I. THE SYSTEM OF GOVERNMENT

A. ALL GOVERNMENTS

1. All governments (federal, state and local) are set up with three co-equal branches: legislative, executive and judicial.

   a. In the U.S. Constitution, the branches are set up as follows:

      1) Article I establishes the legislative branch, i.e., Congress -- the House of Representatives and the Senate.

      2) Article II establishes the executive branch, i.e., the President and the Vice President.

      3) Article III establishes the judicial branch, i.e., the Supreme Court and such inferior courts as Congress may establish.

2. Although the executive branch (e.g., the Attorney General and the U.S. Department of Justice) is responsible for enforcing the criminal laws, the substance and procedure of criminal law play out in the judicial branch of governments (e.g., the United States District Courts).

B. THE JUDICIAL BRANCH

1. The trial level is the most visible forum in which criminal law can be found.

2. The intermediate court of appeals reviews the trial level essentially to make sure that the trial was both constitutionally and procedurally sound.

   a. Criminal defendants generally have a right to appeal to the intermediate court of appeals.

3. The supreme court generally review criminal trials to make sure that they have satisfied constitutional muster.

   a. Criminal defendants do not have a right to appeal to the supreme court.
1) A criminal defendant must file a writ of certiorari and ask the supreme court to take the case on appeal. If the writ is granted, the case will be review; if not, the verdict stands.

4. In the federal courts, there are 94 U.S. District Courts, 13 U.S. Courts of Appeal (11 Circuits plus the D.C. Circuit and the Federal Circuit), and one Supreme Court.

II. THE PROCESS OF ESTABLISHING GUILT OR INNOCENCE

A. SUBSTANCE AND PROCEDURE

1. Criminal law involves the study of crimes and defenses, and the procedures employed to allow the impositions of sanctions against those who commit crimes.

2. Normally, the two areas of criminal law are studied separately—substantive criminal law and criminal procedure.

3. Because of the dictates of the United States Constitution, the rules of procedure are essentially the same in both state and federal courts.

   a. In fact, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence have served as models for state procedures.

4. Because even legislatures find that they can learn from one another, the substantive criminal law is very similar among the states, which are parallel jurisdictions and share many of the same problems.

5. The federal substantive criminal law is quite different from that of the states because it has a different jurisdictional basis and quite different problems with which to deal.

6. As a general rule, both federal and state crimes are divided into two classes: felonies (those in which the potential punishment could be more than one year in jail or prison) and misdemeanors (those in which the potential punishment could be not greater than one year in jail or prison).

B. CRIMINAL PROCEDURE (essentially the same for both federal and state courts)

1. Arrest.

   a. An arrest may be made without a warrant based on probable cause finding by an officer of the law.

   a. An arrest may be made based on a warrant issued by a neutral
1) The arrest warrant may be based on a criminal complaint filed by the United States Attorney. Fed. R. Crim. P. 4(a). A criminal complaint names the accused and sets forth the criminal allegation, and it is supported by a sworn affidavit by a law enforcement officer. The criminal complaint must track the language of the statute defining the crime. In addition, the affidavit in support of the criminal complaint must set forth sufficient evidence (probable cause) to establish each and every essential element of the statutory offense.

2) The arrest warrant may be based on an information (misdemeanor) or an indictment (indictment). As with a criminal complaint, the information or indictment must track the language of the statute—it must identify each and every essential element of the statutory offense.


a. If the accused is arrested without an arrest warrant, then a criminal complaint is filed. If a warrant has already been issued based on a complaint, an information (misdemeanor) or indictment (felony), no criminal complaint is needed.

   1) Note: Criminal complaints are only needed to hold defendants in felony cases pending action before a federal grand jury.

b. The accused must be brought before the nearest magistrate judge without unnecessary delay. Fed. R. Crim. P. 5(a).

   1) Accused is advised of the criminal allegations, the penalty range, and the constitutional rights (fifth amendment right to remain silent and sixth amendment right to an attorney).

   2) Accused may be released on bond or detained briefly for a detention hearing. 18 U.S.C. 3141-3150; Fed. R. Crim. P. 46; Fed. R. Crim. P. 12(h).

      a) In the federal system, a defendant may be detained without bond if the
accused is either a flight risk or a danger to the community. This finding must be made after providing a defendant with procedural due process (i.e., a hearing). 18 U.S.C. 3142(d), (f).

b) In most federal courts, there is a Pretrial Services Office that prepares a report and makes a recommendation as to bail. 18 U.S.C. 3154.

3) If the accused needs counsel, the judge will take a financial affidavit from the defendant. If indigent, the judge will appoint a lawyer to represent the defendant (18 U.S.C. 3006A).

   a) Federal Public Defender or private counsel.

   b) A defendant has a constitutional right to represent himself or herself.

c. The judge sets the next hearing on the criminal charge:

   1) Indictment: Arraignment.

   2) Information: Arraignment.

   3) Complaint: Preliminary examination to determine probable cause to see if the case should be bound over for presentment to a federal grand jury.

d. The judge sets the next hearing on the question of bond if there has been a motion to detain filed by the United States Attorney or if the judge has moved to detain the defendant on the court’s own motion.

   1) Attached is a summary of the statutory provisions authorizing a detention hearing. (See attachment 1.)

3. Preliminary Examination. The preliminary examination is an evidentiary hearing held to determine whether there is probable cause to find that the alleged crime was committed and that this defendant was involved in the commission of
the crime. Defendant shows up with a lawyer, either retained or appointed. Both the prosecution and defense may call witnesses. The burden of proof (the burden of going forward and of proof) is on the government. Fed. R. Crim. P. 5 (c). The government must establish by its evidence each and every essential element of the statutory offense. The burden of proof (that is, the weight of the evidence) must meet the standard of probable cause.

A. If the judge finds probable cause, the case is bound over for presentment to a federal grand jury. It must be presented in 30 days.

B. If the judge does not find probable cause, the defendant is discharged from any further supervision by the court. The case is not bound over for grand jury presentment.

1) However, the U.S. Attorney may still go to the grand jury and seek an indictment.

4. Grand Jury. A grand jury is a group of 23 citizens drawn from the community to hear evidence presented by the government and decide whether or not felony criminal charges should be returned by way of an indictment. The standard of proof required to return an indictment is probable cause. The grand jury meets in secret.

A. In the federal system, all grand jury proceedings, except deliberations, are recorded by a court reporter. Sixteen or more grand jurors must be present to have a quorum. At least twelve or more must vote to return an indictment. Both the foreperson of the grand jury and the prosecutor must sign the indictment.

5. Detention Hearing. (This applies to federal court only.) If bond has not been set at the first appearance, a bond hearing is held to determine whether the defendant is a flight risk or a danger to the community. Defendant appears with counsel, either retained or appointed. Both parties may present evidence including witnesses and exhibits. The burden of proof is on the government to prove that the defendant is a flight risk (preponderance of the evidence) or a danger to the community (clear and convincing evidence). The defendant is either released on bond, a bond is set but the defendant is unable to make the bond, or the defendant is detained without bond as a flight risk, a danger, or both. If detained, the judge must prepare a written order detailing the facts relied upon and the inferences drawn. 18 U.S.C. 3142(i). The defendant may appeal the decision to the district court or the court of appeals.

B. Preponderance is 51% to 49%.

C. Clear and Convincing is somewhere between preponderance and beyond a reasonable doubt.

D. Presumptions: Statutory presumptions against release as a flight risk or a danger to the community.

6. Arraignment (Fed. R. Crim. P. 10). Defendant and counsel appear in court. Government is present. The judge reads the information or indictment, advises the defendant of the penalty range, advised the defendant of the constitutional rights under the fifth and sixth amendments, and asks the defendant for a plea. The court sets the case for trial. Under the Speedy Trial Act, criminal trials in federal court generally must be conducted within 70 days of the arraignment unless the defendant or the government seek a continuance.

A. Usually, the defendant tenders a not-guilty plea to the judge. The judge enters the plea in the record and sets the case for trial.

B. What if the defendant pleads guilty? Usually, the judge will not accept the guilty plea but enter a not-guilty plea despite the defendant’s protestations.

7. Discovery and Motion Practice. During this pretrial stage, the parties engage in mutual discovery as to the evidence to be presented at trial. The parties also file any appropriate pretrial motions including motions for discovery and motions attacking the criminal prosecution. Fed. R. Crim. P. 12.

A. Motions for Discovery. Motions to disclose witness statements, other evidence including audiotapes, videotapes, tangible objects such as drugs, guns, etc.

B. Motions Attacking the Prosecution: Motions to dismiss on jurisdictional grounds, motions to suppress on constitutional grounds such as a violation of the fourth (search and seizures), fifth (Miranda), and sixth (right to counsel) amendments.

8. Guilty Plea (Fed. R. Crim. P. 11). Normally, the parties (plaintiff and defendant) resolve the criminal case through a plea bargain agreement. In such cases, the defendant agrees to plead guilty in exchange for some relief recommended by the prosecution. The plea agreement is usually written and signed by the lawyers and the defendant.

A. Before a guilty plea is tendered by the defendant, the court will go through a lengthy examination of the defendant and the lawyers
to make sure that the plea is knowledgeable and intentional.

1) Attached is a copy of a checklist used to accept a guilty plea in federal court. (See attachment 2.)

B. The Federal Sentencing Guidelines. What is the defendant’s criminal history? What is the level of the offense? Are there aggravating or mitigating factors which are disputed or agreed upon?

C. Types of Pleas:

1) Guilty: “I did it.”

2) Not Guilty: “I didn’t do it.”

3) Nolo Contendere (“no contest”): “I neither concede nor contest the government’s charge.”

   a) No effect on parallel civil litigation.


A. Defendant’s Rights:

1) Defendant is presumed innocent.

2) The government has the burden of proof (both going forward and substantive proof). The burden never shifts to the defendant.

3) The government must prove the defendant’s guilt beyond a reasonable doubt (not proof beyond all possible doubt, but beyond a reasonable doubt).

   a) This burden applies to each and every element of the crime.

4) In any serious offense (not a petty offense), the defendant is entitled to a jury trial. Art. III, section 2, and the sixth amendment. (The court looks at the
nature of the offense and the penalty to determine whether a jury is necessary.) The jury is usually composed of twelve members plus alternates (the number 12 is by statute and not constitutionally required). Fed. R. Crim. P. 23. In federal court, the verdict must be unanimous.

a) Some states allow less than 12 jurors in non-capital cases. Florida is such a state.

B. Note: The facts in dispute are decided by the jury. The judge simply referees the proceedings and gives the jury the law that must be applied to the facts as they find them to be.

C. Trial Procedure (Speedy Trial Act, 18 U.S.C. 3161 et seq.):

1) Voir Dire: Judicial Dodge Ball. Who will sit on the jury?

2) Opening Statements: What’s this case about?

   a) The government makes its statement.

   b) The defense may make its statement or reserve it for later.

3) Government’s Evidence: Why defendant is guilty.

   a) Witnesses (direct and cross).

   b) Exhibits.

4) Defendant’s Motion for Judgment of Acquittal (Fed. R. Crim. P. 29(a).) Is there sufficient evidence for a reasonable jury to find defendant guilty?

5) Defendant’s Opportunity to Present Evidence: Why defendant is not guilty.

   a) If defendant has reserved opening statement, he or she makes it now.
b) Witnesses (direct and cross).

c) Exhibits.

d) Defense Rests.

6) Government’ Rebuttal Evidence (if any).

   a) Government Rests.

7) Defendant’s Sur-Rebuttal Evidence (if any).

   a) Defense Rests.

   b) Motion for Judgment of Acquittal 
at the Close of All the Evidence 
(Fed. R. Crim. P. 29(a), (b).

8) The Court’s Instructions on the Law: What is the 
   law to be applied in this case? (Fed. R. Crim. P. 30).
8) Closing Argument: These are the facts and the 
   reasonable inferences that may be drawn from those 
   facts (Fed. R. Crim. P. 29.1).

9) The court excuses the alternates (Fed. R. Crim. P. 
   24(c)).

9) Jury Deliberations: In secret.

10) Verdict: Accept or reject the verdict. Poll the 
    Jury.

    a) What if they are not unanimous? 
    Mistrial. Do it all over again.

    b) Not guilty: Defendant is released 
    from any further court supervision. 
    Government cannot appeal.

    c) Guilty: Defendant is either 
    continued on bond or imprisoned. A 
    Pre-Sentence Report is ordered. 
    Defendant may appeal after 
    sentencing.

D. Remember that a defendant can waive any right including
his/her right to trial by jury (Fed. R. Crim. P. 23). The defendant must be competent, the waiver must be in writing and on the record, and the waiver must be a knowing and intentional act.

10. Sentencing. Attached is a checklist of the procedure followed in sentencing. (See attachment 3.)

11. Appeal. The defendant has a right to appeal to the U.S. Court of Appeals.

   A. Notice of Appeal filed in district court.

   B. District court record is designated to the court of appeals.

12. Writ of Certiorari. The defendant does not have a right to appeal to the Supreme Court. Instead, the defendant must apply to the Supreme Court and ask the Court to hear his or her case. The application is called a writ of certiorari. If the writ is granted, the Supreme Court will hear the case. If the writ is denied, the opinion of the lower court, i.e., the court of appeals, is the final word on the subject.