felony Justice: An organizational analysis of criminal courts. Boston, MA: Little Brown and Co.

Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a **bench trial,** and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules: on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of **jury instructions** to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

"In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to 'all rise' when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most

of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets."[2]

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Trial Judge Selection and Qualifications

The sole qualification to be a judge in most jurisdictions is graduating from a law school and membership in the state's bar association. Although the trend is for judges to be lawyers prior, a few jurisdictions do not require justices of the peace or municipal judges to be attorneys.

States procedures in selecting judges vary tremendously. "Almost no two states are alike and many states employ different methods of selection depending on the different levels of the judiciary creating 'hybrid' systems of selection"[3]. Nevertheless, the primary differences surround whether judges are elected or appointed, or selected based on merit. There are four primary methods used to select judges in the United States: appointment, with or without confirmation by another agency; partisan political election; non-partisan election; and a combination of nomination by a commission, appointment and periodic reelection (the Missouri Plan).

There are variations within these four primary methods. As noted above, states may use different methods to select judges based on the level in the judicial hierarchy. For example, municipal judges may be appointed, while supreme court judges are elected. Each selection method has its critics and advocates, and the relative merits of each are generally judged by the selection methods ability to achieve judicial independence and accountability. Notwithstanding the critiques of each of the methods, there has been little empirical evidence that the quality of judges, in terms of competency, effectiveness, or honesty, varies depending on the methods used to select the judge.[4][5][6]

The length of time a judge will "sit", called a **term in office** or **tenure,** varies greatly, generally from four to sixteen years. Frequently, the term for a trial judge is less than a term for an appellate judge. At the appellate level, six years is the shortest term, and many states use terms of ten years or more for their appellate judges. Only a few states have lifetime tenure for their judges.

In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. In Article III, U.S. Constitution states that federal judges are appointed to "hold their Offices during Good Behavior." On

2. Spohn, C. & Hemmens, C. (2012) *Courts: A Text/Reader* (2nd ed.). Los Angeles, CA: SAGE Publications, Inc.
3. Berkson, L.C. (2005). *Judicial selection in the United States: A special report.* In E.E. Slotnick (Ed.) Judicial Politics: Readings from Judicature (3d ed., pp. 50). Washington, DC: CQ Press
4. Atkins B.M. & Glick, H.R. (1974). Formal judicial recruitment and state supreme court decisions. *American Politics Quarterly*, 2, 427-449
5. Dubois, P.L. (1986), Accountability, independence, and the selection of state judges: The role of popular judicial elections. *Southwestern Law Journal*, 40, 31-52
6. Nagel, S. (1975). *Improving the legal process*. Lexington, MA: Lexington Books.

February 25, 2019, the Court in Rizo v. Yovino, ___ U.S. ___ (2019) refused to address the merits of the case (an important employment wage discrimination case) because the judge who wrote the Ninth Circuit opinion died eleven days before its release. What will likely become an oft-quoted sentiment, "Federal judges are appointed for life, not for eternity."

The district courts appoint federal magistrate judges to either four or eight-year terms. Though it would seem that politics has played an increasing role in the selection of judges in the federal system, perceptions are influenced by what we currently hear and read. The reality is that complaints of political overreaching in selecting federal judges have been with us since the federal courts were first staffed.

Link to Washington Post showing political judicial appointments since President Reagan https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/?utm_term=.479982ef3fd6)

Link to Washington Post article showing political party breakdown in the confirmation of Justice Gorsuch in 2017 and comparing the breakdown with other current U.S. Supreme Court justices https://www.washingtonpost.com/graphics/politics/scotus-confirmation-votes/?tid=graphics-story&utm_term=.35b33aa30d39

A 1952 article shows that the role of politics in judicial selection is not only a recent concern https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1952012300

Judicial Clerk, Law Clerk, and Judicial Assistants

Generally, judges have one or two main assistants. These individuals are known as "judicial clerk", "clerk of court", "law clerk", or "judicial assistant". Of course, there may be several court clerks who interact each day with all the judges in the courthouse, but generally, judges have only one or two judicial assistants who work directly with them. The clerk of court works directly with the trial judge and is responsible for court records and paperwork both before and after the trial. Usually, each judge has his or her own clerk. The clerk prepares all case files that a judge will need for the day. During hearings and the trial, these clerks record and mark physical evidence introduced in the trial, **swear in the witnesses,** or administer the oath to the witness, take notes cataloging the recordings, etc. In some jurisdictions, the law clerks are lawyers who have just completed law school and may have already passed the bar exam. In other jurisdictions, the law clerks are not legally trained but may have specialized paralegal training or legal assistant training.

Local and State Trial Court Administrators

Local and state trial court administrators oversee the administration of the courts. These administrators' responsibility includes: hiring and training court personnel (clerks, judicial assistants, bailiffs), ensuring that the court caseloads are efficiently processed, keeping records, sending case files to reviewing courts, ensuring that local court rules are being implemented, and working with the local and state bar associations to establish effective communications to promote the expedient resolutions of civil and criminal cases.

Indigency Verification Officers

The Indigency Verification Officer (IVO) is a court employee who investigates defendants' financial status and determines whether they meet the criteria for court-appointed counsel. More than 75% of all individuals accused of a crime qualify as indigent. How poor a defendant must be to qualify for a court-appointed attorney varies from place to place, and each IVO uses a screening device that takes into consideration the cost of defense in the locality as well as defendant's financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk: sends out jury summons to potential jurors, works with jurors requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from the courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit, or the probate unit. In smaller communities, there may be just a few court clerks who "do it all". With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Release Assistance Officers

Release assistance officers (RAO) are court employees who meet with defendants at the jail to gather information to pass on to the judge who makes release decisions. Release assistance officers make their recommendations based on the defendant's likelihood of reappearance and other considerations specified by statute or local rules. In determining whether the defendant is likely to reappear, the RAO considers: the defendant's ties to the community, the defendant's prior record of failures to appear, the defendant's employment history, whether the defendant lives in the community, the nature and seriousness of the charges, and any potential threat the defendant may present to the community.

The availability of space at the jail may also play a role in whether an individual is released. Court and jail

staff may need to work together to establish release protocols when space is limited. The RAO should have a significant voice in drafting those protocols. Whether the RAO recommends security (bail) or conditional release, the RAO will generally suggest to the judge the conditions that the defendant should abide by if he or she makes bail or is conditionally released. Defendants released prior to trial will sign release agreements indicating the conditions of release recommended by the RAO and imposed by the judge. RAOs may also investigate the defendant's proposed living conditions upon release to make sure that they promote lawful activity and the ability for reappearance for all scheduled court appearances.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers' and defense attorneys' scheduled vacations. In addition, the scheduling clerk must be mindful of the judges' calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have **taken under advisement.** (Note that trial judges can either decide "from the bench", meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties written pleadings, and considering the oral arguments).

7.9. Courtroom Players: Prosecutors

LORE RUTZ-BURRI

Prosecutors play a pivotal role in the criminal justice and work closely with: law enforcement officials, judges, defense attorneys, probation and parole officers, victims services, human services, and to a lesser extent, with jail and other corrections officers. The authority to prosecute is divided among various city, state and federal officials. City and state officials are responsible for prosecutions under local and state laws, and federal officials for prosecutions under federal law. Associate Justice Robert Jackson, while he was the U.S. Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940 and stated,

> "The qualities of a good prosecutor are . . . [elusive and . . . impossible to define]. …
>
> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. …
>
> Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. . . .
>
> There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases because no prosecutor can even investigate all of the cases in which he receives complaints. If the department of justice were to make even a pretense of reaching every probable violation of federal law, ten times its

present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

… A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility" [1]

State Prosecuting Attorneys

Prosecutors represent the citizens of the state, not necessarily a particular victim of a crime. States vary in how they organize the groups of attorneys hired to represent the state's interest. Ordinarily, the official with the primary responsibility for prosecuting state violations is the local prosecutor who is referred to as the "district attorney", "county attorney", or "state's attorney". Local prosecutors are usually elected from a single county or a group of counties combined into a prosecutorial district. In many states, the state attorney general's office has the authority that trumps over the local prosecutors' authority, but in practice, the state attorney general rarely intervenes in local matters. The state attorney general's office will intervene, for example, if there is a conflict of interest or when requested by the district attorney. It is not uncommon for a small local prosecutor's office faced with the prosecution of a major, complex, time-consuming trial, to request the aid of the attorney general's office. In these smaller offices, there may be insufficient resources to handle complicated prosecutions and still keep up with the day-to-day filings and cases.

The prosecuting attorney and the attorney general ordinarily are the only officials with authority to prosecute violations of state law. City attorneys may be hired to prosecute city ordinances, but these attorneys primarily specialize in civil matters. When city attorneys and prosecuting attorneys have different policies for treating minor offenses, the result may be disparate, or different, treatment of similarly situated offenders. This raises a concern of inconsistent application of the law. Additionally, different county prosecutors may follow different policies on which matters they will charge, the use of diversion programs, the use of plea bargaining, and the use of certain trial tactics. To limit some of these differences, some states have used statewide training, and district attorneys' conferences. Still, the policies and practices are far from uniform.

Generally, assistant prosecutors, called deputy district attorneys, are hired as "at will" employees by the elected district attorney. Historically, the political party of the applicant was a key criterion, and newly elected prosecutors would make a virtual clean sweep of the office and hire outsiders from the former office. Now, most offices hire on a non-partisan, merit-oriented, basis.

Most states require that the prosecutor be a member of the state bar. Some states also require that he or

1. Associate Justice Robert Jackson while he was the U.S. Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940

she have several years in the practice of law. Deputy district attorneys, on the other hand, are frequently fresh out of law school. They may have limited knowledge of state criminal law, as law school is designed to teach lawyers to enter any new field and educate themselves.

Link to the Oregon District Attorneys Association Website https://www.oregonda.org/

Federal Prosecuting Attorneys

Prosecutors in the federal system are part of the U.S. Department of Justice and work under the Attorney General of the United States. The Attorney General does not supervise individual prosecutors and relies on the 94 United States Attorneys, one for each federal district. U.S. Attorneys are given considerable discretion, but they must operate within general guidelines prescribed by the Attorney General. The U.S. Attorneys have a cadre of Assistant U.S. Attorneys who do the day-to-day prosecution of federal crimes. For certain types of cases, approval is needed from the Attorney General or the Deputy Attorney General in charge of the Criminal Division of the Department of Justice. The Criminal Division of the Department of Justice (DOJ) operates as the arm of the Attorney General in coordinating the enforcement of federal laws by the U.S. Attorneys.

Link to cite to find the U.S. Attorney https://www.justice.gov/usao/find-your-united-states-attorney

Selection and Qualifications of Prosecutors

Most local prosecuting attorneys are elected in a partisan election in the district they serve. State attorney generals may also have significant prosecutorial authority. They are elected in forty-two states, appointed by the governor in six states, appointed by the legislature in one state, and appointed by the state supreme court in another. State attorney generals serve between two to six-year terms, which can be repeated. Federally, senators from each state recommend potential U.S. Attorney nominees who are then appointed by the President with the consent of the Senate. U.S. Attorneys tend to be of the same political party as the President and are usually replaced when a new President from another party takes office.

Prosecutor's Function

Prosecutors arguably have more discretion than any other official in the criminal justice system. They decide whether to charge an individual or not. Much has been written about the prosecutor's broad discretion and the constraints on his or her discretion. If they choose not to prosecute, this is referred to as nolle prosequi, and this decision is largely unreviewable. Spohn and Hemmens (2012, p. 123) concluded in their review of the studies on prosecutor's charging decisions that "these highly discretionary and largely invisible decisions reflect a mix of (1) legally relevant measures of case seriousness and evidence strength and (2) legally irrelevant characteristics of the victim and the suspect" [2].

Prosecutors guide the criminal investigation and work with law enforcement to procure search and arrest warrants. Following arrest, prosecutors continue to be involved with various aspects of the investigation. Roles include: meet with the arresting officers, interview witnesses, visit the crime scene, review the physical evidence, determine the offenders prior criminal history, make bail and release recommendations, appear on pretrial motions, initiate plea negotiations, initiate **diversions** (pre-trial contracts between the government and the defendant which divert cases out of the system), work with law enforcement officers from other states who seek to extradite offenders, prepare the accusation to present to grand jury, call witnesses and present a *prima facia* case (present enough evidence which, when unrebutted by the defendant, shows that the defendant committed the crime) at a preliminary hearing, represent that state at arraignments and status conferences, conduct the trial, and, upon conviction, make sentencing recommendations while representing the state at the sentencing hearing.

In many communities, the prosecutor is the spokesperson for the criminal justice system and appears before the legislature to recommend or oppose penal reform. Prosecutors make public speeches on crime and law enforcement, take positions on requests for clemency for cases they have prosecuted, work extensively with victims' services offices, which may be an arm of the prosecutor's office. In some communities, the prosecutor is also responsible for representing the local government in civil matters and may represent the state in civil commitment proceedings and answer accident claims, contract claims, and labor relation matters for the county. However, only a few counties have prosecutors still perform this function. U.S. Attorneys still have substantial responsibilities for representation of the U.S. government in civil litigation, and there is generally a civil division, a criminal division, and an appellate division of the U.S Attorneys office.

The American Bar Association (ABA) standards indicate that "the prosecutor's [ethical] duty is to seek justice". This means that the state should not go forward with prosecution if there is insufficient evidence of the defendant's guilt or if the state has "unclean hands", for example, illegally conducted searches or seizures or illegally obtained confessions. Ethical and disciplinary rules of the state bar associations govern prosecutors who must also follow state and constitutional directives when they prosecute crimes.

Link to the ABA Standards on the Prosecution Function https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents/

2. Spohn, C. & Hemmens, C. (2012) *Courts: A Text/Reader* (2nd ed.). Los Angeles, CA: SAGE Publications, Inc.

7.10. Courtroom Workgroup: Defense Attorneys

LORE RUTZ-BURRI

The Sixth Amendment to the U.S. Constitution provides, "The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Most state constitutions have similar provisions. Historically, the right to counsel meant that the defendant, if he or she could afford to hire an attorney, could have an attorney's assistance during his or her criminal trial. This right has developed over time and now includes the right to have an attorney's assistance at all **critical stages** in the process, or at all criminal proceedings that may substantially affect the right of the accused. Importantly, the right to assistance of a defense counsel has been held to require that the state pay the costs of the defense counsel when a person is **indigent** or has insufficient financial resources to pay.

Privately Retained Defense Attorneys

Individuals accused of any infraction or crime, no matter how minor, have the right to hire counsel and have them appear with them at trial. The attorney must be recognized as qualified to practice law within the state or jurisdiction, and generally, criminal defendants do well to hire an attorney who specializes in criminal defense work. However, because many criminal defendants don't have enough money to hire an attorney to represent them, the court will need to appoint an attorney to represent them in criminal cases.

Appointed Counsel

Federal and state constitutions do not mention what to do when the defendant wants, but cannot afford an attorney's representation. Initially, the Court interpreted the Sixth Amendment as permitting defendants

to hire an attorney who would assist them during the trial. Later, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendment includes the right to a fair trial, and a fair trial includes the right to the assistance of counsel. In *Powell v. Alabama*, 287 U.S. 45, at 58 (1932), the Court concluded that the focus on trial was too narrow. It stated, "[T]he most critical period of the proceeding[s] against the defendants might be that period from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation are vitally important. Defendants are as much entitled to . . . [counsel's] aid during that period as at the trial itself." [1]

Powell also dealt with the need for states to provide representation to defendants who could not afford to hire counsel in those cases where fundamental fairness required it. In a statement that led to the dramatic extensions to the right to counsel, the Court continued,

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has a small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence." [2] *287* U.S. 45, at 68-69 (1932)

Powell was decided in 1932, and because of television and the multitude of crime drama programs, people probably know more about the criminal justice process than ever imagined by the *Powell* court. Nevertheless, the Court's admonitions still ring true. Not too many non-lawyers know how to conduct themselves at trial, challenge the state's evidence, make evidentiary objections, or file proper pretrial motions with the rudimentary knowledge gained from watching television. One could consult with the many great Internet sources that are easily accessible, however, many individuals charged with crimes have limited education and lack the sophistication to distinguish between those sources that are applicable to their case and which are not.

Between *Powell* (1932) and the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court decided when the appointment of counsel was necessary for a fair trial in state prosecutions on a case-by-case basis. In *Gideon*, however, the Court held that this case-by case-approach was inappropriate. It held that the state had to provide poor defendants access to counsel in every state felony prosecution. Lawyers in serious criminal cases, it said, were "necessities, not luxuries". Since *Gideon*, the Court has extended the obligation to provide counsel to state misdemeanors prosecutions that result in the defendant receiving a jail term. The Court found that the legal problems presented in a misdemeanor case often are just as complex as those

1. *Powell v. Alabama*, 287 U.S. 45, at 58 (1932)
2. Powell v. Alabama,

in felonies.[3] In two cases, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979), the Court tied the right to counsel in misdemeanor cases to the defendant's actual incarceration. Because it is difficult to predict when a judge will want to incarcerate a person convicted of a misdemeanor, this approach is difficult to implement.[4] [5]Many states instead appoint counsel to an indigent defendant charged with a crime where a possible term of incarceration could be imposed.

The Court left it for the lower courts to decide when a person is indigent. Lower courts have generally held that the financial resources of a family member cannot be considered. Also, courts cannot merely conclude that because a college student is capable of financing his or her education that he or she is capable of hiring an attorney. A person does not have to become destitute in order to be classified as indigent. An indigent defendant may have to pay back the court-appointed attorney's fees if they are convicted or enter a plea. In practice, most courts collect appointed attorneys' fees at a standard rate and much reduced from the actual costs of representation as part of the fines that a convicted defendant must pay. When acquitted, defendants are not required to pay the state back for the attorney fees.

Public Defenders, Assigned Attorneys, and Defense Attorney Associations

Most states now have public defenders' offices. Because public defenders and assistant public defenders handle only criminal cases, they become the specialists and have considerable expertise in representing criminal defendants. Public defender offices frequently have investigators on staff to help the attorneys represent their clients. In some states, courts appoint or assign attorneys from the private bar (not from the public defender's office) to represent indigent defendants. The mixed system uses both assigned counsel, or associations of private attorneys who contract to do indigent criminal defense, and public defenders. For example, the public defender's office may contract with the state to provide 80% of all indigent representations in a particular county. The remaining 20% of cases would be assigned to the association of individual attorneys who do criminal defense work- some retained clients, some indigent clients-or private attorneys willing to take indigent defense cases.

In practice, there is no purely public defender system because of "conflict cases." Conflicts exist when one law firm tries to represent more than one party in a case. Assume, for example, that Defendant A conspired with Defendant B to rob a bank. One law firm could not represent both Defendant A and Defendant B. Public defender offices are generally considered one law firm, so attorneys from that office could not represent both A and B, and the court will have to assign a "conflict" attorney to one of the defendants.

3. *Gideon v. Wainwright*, 372 U.S. 335 (1963)
4. *Argersinger v. Hamlin*, 407 U.S. 25 (1972)
5. *Scott v. Illinois*, 440 U.S. 367 (1979)

Controversial Issue: Link to the 2017 report from the Oregon Public Defense Services about indigent representation in Oregon

https://www.oregon.gov/opds/commission/reports/EDAnnualReport2017.pdf

Link to the National Legal Aid and Defenders Association

http://www.nlada.org/

Link to the Oregon Criminal Defense Lawyers Association

https://www.ocdla.org/

The Right to Counsel in Federal Trials

The Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), held that in all federal felony, trials counsel must represent a defendant unless the defendant waives that right. The Court further held that the lack of counsel is a jurisdictional error which would render, or make, the defendant's conviction void. A court that allows a defendant to be convicted without an attorney's representation has no power or authority to deprive an accused of life or liberty. [6]

Zerbst also established rules for a proper waiver of the Sixth Amendment right to counsel. The court said that it is presumed that the defendant has not waived her right to counsel. For a waiver to be constitutional, the court must find that the defendant knew he or she had a right to counsel and voluntarily gave up that right, knowing that he or she had the right to claim it. Therefore, if the defendant silently goes along with the court process without complaining about the lack of counsel, his or her silence does not amount to a waiver. The Court defined waiver as an "intelligent relinquishment or abandonment of a known right or privilege".

In 1945 Congress passed the Federal Rules of Criminal Procedure (FRCP). Rule 44 of the FRCP requires defendants to have counsel, or affirmatively waive counsel, either retained or appointed, at every stage of the proceedings from the initial appearance through appeal. This rule was difficult to implement because there was no recognized federal defense bar, or federal defense attorneys, available or willing to take on appointed cases. So, in 1964, Congress passed the Criminal Justice Act of 1964 that established a national system for providing counsel to indigent defendants in federal courts.

6. *Johnson v. Zerbst*, 304 U.S. 458 (1938)

When Does a Defendant Have the Right to Assistance of an Attorney?

Critical Stages of the Criminal Justice Process

In *White v. Maryland*, 373 U.S 59 (1963), the Court found that defendants are entitled to the right to counsel at any critical stage of the proceeding, defined as a stage in which he or she is compelled to make a decision which may later formally be used against him or her. The Court has found the following court procedures to be critical stages:

- The initial appearance in which the defendant enters a non-binding plea–*White v. Maryland*, 373 U.S.59 (1963).
- A preliminary hearing–*Coleman v. Alabama*, 399 U.S. 1 (1970).
- A lineup that includes a previously indicted defendant–*Wade v. United States*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).

During Other Proceedings

The Court has extended the right to counsel to psychiatric examinations, juvenile delinquency proceedings [7], civil commitments proceedings [8] and probation and parole hearings (see, below). Further, the court in *Estelle v. Smith*, 451 U.S. 454 (1981), held that a defendant charged with a capital crime and ordered by the court to be examined by a psychiatrist, to evaluate possible future dangerousness, was entitled to consult with counsel. Similarly, in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court found prejudicial error occurs when defense counsel was not appointed to represent a defendant subjected to a psychiatric evaluation. The Court further held that counsel must be made aware of the projected psychiatric evaluation before it occurs.

During Probation and Parole Revocation Hearings

In *Mempa v. Rhay*, 389 U.S. 128 (1967), 17-year-old Mempa was placed on probation for two years after he pleads guilty to "joyriding". About four months later, the prosecutor moved to have petitioner's probation revoked alleging that Mempa had committed a burglary while on probation. Mempa, who was not represented by counsel at the probation revocation hearing. admitted being involved in the burglary. The court revoked his probation based on his admission to the burglary. The U.S. Supreme Court held that Mempa should have had counsel to assist him in his hearing.

Five years later, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the state sought to revoke defendant's probation. Originally, Gagnon was sentenced to fifteen years of imprisonment for armed robbery, but the judge had suspended the imposition of sentence and placed him instead on seven years of probation. The Court found that the probation revocation hearing did not meet the standards of due process. Because a probation revocation involves a loss of liberty, the probationer was entitled to due process. The Court did

7. *In re Gault*, 387 U.S. 1 (1967)
8. Stefan, S. (1985). Right to Counsel in Civil Commitment Proceedings. *Mental & Physical Disability L. Rep.*, 9, 230.

not adopt a *per se* rule that all probationers must have the assistance of counsel in every revocation hearings, but rather stated:

"We find no justification for a new, inflexible constitutional rule with respect to the requirement of counsel. We think rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim. . . . In passing on a request for the appointment of counsel, the responsible agency should also consider, especially in doubtful cases, whether probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal shall be stated succinctly in the record." [9]

At Some Post-Trial Proceedings

The Sixth Amendment's right to the assistance of counsel does not stop when the jury finds the defendant guilty. When an out-of-custody defendant is found guilty at the end of a trial, the judge may remand the defendant to custody- has the bailiff take the defendant into custody and transport them to the jail- and revokes conditions of bail if there had been any. Counsel must assist the defendant through the end of the sentencing hearing, and the defendant's attorney has the legal obligation to make post-trial motions to preserve the defendant's rights.

The Court has distinguished between the defendant's right to the assistance of counsel on mandatory appeals and discretionary appeals. In *Douglas v. California*, 372 U.S. 353 (1963), the Court found that indigent counsel should be provided to individuals when an appellate court must review their appeal or **an appeal of right**. Once the first appeal has been dismissed or resolved, however, *Ross v. Moffitt*, 417 U.S. 600 (1974), holds that indigent defendants do not have a right to appointed counsel for discretionary review in either the state supreme court or with the U.S. Supreme Court. The *Ross* majority reasoned that the defendant did not need an attorney to have "meaningful access" to the higher appellate courts because all the legal issues would have already been fully briefed in the intermediate appellate court. Additionally, the Court noted that the concept of equal protection does not require absolute equality. The majority opinion states,

> "We do not believe that the Due Process Clause requires North Carolina to provide the respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings

9. *Gagnon v. Scarpelli,* 411 U.S. 788, 790 (1973).

> of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" (Citations omitted).
>
> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a word to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . (Citations omitted.)

The facts show that respondent … received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage, he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials . . . would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review" (Citations omitted).

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in Douglas. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. (Emphasis added). The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think the respondent was given that opportunity under the existing North Carolina system."[10]

10. *Ross v. Moffitt,* 417 U.S. 600, 610–611, 614, 616 (1974).

Similarly, prisoners have a limited right to legal assistance for the purpose of filing writs of habeas corpus. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law". Prisons can meet this obligation by training prisoners to be paralegal assistants to work under a lawyer's supervision or by using law students, paralegals, and volunteer lawyers. Again, it may seem inconsistent that the court requires more for habeas corpus relief than it does for discretionary review on appeals. The difference lies in the nature of habeas corpus as a collateral attack, or side attack, where the claim is often being advanced for the first time and therefore the need for legal assistance may be greater.

Functions of Defense Attorneys

Defense lawyers investigate the circumstances of the case, keep clients informed of any developments in the case, and take action to preserve the legal rights of the accused. Some decisions, such as which witnesses to call, when to object to evidence, and what questions to ask on cross-examination, are considered to be strategic ones and may be decided by the attorney. Other decisions must be made by the defendant, most notably, after getting advice from the attorney about the options and their likely consequences. Defendants' decisions include whether to plead guilty and forego a trial, whether to waive a jury trial, and whether to testify in their own behalf.

The ABA Standards relating to the Defense Function established basic guidelines for defense counsel in fulfilling obligations to the client. The primary duty is to zealously represent the defendant within the bounds of the law. Defense counsel is to avoid unnecessary delay, to refrain from misrepresentations of law and fact, and to avoid personal publicity connected with the case. Fees are set on the basis of the time and effort required by counsel, the responsibility assumed, the novelty and difficulty of the question involved, the gravity of the charge, and the experience, reputation, and ability of the lawyer.

ABA Standard 4– 1.2, The Function of Defense Counsel, states:

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense

counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with the law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in legal aid or defender program. [11]

Tricky Issues in Representation

Defendants sometimes want to have a friend or family member speak up for them, but, the Court will not permit that. The right to counsel means the right to be represented by an attorney, someone legally trained and recognized as a member of the bar association. Similarly, defendants may not necessarily get the attorney of their choice. For example, in *Wheat v. United States*, 486 U.S. 153 (1988), one defendant who wanted to be represented by the same attorney who was representing his accomplice/co-conspirator in a complex drug distribution conspiracy was not allowed to have that attorney. The Court disallowed his application for the appointment of counsel noting that irreconcilable and unwaivable conflicts of interest would be created since there was the likelihood that the petitioning defendant would be called to testify at a subsequent trial of his co-defendant and that his co-defendant would be testifying in petitioner's trial. On the other hand, in *United States. v. Gonzalez-Lopez*, 553 U.S. 285 (2008), the Court reversed the defendant's conviction because the trial court erroneously deprived the defendant of his choice of counsel. The defendant, Gonzales-Lopez, had hired counsel from a different state, and during pretrial proceedings, the judge and the counsel had some disagreements. The judge then prohibited the attorney from taking part in the defendant's trial. The Court found that a trial judge violated the defendant's Sixth Amendment rights.

Defendants cannot repeatedly "fire" their appointed counsel as a stall tactic, and, at some point, the court will not allow the defendant to substitute attorneys and will require the defendant work with whatever

11. ABA Standard 4- 1.2 The Function of Defense Counsel (2015). *Criminal Justice: Prosecution and Defense Function.* American Bar Association.

attorney is currently assigned. A defendant may not force an unwilling attorney to represent him or her, but a court does have the discretion to deny an attorney's motion to withdraw from representation after inquiring about counsel's reasons for wishing to withdraw. This may present an ethical dilemma for the attorney because professional rules of responsibility require that even when an attorney withdraws from a case, he or she must still maintain attorney-client confidences. If, for example, the attorney knows that the defendant insists on taking the stand and presenting perjured testimony, the attorney must withdraw. But, at the same time, the attorney cannot discuss with the court why he or she needs to withdraw. At some point in the inquiry, after the judge has asked and the attorney has talked around the subject, the judge hopefully catches on, and the judges will allow the attorney to withdraw.

Effective Assistance of Counsel

Defendant's attorneys must provide competent assistance and should not harm the defendant's case by their legal representation. According to *McMann v. Richardson*, 397 U.S. 759 (1970), the right to counsel means the right to effective assistance of counsel. The constitutional standard for evaluating effective assistance was determined in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* decision looked at two aspects of the representation to determine whether counsel was ineffective. First, the defense attorney's actions were not those of a reasonably competent attorney exercising reasonable professional judgment; and second, the defense attorney's actions caused the defendant prejudice, meaning that they adversely affected the outcome of the case (i.e., they likely caused the jury to find the defendant guilty).

Courts may be more inclined to find ineffective assistance of counsel in a death penalty case than other run-of-the-mill cases. For example, the Court found the defense attorneys provided ineffective assistance in the sentencing portion of defendant's death penalty trial for the murder of a 77-year-old woman because they had failed to conduct an adequate "social history" investigation of the defendant's life and had not presented information to the jury they did have which showed that defendant had been subject to regular sexual abuse as a child. *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court stated,

> "In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that reasonable professional judgments support the limitations on investigation. . . . A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records–evidence that would have led a reasonably competent attorney to investigate

further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to defense counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland."*

Waiving Counsel

Sometimes, a defendant wishes to waive counsel and appear **pro se,** or represent him or herself at trial. The Court, in *Faretta v. California*, 422 U.S. 806 (1975), held that the Sixth Amendment includes the defendant's right to represent himself or herself. The *Faretta* Court found that, where a defendant is adamantly opposed to representation, there is little value in forcing him or her to have a lawyer. The Court stressed that it was important for the trial court to make certain and establish a record that the defendant knowingly and intelligently gave up his or her rights.

"Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish he knows what he is doing and his choice is made with eyes open." [12]

In *McKaskle v. Wiggins*, 465 U.S. 168, at 174 (1984), the Court held that a "defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course." The constitutional right to self-representation does not mean that the defendant is free to obstruct the trial, and a judge may terminate self-representation by a defendant who is obstructing the process. Frequently, judges will assign a **standby counsel** to assist defendants. Stand-by counsel is an attorney who can be available to answer questions of a pro se defendant, and if necessary, standby counsel can step in if the defendant is engaging in misconduct.

Conclusion

Court jurisdiction determines where a case will be filed and which courthouse has the legal authority to hear a case. Jurisdiction can be based on geography, subject matter, or seriousness of the offense. Jurisdiction is also divided between trial courts (original jurisdiction) and appellate courts (appellate jurisdiction).

More than 51 court systems operate in the United States. We have a dual court system comprised of federal trial and appellate courts and state trial and appellate courts. Federal and state courts have similar hierarchical structures with cases flowing from lower trial courts through intermediate courts of appeals and up to the supreme courts.

Defendants who wish to appeal their convictions are entitled to have their cases reviewed at least once, a mandatory appeal of right in the intermediate courts of appeal. After that, the review is discretionary and rare. Appellate courts generally affirm the decision of the trial courts, but may also reverse and remand the case back to the trial court if they determine that prejudicial error occurred. At the intermediate appellate court level, judges most frequently affirm the trial court's decision without writing an opinion, but sometimes the judges will write opinions informing the parties of their decision and the reasons for holding

12. *Faretta v. California,* 422 U.S. 806, 835 (1975).

as they did. Judges don't always agree, and at times, judges will write dissenting opinions or concurring opinions. Appellate court opinions become precedent that must be followed in the trial courts.

Judges, prosecutors, defense attorneys work together along with court clerks, bailiffs, and other court staff to process tens of thousands of cases daily in trial courts across the nation. Judges, prosecutors, and defense attorneys play an important role in the criminal justice process. Although few cases actually go to trial, and the vast majority of criminal cases are resolved in the trial courts at the pre-trial stage, the defendants must be represented by an attorney at critical stages in the process, and at the government's expense if they cannot afford to hire an attorney, unless they have voluntarily waived the right and wish to represent themselves.

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More than 51 court systems operate in the United States. We have a dual court system comprised of federal trial and appellate courts and state trial and appellate courts. Federal and state courts have similar hierarchical structures with cases flowing from lower trial courts through intermediate courts of appeals and up to the supreme courts.

Defendants who wish to appeal their convictions are entitled to have their cases reviewed at least once, a mandatory appeal of right in the intermediate courts of appeal. After that, the review is discretionary and rare. Appellate courts generally affirm the decision of the trial courts, but may also reverse and remand the case back to the trial court if they determine that prejudicial error occurred. At the intermediate appellate court level, judges most frequently affirm the trial court's decision without writing an opinion, but sometimes the judges will write opinions informing the parties of their decision and the reasons for holding as they did. Judges don't always agree, and at times, judges will write dissenting opinions or concurring opinions. Appellate court opinions become precedent that must be followed in the trial courts.

Judges, prosecutors, defense attorneys work together along with court clerks, bailiffs, and other court staff to process tens of thousands of cases daily in trial courts across the nation. Judges, prosecutors, and defense attorneys play an important role in the criminal justice process. Although few cases actually go to trial, and the vast majority of criminal cases are resolved in the trial courts at the pre-trial stage, the defendants must be represented by an attorney at critical stages in the process, and at the government's expense if they cannot afford to hire an attorney, unless they have voluntarily waived the right and wish to represent themselves.