20th Anniversary Edition (2006)

What You Should Know If You're Accused Of A Crime

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Foreword by the Hon. Milton Mollen
Former Presiding Justice Appellate Division
Second Judicial Department

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F O R E W O R D

Anyone confronting the bewildering and, to many, the intimidating and nerve shattering complexities of the New York criminal justice system for the first time in his or her life, will find Joyce David's handbook outlining the ABC's of the system an invaluable tool in dealing with them.

A highly-respected attorney with a wealth of first-hand experience in all aspects of criminal law, Ms. David's thorough, step-by-step description of what a criminal case is all about, written in language readily understood by the average layman, unschooled in legal procedures and terminology, will do much to ease the pain of that first encounter with the law.

Ms. David, expertly and concisely, spells out just what he or she may expect at every stage of the case, explaining just what will happen and why.

As she points out correctly in her own introduction, those exposed for the first time to the criminal justice system often feel as though they are in a foreign country, with strange new rules, procedures and language. WHAT YOU SHOULD KNOW IF YOU'RE ACCUSED OF A CRIME provides the anxious "tourist" with a thoroughly professional and knowledgeable guidebook.

Hon. Milton Mollen*
Presiding Justice
Appellate Division
Second Judicial Department
(1986)

*** After Judge Mollen retired from the bench in 1990, he was appointed Deputy Mayor for Criminal Justice for the City of New York by former Mayor David Dinkins. He was subsequently appointed to head the "MOLLEN COMMISSION", which investigated corruption in the New York City Police Department.**

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INTRODUCTION

People exposed to the Criminal Justice System for the first time often feel like they're in a foreign country with strange rules, procedures and language.

This handbook is geared to the State and Federal system in New York, but many of the general principles apply to other jurisdictions as well. It's based on 30 years of experience in the trenches. It's a realistic, not a philosophical, look at the system.

This handbook has general information and shows how cases make their way through the system. Most of the legal terms used are explained in the text or are self-explanatory.

This handbook does not deal with specific cases or crimes. Some information is too technical, fact specific, or complicated for this book.

The Criminal Justice System, just like the rest of life, is not always fair. That doesn't mean that we give up, it just means that we try harder.

CHOOSING A CRIMINAL LAWYER

If you can afford a private lawyer, you should hire a criminal lawyer. You wouldn't go to an eye doctor for a problem with your elbow. Don't hire a lawyer who approaches you in the courthouse. Lawyers are not supposed to solicit clients that way.

Find out how much criminal experience a lawyer has before hiring her. The more serious the charges against you, the more experienced a lawyer you need. Federal Court is the big time. Make sure your lawyer is thoroughly familiar with Federal practice before retaining her on a Federal case.

It helps if your lawyer practices where your case is pending. She'll know the Judges and ADA's (Assistant District Attorney – State Prosecutor) or AUSA's (Assistant United States Attorney – Federal Prosecutor) and will have a better idea of what you can expect in your case. You also have an advantage if the Judges and ADA's or AUSA's know and respect your lawyer. They're more likely to listen to her if she has a good reputation.

In certain cases it might be especially advantageous to be represented by a woman lawyer – if you're accused of committing a crime against a woman.

LAWYER/CLIENT RELATIONSHIP

It's important to trust your lawyer. Her job is to defend you and protect you from the system, whether you're innocent or guilty. If you committed the crime or participated in some way and don't feel comfortable telling your lawyer, you should get a different lawyer.

You're not helping yourself if you think your lawyer will do a better job if she thinks you're innocent. It's not a good lawyer/client relationship if you don't trust her enough to be truthful. Your lawyer can't advise you effectively if you keep things from her. Everything you tell your lawyer is confidential, even if you eventually hire a different lawyer. The lawyer's obligation is to her client, no matter who is paying the fee.

Ask your lawyer to explain what's happening with your case. Don't think your questions are stupid just because you don't understand the system. It's a complicated system - that's why you need a lawyer's help.

Just because your lawyer isn't in touch with you all the time, doesn't mean she isn't working on your case. There may be times when your lawyer may have to give priority to another client's case. This is most likely to happen when she's doing a trial. Trial is the most important and difficult part of a case. It demands the most attention and concentration.

Don't be upset if your lawyer can't appear on your case when she's on trial with another client. It doesn't mean your case isn't important, just that at this time, another client's case needs priority. You'll appreciate this when your case goes to trial. You wouldn't want your lawyer distracted by less pressing matters when you face your moment of truth.

LAWYERS' FEES

Lawyers' fees vary depending on the amount of experience they have and the nature of the case. Fees for Federal criminal cases are generally higher than for State criminal cases. It's best to have a clear understanding about the fee before any work is done, so your lawyer can concentrate on your case and not your bill.

Your lawyer's fee will usually not include any other expenses. You usually have to pay separately for a private investigator, expert witnesses (if necessary), transcripts, etc. Appeals, civil work and re-trials are also usually extra.

Criminal lawyers usually require most or all of their fee up front. This should all be clearly spelled out in the *retainer agreement* you sign when you retain the lawyer.

Ironically, innocent people often have to pay higher fees. Because they're less likely to plead guilty, their cases usually require more work, to prepare for, and take through trial. You shouldn't be looking for bargains when your freedom and reputation are at stake.

ASSIGNED COUNSEL

Many people accused of crimes can't afford to hire a private lawyer and are assigned a lawyer from a public defender organization or a lawyer from the 18-b Panel (for State cases) or from the Criminal Justice Act Panel (for Federal cases). *18-b lawyers* and *CJA lawyers* are private lawyers who accept assignments of criminal cases from the court and are paid by the State or Federal government to represent indigent defendants. Even though they are being paid by the government, they represent you, not the government. You can't choose your assigned lawyer.

If two or more defendants are charged with committing a crime together, one defendant may be represented by a lawyer from a public defender organization and the other(s) may be assigned an *18-b lawyer* or *CJA lawyer*, so that there is no conflict of interest. You may also get an *18-b lawyer* or *CJA lawyer* if the public defender organization represents a witness against you.

WHY YOU NEED A LAWYER

The sooner you get a lawyer involved in your case, the better. There are important decisions to be made, and rights to be protected, early in a case, that may affect the outcome.

If you hear that the police, or FBI, or anyone from law enforcement, are looking for you, call a lawyer before responding to them. She can find out what they want - if they want to question you as a witness or a suspect, or if they intend to arrest you. If you're a suspect, she can tell them that she doesn't want you questioned. If they know you have a lawyer and talk to you after that, they can't use your statements against you, unless they can prove that you blurted out a confession without being asked any questions. If they want to arrest you, at least you will know, and have the opportunity to surrender, instead of being picked up at your home or place of employment, and embarrassed in front of your family and friends.

If you're accused of drunk driving, try to call a lawyer before you submit to any testing. If you refuse to submit to certain testing you may lose your driver's license, but if you submit to testing and are found legally intoxicated, there may be more serious consequences.

If you're arrested, call a lawyer or someone you can count on to help get you one. Be careful what you say on the phone - the police may overhear what you say. If you can't call a lawyer, tell whoever is arresting you that you want a lawyer, and do not answer any questions except *pedigree information* (name, address, height, weight, date of birth, etc.). Do not discuss anything about the charges against you. Do not give the police a different name or date of birth each time you're arrested. It will show up on your rapsheet and be used against you.

SILENCE IS GOLDEN

The police, and FBI, etc., are good at getting confessions. It's the easiest way for them to wrap up a case. If they trick you into confessing by telling you things will go easier for you or that a co-defendant has implicated you, this may be considered good police work, and a Judge may allow them to use your statements against you. It's harder to defend you if you've made a confession. Even telling them that you were at the scene of the crime but didn't do anything is an admission to an element of the crime.

If you're arrested, don't answer any questions about any crimes. Don't write or sign any statements. Don't let yourself be audio or video taped. Don't think you can outsmart law enforcement, or that they'll release you if you talk to them. They want to make a case against someone they suspect committed a crime. They're not your friends. They may mislead you if they want you to talk to them, and you may find yourself under arrest based on your own statements. If they stop you on the street, they may be able to use what you say against you even if they don't read you your rights (right to remain silent; anything you say can be used against you; right to have a lawyer during questioning; if you can't afford a lawyer one will be provided for you), because they don't have to read you your rights if you're not in custody. Tell them you want a lawyer, whether they read you your rights or not, and if they suggest that you don't need a lawyer if you didn't do anything wrong, don't fall for it.

Whatever you do, don't lie, especially to the Feds. Lying to the Feds about anything material is a separate crime. Even if they can't ultimately prove the case against you for which you've being arrested, if you lie to them they can prosecute you for that. Your silence can't be used against you.

If you're in Federal jail, all of your telephone calls are recorded and the AUSA's often listen to recordings of your calls to get more evidence against you. Don't think you can use code words on the telephone. The AUSA's will be allowed to call an *expert witness* at trial who will testify that you used code words, and what you probably meant. This also happens if you're caught on a wiretap talking about illegal conduct using code words.

If you're in jail and have an *Order of Protection* and call someone and ask them to make a conference call to the person you're not supposed to call, it can be traced back to you, and prove that you did make the call and violate your *Order of Protection*, which will subject you to additional charges, which will be more difficult to defend.

If you're in jail, be careful what you say to other inmates. They may try to work out their own problem with the law by becoming a witness against you. Be careful about discussing your case with co-defendants. You never know when they might decide to take a plea and/or cooperate with the government against you. This often happens in big Federal cases. Don't let any other inmates see your paperwork. They may learn details about your case that they can use to claim that you confessed to them, and testify against you in court, to help themselves.

Don't talk to the Press.

DON'T WAIVE YOUR RIGHTS

Don't consent to a search of your home, your car or your person. Don't consent to being put in a *line-up* or *show-up*. This doesn't mean you should physically resist, just that you should object and tell the police you want a lawyer. If you consent, you *waive* (give up) your right to challenge in court whether the police or FBI had the right to do whatever you consented to.

Don't resist arrest or become verbally abusive to the police or FBI or you might find yourself charged with additional crimes, and possibly injured in the arrest process. If you're the victim of police brutality, try to have pictures taken of your injuries. If you want to sue contact a Civil Attorney right away - there may be certain time limits for filing a lawsuit.

LINE-UPS

If the police are going to put you in a *line-up*, ask to have a lawyer there. She can determine if they have the right to do so, and if they don't, she can protect you. If they have the right to put you in the line-up, your lawyer can monitor the procedure to make sure it's done fairly and that the police don't do anything improper, like suggesting in some way that the witness pick you out.

A lawyer is very helpful at this stage. She can help you choose the best place to sit and number to hold, to minimize your chance of being picked. If you're not picked out of the *line-up*, your case may be over before it begins, and you'll save a lot of hassle and money.

If the people placed in the *line-up* with you don't resemble you, she can ask the police to find better fillers. If they won't find better fillers, she can note differences in appearance between you and the fillers to help later when the ADA tries to use the *line-up* identification against you. The police usually take a picture of the *line-up* that doesn't clearly show the differences between you and the fillers. If you don't have a lawyer at the line-up, this photo and the police testimony will often be the only evidence a Judge will have, to decide if the *line-up* was fair. A *show-up* is a one on one identification procedure, often done on the street when the police make an arrest shortly after the crime.

Identification cases are difficult to defend. There is scientific evidence that people of one race have a difficult time distinguishing people of another race. If your case involves a *cross-racial identification* your lawyer may try to get an expert witness to testify about this at your trial. Even though there is a lot of scientific evidence that identification testimony is not always accurate, jurors tend to believe that a victim will remember the person who committed the crime. At trial a prosecutor may try to tell a jury that the eyes are like a camera. That is not accurate, and your lawyer should not allow a prosecutor to get away with a statement like that.

ACTING IN CONCERT

If you're accused of committing a crime with other defendants, you can be charged with everything your co-defendants are charged with. Even if your participation was minor, like being the look-out, or driving the get-away car, you can be charged with the more serious crime(s) committed by your accomplice(s).

If you're arrested for *felony-murder* (where a non-participant is killed during the commission of certain felonies), and you tell the police that you were "just the look-out, but didn't shoot anyone," you may have just confessed to *felony-murder*, which is just as serious as if you killed the victim yourself.

Certain crimes are considered more serious and result in greater penalties just because they're committed by more than one defendant - *acting in concert.*

In a Federal drug conspiracy case, you may be held accountable for all the drugs the conspiracy was involved in, even if you only dealt with a limited amount. Also, your role in the conspiracy may be taken into consideration in determining your sentence, which can be a good thing or a bad thing, depending on whether you played a minor or a major role.

SURRENDER

If the police are looking to arrest you, your lawyer can arrange for you to surrender. If you surrender, it will show the court that you're a responsible person who is likely to return to court. Your lawyer can tell the Judge that you knew the police were looking for you, that you had the chance to run, but didn't. It helps your lawyer's argument to the Judge that you are worthy of being *released on your own recognizance* (ROR'd), or on low bail. Surrendering won't guarantee low bail, but it gives you a better shot. Bail is money or property that is posted to make sure that you will return for your court appearances.

If you surrender, and your lawyer does not accompany you, make sure the police know that you have a lawyer and that your lawyer told you not to answer questions about the case. If possible, have an extra copy of your lawyer's card, or at least have her phone number, to give to the police.

Don't wear any expensive jewelry when you surrender. Try to leave your keys or anything of value with a loved one. This way you won't have to worry about going back to the precinct to get your personal property when you're released from custody. Just bring some change in case you get access to a payphone and want to make a call.

Surrendering may also be helpful later on in your case, if you go to trial. If someone runs away when they know the police are looking for them, a prosecutor can ask the Judge to instruct the jury that *flight shows consciousness of guilt.* By surrendering, your lawyer can use that to your advantage at trial.

THINGS YOUR LAWYER MAY NEED TO KNOW

There are things your lawyer needs to know, to defend you. Below is a list of some information she may need:

1) Whether you have any witnesses. These include alibi witnesses; character witnesses & eyewitnesses;

2) The names, addresses and phone numbers of your witnesses, so she can get their statements, and advise them of the disadvantage to you if they speak to the prosecutor;

3) Where and when you were arrested, and the circumstances surrounding your arrest;

4) Whether you were shown to any witnesses by law enforcement, and the specifics of that identification procedure;

5) Whether law enforcement found anything on you, or in your car or residence, relating to the crime;

6) Whether law enforcement had an arrest warrant or a search warrant;

7) Whether you know the witnesses against you, and if they have any motive to lie against you;

8) Whether you made any post arrest statements to law enforcement. If so: Were you read your rights?; Did you write or sign anything?; Were you audiotaped, or videotaped?; Were you threatened in any way?; Was any force used against you?; Do you have any injuries?

9) Whether you're on probation or parole;

10) Whether you have problems that may affect your case: like mental or physical problems; or problems with drugs or alcohol. These problems may help in your defense;

11) Your immigration status. If you're not a citizen, a criminal conviction may create problems with immigration, causing you to be deported or removed. If you're not a citizen, you should also consult with an Immigration Lawyer.

THE ARREST

The cops can arrest you, without a warrant, if they see you committing a crime or if they have *probable cause* to believe you committed a crime. All it takes is one person making a criminal complaint against you, without any corroboration, to give the police *probable cause* to arrest you. They'll arrest you even if you tell them you're innocent. They hear that from almost every defendant, even the guilty ones, so they leave it for the courts to decide.

The police can charge you with possession of a gun or drugs, even if they don't find anything on you, if a witness claims she saw you with a gun or drugs.

The police should have an arrest warrant if they're arresting you at home, or a search warrant to search your home, but there are exceptions to every rule. If they say they have a warrant, ask to look at it.

BOOKING

When you're arrested, you'll be processed by the police – *booked* - before being brought to court for arraignment. The amount of time between arrest and arraignment should be less than 24 hours. At the precinct you will probably be searched. If the police take any personal property from you, ask for a receipt (sometimes called a *voucher*). You will need this later to help you get your property back.

You will also be fingerprinted and photographed. Do not scowl at the camera when your mugshot is being taken. You never know how your mugshot may be used (by the newspapers or at your trial), and it doesn't help you if you look mean or scary.

There may be an identification procedure at the precinct. If you and the complainant are strangers there should be a *line-up*. If the complainant allegedly knows you, there may be a *show-up* or *confirmatory identification*. Either way, the complainant will view you through a one-way mirror (s/he can see you but you cannot see him/her).

You will probably be placed in a cell until the police are ready to take you to Central Booking. There are sometimes delays in the booking process. Your fingerprints are checked to get your criminal record and to see if you have any warrants. Sometimes the computers aren't working and this delays getting your criminal record. If it's your first arrest, the process often takes longer. If you refuse to be fingerprinted, you can be held until you agree.

PRE-ARRAIGNMENT INTERVIEW

If you're arrested in New York City for a State offense, after you're *booked*, you'll be interviewed by the Criminal Justice Agency, about your residence, employment, criminal record, etc. (not about the facts of the case). They prepare a report making a recommendation to help the Judge decide what bail to set for you. If you're arrested by the Feds, after being processed by whatever agency arrested you, you'll be taken to the appropriate Federal Courthouse, and interviewed by Pre-Trial Services, who prepares a report to help the Judge make decisions about your release from custody. Pre-Trial Services sometimes asks questions about the offense. Do not answer questions about the offense.

It's important not to lie to the Criminal Justice Agency or to Pre-Trial Services. They will contact a friend or family member (depending on the name you give them as a contact person) to verify your information. If you give them incorrect information, it may hurt your chance of getting low bail, because they'll note the fact that your information was inconsistent with the verifier's, and it will look like you're trying to hide something from the court. In addition, lying to the Feds about anything material is a separate crime.

If you give a phony name when you're arrested, the ADA or AUSA may use it against you later to ask a Judge to set high bail because you tried to hide your identity, or use it to impeach your credibility, if you testify at trial.

WHAT ELSE HAPPENS BEFORE ARRAIGNMENT

While you're being *booked* and interviewed by the Criminal Justice Agency or Pre-Trial Services, an ADA or AUSA may be drawing up a the formal charges against you. In the State system, this is usually done by the DA's (District Attorney's office) Early Case Assessment Bureau (ECAB). They interview the arresting officer and/or the witnesses/victims, and decide what you'll be charged with. They may charge you with different crimes than the police did.

All of the above must be done before you are brought before a Judge for arraignment. There are sometimes delays in seeing a Judge. The system may be backed up if a lot of people have been arrested before you, who are also waiting for arraignment. Sometimes it takes more than 24 hours. You may get upset at this, but there's not much you can do about it. Your lawyer can find out where you are in the system and let your family know approximately when you'll be arraigned. In certain counties, private lawyers are given preference once you're produced in court, and this can speed things up a little.

You will wait at Central Booking until your paperwork is completed and it is your turn to see a Judge. If a lawyer is assigned to represent you, she will meet you for the first time before you see the Judge. She will read you the charges against you and ask you questions to help prepare for bail arguments.

ARRAIGNMENT ON COMPLAINT

At the arraignment, your lawyer will enter a plea of not guilty to the charges against you. She may *waive formal arraignment,* so the charges against you won't be read aloud in open court (because she has already explained them to you). Your lawyer and the prosecutor may even have a private discussion about your case with the Judge (*bench conference*). Your lawyer can get some valuable information from the prosecutor at a *bench conference*. She will then tell you whatever she learned at the *bench conference*.

In State Court, there is often some discussion about a plea-bargain. Certain cases are disposed of at the arraignment. Your lawyer will discuss the offer with you and advise you if she thinks it would be a good idea to accept it. Sometimes felony charges are even reduced to misdemeanors at the arraignment, for the purposes of a plea.

If the charges are serious felonies, they probably won't be disposed of at the arraignment. The ADA may give notice that she intends to present your case to a *Grand Jury*. Your lawyer may give reciprocal notice, that you wish to testify in the *Grand Jury* on your own behalf. The *Grand Jury* will be discussed later in this book.

In Federal Court the arraignment on a complaint is similar but your lawyer will also be asked if she waives your right to a *preliminary hearing*. She will discuss with you the fact that even though you are entitled to a *preliminary hearing*, the AUSA can circumvent that request by presenting their evidence to a *Grand Jury* instead and getting an *Indictment* (more formal accusation) against you. You will usually agree to waive the *preliminary hearing* because it gives you greater flexibility in plea-bargaining and because you never get a *preliminary hearing* anyway. If you don't waive it, you just get indicted sooner.

The witnesses against you do not have to come to the arraignment - or appear in court at all unless they are needed to testify against you at a hearing or at trial.

BAIL

In State Court, the prosecutor will probably ask the Judge to set bail or *remand* you (hold you without bail), and make arguments to support her request. Your lawyer will then argue that you should be *released on your own recognizance* (ROR) or for the Judge to set low bail.

The Judge will then either set bail (cash and/or bail-bond); *release you on your own recognizance* (no one has to post bail to get you released); or remand you without bail (keep you in custody) if you're charged with murder, if the charges are felonies and you already have a pending felony, or if you have a history of missing court appearance (*bench warrants*).

It helps to have friends and family members at the arraignment. The bail may be lower if your lawyer can show the Judge you have strong community ties, as evidenced by the people who come to court for you. Have your people bring money with them for bail. Your lawyer can often estimate the amount of bail the Judge will set, depending on the nature of the case, your criminal record, your community ties, and which Judge is presiding in arraignments. If your people have money with them at the arraignment and the Judge intends to set bail that's a little more than they have, your lawyer can tell the Judge the amount of money your people have with them, and the Judge might set the bail at that amount, so you can be bailed out from court. It's easier to post bail at arraignment. Once you're removed from the court building, bail must be posted at the jail you're in or at other designated places, and the process takes longer.

The first bail that is set is the most important. It's hard to get bail reduced by another Judge unless you can show there's been a change in circumstances in your favor since the first bail was set.

Bail can be posted by a bail-bond or in cash. When a Judge sets bail, she usually sets a bond amount and a cash alternative. To get a bail-bond, your people have to see a bail-bondsman. He requires at least 5% of the bond in cash, and collateral for the rest, like a house or bank book.

Bail is very different in Federal Court. In Federal Court, the AUSA and defense attorney may agree to a *bail package* – which is a combination of factors that will allow you to be released. If the AUSA does not agree, you can still present a *bail package* to the Judge, but you have a better chance of being released if your lawyer can persuade the AUSA to agree.

Whether or not your *bail package* will be accepted will largely depend on the recommendations in the Pre-Trial Services report and the nature of the charges against you. There are certain cases that are referred to as *presumption cases*, where, based on the nature of the charges (serious drug conspiracies, etc.), if you are facing such heavy jail time, there's a presumption that you will flee. In these cases, to even have a chance of being released, the *bail package* has to include some valuable real estate.

For serious cases, the *bail package* may be a Federal bail-bond in the amount of several hundred thousand dollars, often secured by real estate, and co-signed by several relatives or friends (suretors) with good jobs. Whoever puts up their property for you will have to file a lien against their property, called a *Confession of Judgment.* This means they can't sell their property, or refinance it, or use it for collateral for any other loan until your case is over. In addition, in a serious case, you may also be subject to home confinement and/or electronic monitoring (by ankle bracelet) – and have to pay the costs of the monitoring, as a condition of your release. In both State and Federal Courts, if the bail is high, the prosecutor and/or Judge may require a *bail source hearing* to make sure the cash and/or property being offered is clean (usually in drug cases to make sure that no drug money is involved).

For less serious Federal cases, *bail packages* may be less restrictive. You may even be released on a *Personal Recognizance Bond* (PRB), which means you sign a bond agreeing that if you violate any of the conditions of your release, you will owe the Federal government whatever the dollar amount of the bond is. Sometimes a PRB has to be co-signed by suretors with good jobs, who agree that if you violate the conditions of your release, they will owe the Federal government whatever the dollar amount of the bond is. You and your suretors will be instructed about the ramifications of signing the bond and the Judge will warn you that if you violate your conditions of release (which may include travel restrictions; reporting to Pre-Trial Services at the courthouse as often as required; and drug testing, as well as appearing in court on your case), not only will you be returned to custody and face additional charges for bail jumping, but the Federal government will also come after you and your suretors for the dollar amount of the bond, even if they have to seize their property or garnish their salaries until it is paid.

It is helpful if your loved ones are in Federal Court when you are arraigned - prepared with proof of ownership of any property they are willing to post as part of a *bail package*, as well as proof of employment, such as a pay stub, that shows where they work and how much they earn. This will make it possible for you to be released from court if your *bail package* is accepted. Otherwise you may remain in custody until your lawyer can schedule a bail hearing when she is ready with a *bail package*.

WHAT HAPPENS AFTER ARRAIGNMENT ON COMPLAINT

In the State Court system, if you can't make bail on a felony charge, the DA has six days from the date of your arrest, to have witnesses give sworn testimony supporting the charges against you, either at a *preliminary hearing* (rare) or before a *Grand Jury*, which then votes an *Indictment.* If the 6th day falls out on a Saturday, Sunday, or court holiday, the DA has until the end of business on Friday before the weekend, to get an *Indictment.* If not, you are entitled to be released from custody (ROR'd), unless the DA can show *good cause* to get an extension of time. If you are charged with an assault and the complainant cannot testify because of his/her medical condition, this may be an example of *good cause* that would allow the DA to get an extension of time. Most serious felonies are presented to a *Grand Jury* within the time frame allowed by law, to prevent the defendant's release.

It's rare to get a *preliminary hearing* in New York City because at a *preliminary hearing* the defense lawyer can cross-examine the witnesses. ADA's would rather not expose their witnesses to cross-examination at this early stage and they avoid this by going to the *Grand Jury* instead. *Grand Jury* proceedings are secret and your lawyer can only be present when/if you testify.

GRAND JURY

A *Grand Jury* is comprised of 16 to 23 people who hear evidence presented by the DA and decide if there's enough evidence to transfer your case to the Supreme Court as a felony. 12 grand jurors can vote an *Indictment,* or they can return the case to Criminal Court as a misdemeanor if they think there is not enough evidence for felony charges but is enough for misdemeanor charges, or they can fail to indict – which is called *No True Bill.* The *Grand Jury* is an arm of the DA's office. The DA can easily get an *Indictment* because the *Grand Jury* usually only hears one side. There's no Judge to rule on the admissibility of evidence or defense lawyer to cross-examine the witnesses, and they usually don't hear from the defense.

If you've been arrested, your lawyer will be notified if the DA intends to present your case to a *Grand Jury*. If you wish to testify in the *Grand Jury* and/or present witnesses in your own behalf, your lawyer must notify the DA before the *Grand Jury* presentation is completed. You have a right to testify in the *Grand Jury,* but your lawyer must get permission by writing a letter addressed to the Foreperson of the *Grand Jury,* in order to present other witnesses. If you testify, your lawyer can be there with you, but she can't ask questions or make objections. She can't be there if/when your witnesses testify.

If you testify in the *Grand Jury,* you will be required to sign a *waiver of immunity* wherein you acknowledge that anything you say in the *Grand Jury* can be used against you later at trial.

There are pros and cons to testifying in the *Grand Jury*. If things go well for you, and the *Grand Jury* votes *No True Bill,* your case will be over, saving you a lot of hassle and money. But most of the time, a *Grand Jury* does indict. This is because their job is not to decide if you are innocent or guilty, by the standard of proof that is required of a trial jury – proof beyond a reasonable doubt. Their job is just to decide if there's *probable cause* to believe that you committed a crime. A much lower standard of proof is required to get an *Indictment,* and if the grand jurors are not sure who to believe, they are supposed to indict. If you do testify before the *Grand Jury,* and you get indicted anyway, the DA will know your defense, and may have locked you in to certain details that give your lawyer less to work with at trial. If you testified in the *Grand Jury,* the ADA will be able to use your *Grand Jury* testimony to cross-examine you at trial, or as evidence against you, if you made any admissions during your *Grand Jury* testimony.

Your lawyer will also be entitled to copies of the *Grand Jury* testimony of any witnesses who testify against you at trial, assuming they testified in the *Grand Jury*. This helps you lawyer cross-examine the witnesses against you.

In Federal Court, the prosecutor is allowed to get an *Indictment* by presenting hearsay evidence. The AUSA can have Case Agents testify to what they have learned from their investigation. This makes it much more difficult to use *Grand Jury* testimony to cross-examine the witnesses who testify against you at trial in a Federal case.

INDICTMENT

An *Indictment* is a formal accusation listing the felony charges against you. It is not evidence. The difference between an *Indictment* and a complaint is that an *Indictment* is based on sworn testimony.

If you're indicted in State Court, your case is transferred from the Criminal Court to the Supreme Court. If you're out of jail, you and your lawyer may be notified by mail, when to come to Supreme Court to be arraigned on the *Indictment.* If you're in jail, you'll be brought to Supreme Court for arraignment and your lawyer will be notified to appear.

SILENT INDICTMENT

Occasionally cases are presented to a *Grand Jury* before anyone is arrested. If the *Grand Jury* indicts, this is often referred to as a *Silent Indictment* or an *X Indictment.* The same procedure may be followed if you were arrested for a felony and had your case dismissed by a Judge in the Criminal Court. The DA still has the right to present felony charges to a *Grand Jury* within six months of your arrest. There's no time limitation if you're accused of homicide.

In *Silent Indictment* cases, you won't be notified that your case is being presented to a *Grand Jury* and you may not have the chance to testify or present defense witnesses, unless your lawyer has learned about the presentation of evidence and notified the DA's office of your intention to testify in your own behalf. You'll still be able to present your defense at trial. If you're indicted this way, an arrest warrant is usually issued and you're brought to Supreme Court for arraignment on the *Indictment,* bypassing the Criminal Court.

ARRAIGNMENT ON INDICTMENT

The Supreme Court arraignment is similar to the Criminal Court arraignment on the initial complaint. You're advised of the charges against you and there's a decision on bail. If you're out of jail and have been coming to court when you were supposed to, and if you appear for arraignment when notified, your bail status will probably remain the same.

Your lawyer gets a copy of the *Indictment* from the ADA in court. She'll *waive the public reading* of the charges against you and enter a plea of not guilty for you. She may also get a *Voluntary Disclosure Form* (VDF), at this time from the ADA. The VDF has some information your lawyer needs to prepare your case. The VDF may also contain certain notices, if you made any statements when you were arrested, or if you were subjected to any identification procedures.

WHAT CAN HAPPEN TO YOUR CASE

In State Court almost all criminal cases (felonies, misdemeanors and violations) start in the Criminal Court. Cases that start as felonies and are reduced to misdemeanors and cases that start as misdemeanors or violations stay in the Criminal Court. Cases that are going to remain felonies must be transferred to the Supreme Court. To do this, the DA must present evidence to a *Grand Jury*, and get an *Indictment*.

There are only a number of things that can happen to a criminal case: It can be dismissed or ACD'd (sometimes called ACOD'd) (*adjourned in contemplation of dismissal* - explained later), by the DA or by a Judge in certain rare cases; you can plead guilty; or the case can go to trial (where you're either acquitted or convicted). Under special circumstances your lawyer may be able to get your case dismissed on a technicality, or in the interest of justice pursuant to a Clayton Motion.

If you get a dismissal, ACD, or acquittal after trial, your case will be sealed; your fingerprints should be destroyed and your arrest photo should be returned to your lawyer. Unfortunately these will just be souvenirs because the police usually keep a copy of your photo in their files and your fingerprints are kept in the criminal justice computers. Potential employers generally won't have access to your fingerprint record or information about your case, but if you're rearrested, it may show up. If you plead guilty to a *violation*, which is not considered a crime, your records will not be available unless someone goes to the courthouse to request them, even though you are usually told that they will be sealed.

If you're convicted after trial or plead guilty, in addition to facing possible jail time, you may be subject to fines, forfeitures and civil suits. If you're not a citizen, you may also be subject to deportation. If you're convicted of a felony, you may also lose some of your civil rights. Your lawyer may be able to get a *Certificate of Relief from Civil Disabilities* that may mitigate the effect of a felony conviction.

FELONIES

Serious crimes are called felonies. The most serious are "A" felonies, the least serious are "E" felonies. Certain felonies carry mandatory jail sentences, if you plead guilty or are found guilty after trial (conviction). This means you can't get probation. These are usually cases involving drugs or the use of a gun or violence -*armed felony offenses* and *violent felony offenses* (AFO's and VFO's).

If you're accused of a felony and have one or more prior felony convictions, jail sentences are mandatory and longer. Generally, one prior felony conviction makes you a *predicate felon*. More than one prior felony conviction makes you a *persistent felony offender* (three-time loser), and you face substantial jail time if convicted. If you're on probation or parole, a conviction after trial or plea of guilty to a new crime (misdemeanor or felony) can violate your probation or parole (VOP) and you'll probably get extra jail time, that will usually run consecutively with your new sentence.

MISDEMEANORS & VIOLATIONS

Less serious crimes are called misdemeanors. Offenses that are less serious than misdemeanors are called *violations* and are not considered crimes.

In the Federal Courts very few crimes charged are misdemeanors. The Federal Courts usually handle only serious crimes – felonies. Sometimes if someone commits a misdemeanor on Federal property they are brought to Federal Court and charged with a misdemeanor.

In the State system, if you're arrested for a misdemeanor, *violation*, or certain low-grade felonies, the police can, under certain circumstances, give you a *desk appearance ticket* (DAT), which is like a summons. Instead of going through the booking process and being held in jail until you're brought before a Judge for arraignment, you're released from custody and given a date to appear in court to be arraigned.

Penalties for misdemeanors and *violations* are not as serious as for felonies. You may be able to get an ACD (*adjournment in contemplation of dismissal*). This generally means your case is adjourned for six months (you don't have to return to court), and, if you don't get into trouble within that time, your case is dismissed and sealed, as if you were never arrested. You are more likely to get an ACD if it's your first arrest.

JUVENILE OFFENDERS/FAMILY COURT

Juveniles are treated as adults in the Supreme Court for certain crimes, but most juvenile's cases are handled in Family Court. Family Court is usually crowded and cases take longer to be heard. You may have to wait all day for your case to be called.

If a juvenile is not released to her/his parents after being arraigned, s/he may be held in custody until the *fact finding hearing*, (like a trial) in Family Court. There are no jury trials in Family Court. Many procedures and dispositional rules are different for juveniles.

COURT APPEARANCES

If you're out of jail while your case is pending, you must appear in court on every court date, unless your lawyer has arranged for you to be excused. It's your responsibility to know your court date and part. Unless you're told otherwise, be in court at 9:30 A.M.

If you get to court on time and don't see your lawyer, check to see if your name is on the court calendar to make sure you're in the right part on the right date. If it's the right part and date and your lawyer isn't there, she probably had to cover another case first. If you leave the courtroom to call your lawyer, tell one of the court officers, so they won't call your case and issue a *bench warrant* for you while you're not there.

The only time you should wait for a letter from the court, before appearing, is if your felony case has been transferred to the Supreme Court and you've been told to wait for notification of the Supreme Court arraignment date.

In Federal Court you are usually given a more specific time to appear in court. Sometimes you are not given a specific adjourn date and you have to wait to hear from your lawyer to find out when you have to go to court. Make sure your lawyer has up to date contact information for you. Let her know if you move or change your phone number.

BENCH WARRANTS & BAIL FORFEITURES

If you're late, or don't show up, the Judge may issue a *bench warrant.* You can be arrested on that warrant. If you're out on bail, your bail money can be forfeited. A *bench warrant* will stay on your record and come back to haunt you later, even if you clear it up. It will give a Judge an excuse to set higher bail on you in the future.

You can also be charged with *Bail Jumping*, which is a separate crime. It's almost impossible to defend that charge and may give the DA extra leverage in dealing with your current case. You can be charged with *Bail Jumping* even if you're out on ROR, if you fail to come to court when you're supposed to.

If you can't come to court because you're sick, or you've been rearrested, it's your responsibility to contact your lawyer. If you have an assigned lawyer, that's no excuse for not calling to let her know you can't come to court. You should have your lawyer's card with her name and phone number. Don't assume your lawyer or the court will know if you've been rearrested. If you have a good excuse why you can't come to court, and your lawyer knows about it before going to court, she can ask the Judge not to issue a *bench warrant.* Otherwise, the Judge will issue a *bench warrant* and a *bail forfeiture*, creating a problem for you and for the person who posted your bail.

GETTING BACK BAIL MONEY

If you make all your court appearances, the bail money should be returned to the depositor several weeks after your case is over, whether you win or lose. This is supposed to be automatic, but it's a good idea to make sure the clerk puts in a *refund request* for the return of the bail money when the case is over.

For New York City cases, if the depositor has moved since putting up the bail money, she'll have to go to the Department of Finance, at 1 Centre Street in Manhattan, with proof of identification and her bail receipt, to get the bail check.

In a Federal case, your lawyer may have to get a *Satisfaction of Judgment* signed by the AUSA in order to release the lien on your suretor's property.

If your bail was forfeited because you missed a court date, it's difficult for the depositor to get it back. Even if you're represented by an assigned lawyer, the person who posted your bail (depositor, or suretor) may have to pay a private lawyer to do a *bail remission motion* to try to get back her money.

In New York City, the procedure varies in each county, as does the amount of cash bail that may be returned. A *bail remission motion* must be done within a year of the bail forfeiture - that's the *statute of limitations* on these motions. The defendant must have returned to court before this motion can be made. If you have a bail-bond instead of cash bail, you must contact the bail-bondsman if there's a forfeiture.

The bail depositor should not wait until your case is over before arranging for a *bail remission motion*. If she waits beyond a year from the date of forfeiture, it may be too late to get any money back, because of the *statute of limitations*. If you *bench warrant*, have your lawyer check your bail status when you return. If you return soon enough, there may be an easier procedure for reinstating bail.

WHAT TAKES SO LONG

Criminal cases can take a long time. This depends on the seriousness of the charges and whether you're going to take a plea or go to trial. There are *speedy trial rules* governing the amount of time the prosecutor has, to be ready for trial. In State Court, technically she must be ready for trial within six months of your arrest, (90 days for misdemeanors), but there are certain time periods that are excluded from the six months (or 90 days). Cases can take six to 12 months, or longer, to go to trial, and *speedy trial rules* do not apply to homicides.

In Federal Court, cases are supposed to be ready for trial in 70 days from the date of your *Indictment*, but that hardly ever happens. Most Federal cases are considered *complex* cases, which makes them an exception to the 70 day rule. Time is also generally excluded for receiving and reviewing discovery, motion practice, and for plea negotiations. If your lawyer is ordered to be ready for trial on a certain date on a Federal case, she must give that case priority. A Federal Judge will not delay a trial because your lawyer has conflicting cases in State Court.

In general, some of the reasons for delays include: Crowded court calendars; busy prosecutors and defense lawyers; and delays in getting documents and other *discovery* from the prosecutors, that your lawyer needs in order to prepare for trial. Each case requires different preparation. There are certain procedures that must be followed. Your lawyer can explain this more fully as it relates to your case. The wait is frustrating, but there's little that can be done to speed things up. Delay is usually helpful to the defendant. Trial preference is given to jailed defendants. It's upsetting having criminal charges hanging over your head. Lawyers who are sensitive to their clients' feelings often act as psychologists and social workers as well as lawyers. Maybe that's why we're also called counselors.

TRIAL PREPARATION

In order to prepare your case for trial your lawyer has to get *discovery* from the prosecutor. This may include police reports, phone records, medical records, autopsy reports, 911 calls, audio or video tapes, transcripts, etc., depending on the type of case and the type of evidence.

In Federal Court there is generally a great deal more *discovery* because the Feds usually investigate for a long time before making an arrest. There may be numerous wiretapped phone calls to review, and the Feds are generally more thorough in the documents they gather as evidence. The Feds always seem to find the pictures you have of yourself posing with your guns and drug money, making it much harder to defend you at trial.

Part of the trial preparation generally includes your lawyer preparing certain written legal motions, either to obtain evidence that the prosecutor is trying to withhold, or to try to exclude evidence that may have been obtained in violation of your constitutional rights, or that may be more damaging than relevant. These motions often involve legal research, and sometimes result in various hearings. There may also be motions to dismiss your case or certain charges, under the appropriate circumstances.

In many cases, as part of trial preparation, it's important to get a Private Investigator involved in your case. The earlier this is done, the better. If you want your investigator to find certain witnesses, it's better to do that while they can still be found, and while they might remember the incident better. Sometimes an investigation can't start until the prosecutor responds to your lawyer's motions and gives her police reports. The prosecutor often tries to keep important information from the defense as long as possible. Police reports may be turned over with names and addresses of witnesses deleted, to protect them. Judges often don't make the prosecutor disclose that information until trial. We call this *trial by ambush*.

If you have an assigned attorney, she can ask the court to appoint an investigator. If you are paying your lawyer, you will have to pay separately for the investigator. It's a bad idea for you or your loved ones to do your own investigating. Sometimes witnesses have *Orders of Protection* against you, which also prohibits *third party contact,* and if you or your loved ones talk to them, you could be charged with *contempt* for violating the *Order of Protection,* and be put back in jail. You could also be charged with *witness tampering.* If the complainant tells you she wants to drop charges, have her contact your lawyer before she contacts the prosecutor, so that your lawyer can arrange for your investigator to get a statement from her before the prosecutor can talk her out of dropping the charges.

During trial preparation there are also generally plea negotiations going on between your lawyer and the prosecutor. These are very different in State Court and in Federal Court. In State Court, you can generally plea-bargain for your sentence, but this is not possible in Federal Court. The AUSA does not have the authority to promise you a specific sentence. Your lawyer can still negotiate various aspects of a plea with the AUSA, but not your sentence – that is up to the Judge at the time of sentence.

One of the biggest delays in the system is due to trial preparation. It's better to have the delay than go to trial without adequate preparation, even if you're in jail.

Your case will be adjourned, usually about three weeks at a time, until it's ready for trial or you take a plea. Because of the delays, some defendants plead guilty just to avoid having to come back to court so often. This happens more often in Criminal Court on misdemeanor cases.

TO PLEAD OR NOT TO PLEAD

Many people think plea-bargaining is a dirty word, but it is just a way to negotiate a fair disposition to a case. Whether you plead guilty or go to trial is an important decision that you should make with your lawyer's help. Once your lawyer knows enough about the evidence against you, she can help you evaluate the chances of winning your trial. She will help you balance your odds of winning, against the amount of time you could get if you lose trial, and the sentence being offered if you plead guilty (in State Court). Once you plead guilty, you usually can't get your plea back if you change your mind later, so make sure it's what you want to do. When you take a plea in Federal Court the Judge asks a lot of questions to lock you in to your plea (*plea allocution*), reminding you that pleading guilty is the same thing as if you were convicted after trial. You are often placed under oath when you take your plea so that you can be threatened with perjury if you later deny your guilt to try to get your plea back.

The decision is difficult, especially if you're innocent and the evidence against you looks strong. There are provisions in the law for a person to plead guilty without admitting guilt. This is called a *Serrano* or *Alford* plea (named after the cases that allow this kind of plea). Most Judges don't like *Serrano/Alford* pleas, and in Federal Court it works against you if you plead guilty without admitting your guilt and *accepting responsibility* for your crimes (will be explained later in chapter on Sentencing).

It's hard to admit guilt if you're innocent, but some defendants do it because their chances of winning are so slim that they'd rather take the sure thing (usually probation or low jail time) than risk a long jail sentence after losing trial. If you go to trial and lose, you usually get more time than that offered in the plea-bargain. It's like getting extra punishment for putting the government through the trouble and expense of the trial. No matter how experienced or skillful your lawyer is, there's no guarantee of winning a trial, so some defendants take pleas to avoid the uncertainty of trial. Defendants who are in jail awaiting trial are more likely to take pleas than defendants who are out of jail.

Trial is an uphill battle for the defense. The prosecutor has better resources, (especially the Feds, who spare no expense), to investigate and get witnesses to cooperate. Even if your lawyer has spoken to your witnesses, it's hard to get them to come to court for you - most people don't want to get involved, and many are afraid of reprisals by the government if they testify for you and have something to hide in their own backgrounds.

The prosecution also usually has public opinion on its side. Even though the law says that you're presumed to be innocent, and that the burden of proving your guilt is on the prosecution, jurors do not always understand or follow the law. Unfortunately, nowadays, especially is big cities, jurors are exposed to crime on the streets, either personally or through the media, and tend to presume you're guilty and expect the defense to prove your innocence, especially if you're minority or poor. Sorry to paint such a grim picture, but that's where things are at, and this book discusses realities, not ideals.

In Federal cases, the decision to plead guilty or go to trial is even more complicated because the prosecutor does not have the authority to promise you a specific sentence, so you don't know how much time you'll get if you plead guilty. Federal sentencing is more complicated than in State Court because there are more factors taken into consideration.

In Federal Court, there are Statutory sentences you may be facing and there are also the *Federal Sentencing Guidelines* to contend with. These *Guidelines* used to be mandatory, but last year the United States Supreme Court ruled that they are now merely advisory. They are still part of the factors given consideration by Federal Judges in determining a reasonable sentence. The *Guidelines* are like a point system – the idea being to get the lowest score possible. This will be discussed in greater detail in the chapter on Sentencing.

If you're pleading guilty in Federal Court, you can plead guilty with a *Plea Agreement,* which may provide some benefits to you, but usually requires that you waive your right to appeal; or you can plead to the *Indictment* without a *Plea Agreement,* which, under certain circumstances, may be more beneficial to you; or you can plead guilty with a *Cooperation Agreement,* if you are willing to help the prosecutor convict other people, and if the prosecutor determines that you can provide *substantial assistance* to them. The benefit of a *Cooperation Agreement* is that it allows the sentencing Judge to sentence you below any *statutory mandatory minimum,* and generally, depending on how much assistance you have given the prosecutor, results in a greatly reduced sentence for you.

Many defendants do not want to snitch, but many defendants wind up doing just that, to save themselves. In Federal cases, because they are usually more thoroughly investigated before any arrests are made, the Feds generally have pretty strong cases against those they arrest, often including your own words caught on tape, incriminating you. After being confronted by such strong evidence and the strong likelihood of conviction and very long jail sentences, many defendants will do whatever they can to avoid spending most of the rest of their lives in jail – by cooperating.

If you have decided that your chances of winning at trial are too risky, and the jail time you face is too lengthy, and you would like to try to get a *Cooperation Agreement,* you must know that once you start down that path, whether the prosecutor gives you a *Cooperation Agreement* or not, you will lose any real ability to mount a successful defense at trial. In order to try to get the prosecution to give you a *Cooperation Agreement* you have to meet with them in what's called a *Proffer session,* so they can decide if you have information that's useful to them, and if they believe what you are telling them.

At that *Proffer session* you will be asked to detail all of your involvement with the crimes charged. Even though you will be given a *Proffer Agreement* to sign that says that the prosecution can't use your statements against you in their *direct case* if you ultimately go to trial, the truth is that your statements could be used to challenge or rebut any testimony or even arguments by your lawyer, that are contrary to what you have admitted in your *Proffer sessions*. So your lawyer's hands would be tied in trying to defend you at trial.

If you go in for a *Proffer session*, many of questions you will be asked by the prosecutor, and other law enforcement present at the meeting, will be questions to which they already know the answers. They are just testing you to see if you are lying to them or telling them the truth. Don't even go in for a *Proffer session* unless you are prepared to be 100% truthful. It will only backfire if you try to hide something that you or someone else has done. Don't think you can outsmart them. If they decide you are not being truthful, you will not get the *Cooperation Agreement* you wanted, and you will be stuck pleading guilty with no benefit to you. In addition, they can charge you with additional crimes for lying to them.

You may have several *Proffer sessions* with the prosecution before they decide if they are going to give you a *Cooperation Agreement.* If they do, you will plead guilty shortly after that. You will not be sentenced until you have finished cooperating. That could even take a few years, if you are cooperating against a lot of people, because you may be needed to testify against them at their trials, if they do not plead guilty. The prosecution can't evaluate how much assistance you have provided until they are finished using you. The more assistance you provide, the better a letter – called a *5K1 letter* - they write to the sentencing Judge on your behalf. The better a letter they write, the less jail time you will probably get. If you are in jail during this time, you get credit for the time you spend in jail waiting to be sentenced.

PRE-TRIAL HEARINGS

There are several types of pre-trial or suppression hearings, that may occur before a jury is selected. Not every case has pre-trial hearings - it depends on the evidence against you. These hearings are generally named after landmark cases. After the hearing, the Judge decides whether or not certain evidence can be admitted at trial. If the evidence in question is the only evidence against you, your case may be dismissed if you win the hearing.

In State Court, you may have a *Huntley* hearing to suppress statements you allegedly made to law enforcement, on the grounds that you weren't advised of your Constitutional right to remain silent or were forced to make the statement, either by threats or brutality. Clients sometimes think that if the police didn't read them their rights their case can be dismissed. But if you weren't read your rights it just means that if you made a confession, you may be able to get it suppressed. It's unlikely the police will admit that they failed to read you your rights, or that they threatened or beat you. They'll probably testify that they read you your *(Miranda)* rights, and deny that they used any force. The Judge usually believes the police when their version of what happened differs from the defendant's. In Federal Court this is often called a *Miranda* hearing.

You may be entitled to a *Dunaway* hearing, to suppress certain evidence, on the grounds that the police did not have *probable cause* (any legal reason) to arrest you.

If you have a criminal record and want to testify in you own behalf you will have a *Sandoval* hearing to try to preclude the DA from using your criminal record to impeach your credibility on cross-examination. When a witness testifies at trial, opposing counsel can use the witness' criminal record on cross-examination to show that the witness isn't worthy of belief. If the witness is the defendant, the court must balance the defendant's constitutional right to testify, against the DA's right to this cross-examination technique. The problem is that jurors believe that if you've committed crimes in the past, you probably committed this one too, and that's not one of the factors a jury is supposed to consider as evidence. The defense attorney tries to limit this through the *Sandoval* hearing. In Federal Court this is referred to as a *Luck* motion and is usually decided by written motion rather than a hearing.

If you don't testify at trial, the prosecutor generally can't introduce your criminal record or prior bad acts, unless she can show that it's relevant to an issue at trial, and that the relevance is not outweighed by the danger of undue prejudice. In State Court this is referred to as a *Molineux/Ventimiglia* hearing. In Federal Court, the prosecutor asks to use this as *404(b)* evidence, referring to the Federal Rules of Evidence. The Judge will decide before trial whether she will allow the prosecutor to use this type of evidence.

You may be entitled to a *Wade* hearing to suppress a witness' identification of you on the grounds that the pre-trial identification procedure violated your constitutional rights, or was suggestive, and that the witness(es) would not have otherwise been able to identify you.

You may be entitled to a *Mapp* hearing to suppress physical evidence seized from you (usually a weapon, drugs, or the proceeds of a crime), on the grounds that the police had no legal right to stop or search you, your car or your home, or that they found the evidence by violating your constitutional rights.

TRIAL

After pretrial hearings are finished, the trial begins. At trial a Judge or jury listens to the evidence and decides if the prosecution presented enough evidence to prove your guilt *beyond a reasonable doubt.* If not, they are supposed to find you Not Guilty.

You're entitled to a jury trial in all felony cases, and in many misdemeanor cases. In New York City, the DA can reduce the charges against you to a Class B misdemeanor in order to deny your right to a jury trial. They feel they get an advantage by doing this because they believe a Judge will be more likely to find you guilty than a jury. In State Court even if you are entitled to a jury trial, you may waive that right and be tried by a Judge. This decision depends on the specifics of your case and which Judge is in the trial part.

You must dress appropriately when you're on trial. The people who sit on juries are generally older and more conservative than you are, and they will be affected by your appearance. If you look like a thug they are more likely to think you're guilty. You want to look neat, but not flashy. Don't wear a lot of gold jewelry, especially if you're charged with a drug offense. Tone down your hair style, if necessary. You need to look as main-stream as possible. You want to create the right impression on the Judge or jury.

If you're out of jail and don't appear for trial, in addition to getting a *bench warrant* and forfeiting your bail, your case may be tried without you. Most Judges warn defendants of that possibility – in State Court, that's called *Parker warnings*. If you've been warned, and don't appear, you can be tried, convicted and sentenced in your absence. The likelihood of conviction increases if you're not present at your trial. When the police pick you up on the *bench warrant,* you'll be sent to jail to serve your sentence. You may also, practically speaking, waive your right to appeal, if you abscond.

If you're having a jury trial, the first part is to select the jury. This is called *voir dire*. Prospective jurors are brought to the courtroom from the Central Jury Panel. The Judge explains some general principles of law to them. From that panel, 12 or more at a time, (six if it's a misdemeanor trial), are called into the jury box to be questioned about their qualifications to serve as jurors. In Federal Court only the Judge asks questions. Your lawyer and the AUSA may submit questions to the Judge beforehand that they would like the Judge to ask. In State Court, the Judge asks questions, then the ADA, and then your lawyer.

The purpose of the *voir dire* is to give the prosecutor and the defense attorney a chance to find out whether the prospective jurors can be fair. In State Court, the lawyers try to use the *voir dire* process to educate the prospective jurors about the case.

After each round of questioning, the attorneys usually leave the courtroom with the Judge and court reporter (who records the proceedings), and challenge the jurors they don't want. It's more a process of elimination than one of selection. Each side has a specific number of *peremptory* challenges depending on the criminal charges. *Peremptory* challenges are those that do not require the attorney to give a reason for the challenge. If either side can show that a potential juror can't be fair, that juror can be challenged for *cause*. Challenges for *cause* are unlimited.

A felony trial jury consists of 12 jurors and usually at least two alternates. If a juror can't continue to serve (because of illness or the like), an alternate is substituted. After the jury is selected, the Judge usually explains their duties and the order of the trial. She also warns them not to discuss the case with anyone until it's over.

The prosecutor then makes an *opening statement* that tells the jury what she intends to prove to them during the trial. She usually describes this as a table of contents. Your attorney may then make an *opening statement,* but does not have to, because the defense does not have to prove anything during the trial. Whether or not your lawyer makes an *opening statement* is a matter of strategy that she will decide based on the nature of your defense.

After *opening statements*, the prosecutor presents evidence. Evidence is testimony from witnesses, and exhibits (weapons, contraband, documents, etc.).

Clients sometimes think that there is no evidence against them if the prosecutor has no scientific evidence or audio or video tapes, but testimony is considered evidence. Your own statement to the police is considered evidence. At trial, the testimony of one witness may be enough to convict you, if the jury believes that witness *beyond a reasonable doubt.*

***Circumstantial evidence* is also admissible against you. *Circumstantial evidence* is evidence that does not prove a fact directly, but evidence from which a fact can be inferred. For example, if you are in a room without windows and someone walks in with a wet raincoat and umbrella, that is *circumstantial evidence* that it is probably raining outside, even though you cannot see the rain yourself. *Circumstantial evidence* is given just as much weight by the courts as direct evidence.**

When the prosecution calls a witness to testify, she questions the witness first. This is *direct examination*. When the defense attorney questions that witness, it's *cross-examination*.

When the prosecution finishes presenting their case, they *rest*, and your lawyer may present a defense case, but is not required to, because the defense does not have to prove anything. The jury is supposed to decide, based on what the prosecution presents, if they're convinced of your guilt *beyond a reasonable doubt.*

A big decision is whether you'll testify or present witnesses at trial. Even though the jury is told not to hold it against you if you don't testify, they often assume that if don't testify, you have something to hide. The decision is harder if the prosecutor will be able to *cross-examine* you about your criminal record. If you put on a defense case, the prosecutor may present evidence to *rebut* something you raise in your defense case. If this happens, you may present evidence to *rebut* that. When both sides finish presenting evidence, they *rest.*

In a State case, the defense *sums up* first and the prosecution *sums up* last (because they have the burden of proof). *Summations* are the lawyers' comments about the evidence to show why the jury should reach a certain verdict. In a Federal case, the prosecution *sums up* first, then the defense *sums up*, and then the prosecution *sums up* again in what's called a *rebuttal summation*.

After *summations*, the Judge explains the law to the jury and sends them out to deliberate until they reach a verdict. They can't discuss the case with anyone who is not on the jury. A verdict must be unanimous. If the jurors can't reach a verdict by the end of the day, they are usually sent home for the night. It's very rare nowadays for a jury to be *sequestered* (sent to a hotel together for the night instead of going home). This only happens in very unusual, high profile, serious cases. If you're *acquitted* (found not guilty), you can't be charged or tried again for the same case. If the jury indicates that they cannot reach a unanimous verdict no matter how long they deliberate, (that they're *deadlocked*), the Judge may declare a *mistrial* based on the *hung jury*. If that happens, you may be tried again.

SENTENCING

If you're convicted after trial or take a plea, the case is adjourned for the Probation Department to prepare a report to aid the Judge in sentencing. It's important to make a good impression on the person who interviews you, because her recommendation is important. Even if your sentence was negotiated by plea-bargain, if the probation report is bad the Judge may decide not to keep her promise to you and may give you the option of taking more jail time or withdrawing your plea.

In the State system, the Probation Department prepares a report to help the Judge decide your sentence. They contact the ADA for input, but not the defense attorney, and your attorney is not allowed to be there for your probation interview. Your lawyer may prepare a sentencing memorandum for you to try to balance things out. You and your lawyer are not entitled to see the Probation Report until one day before your sentencing. In the Federal system your lawyer is allowed to be there for your *Pre-Sentence Interview* (PSI), and it is helpful if she is there. You will usually have your PSI within a few weeks of pleading guilty or being found guilty after trial. A United States Probation Officer (USPO) will ask you questions about your background to help the sentencing Judge get a better idea of who you are. Your lawyer should advise you beforehand what to expect. She may advise you not to discuss the crime(s) to which you pled guilty or were found guilty, or your criminal history. She may advise you to mention if you have a drug problem, or other medical or family issues that may help you get a lower sentence. The USPO will also speak to the AUSA to get her version of the crimes to which you pled or were found guilty. The USPO will also calculate the *Federal Sentencing Guidelines* level she thinks is appropriate. Usually within a month of your PSI, your lawyer will receive a copy of the *Pre-Sentence Report* (PSR) that was prepared by the USPO. She will review it with you to see if it is accurate. If you disagree with any of the facts or any of the legal conclusions, your lawyer will write *Objections* to the PSR. The prosecutor may also have some objections to the PSR. Sometimes the USPO will issue an addendum to the PSR either agreeing or disagreeing with your lawyer. Ultimately it will be the sentencing Judge who decides whatever issues are unresolved, and what your sentence should be. Your lawyer should also submit a sentencing memorandum to the sentencing Judge highlighting the reasons the sentencing Judge should give you the lowest sentence possible. It helps if your loved ones write letters about you for your lawyer to submit with her sentencing memorandum. If you have a *Cooperation Agreement* with the prosecutor, she will submit the *5K1 letter* at this point to the sentencing Judge outlining the assistance you provided.

The *Federal Sentencing Guidelines* is a point system. The goal is to get the lowest number of points (also called *levels*). Even though it's no longer mandatory for the sentencing Judge to sentence you within the *Guidelines*, it's one of a number of factors the Judge will look at in determining a reasonable sentence. Every crime has a *Base Offense Level*, which is a starting point for calculating the *Guidelines*. If you plead guilty you get two points deducted for *acceptance of responsibility*. If you plead guilty early in the case you get a 3rd point deducted for *early acceptance of responsibility*. If you want to plead guilty without admitting guilt (*Serrano/Alford plea*) you will lose your *acceptance of responsibility* deduction.

In Federal cases involving fraud or theft, the *Guidelines* range is affected by the amount of money involved – the more money, the more points are added. In drug cases, the *Guidelines* range has a lot to do with the type and quantity of the drugs involved.

In drug cases, you may qualify for the *safety valve*. This allows someone who plays a small role and has a minor enough criminal history to get less than the mandatory minimum sentence – even a statutory mandatory minimum – if she meets certain criteria.

Generally in conspiracy or multiple defendant cases, if you were an organizer or supervisor you get extra points. If you played a minor or minimal role you will get points deducted. These are some of the issues your lawyer may argue for you. If you have a prior criminal record you generally get a higher sentence, depending on the nature of the criminal history, among other factors.

Your probation report is attached to your file and follows you into the prison system. It may impact where you are placed, and in certain State cases, will be taken into consideration when you become eligible for parole. Parole has been abolished in most New York State cases. Instead you may be sentenced to a period of *supervised release* after you get out of jail. If you're eligible for *youthful offender* treatment (see below), the probation report is sometimes the deciding factor.

If you took a plea and are out of jail awaiting sentence and don't keep your appointment for the probation interview, or get convicted of another crime, or don't appear in court on the sentence date, the Judge can give you a harsher sentence, without giving you the option of withdrawing your plea. If you've been in jail awaiting trial, you'll get credit toward your sentence for the time you've been in custody.

YOUTHFUL OFFENDER

In State Court, if you're under 19 when you commit a crime, and you're convicted (pled guilty or were found guilty after trial), the Judge might treat you as a *youthful offender* (YO) - the conviction is vacated and the case sealed. You're entitled to a YO adjudication on your first misdemeanor conviction. It's discretionary for certain first time felony convictions. YO doesn't mean you won't be punished for the crime (with jail or probation), but the punishment is usually less severe and you won't have a criminal record. This is meant to give a young person a chance to straighten out without the stigma of a criminal record. Federal Court is not bound by a YO adjudication in State Court, and you may get *criminal history points* for this crime if you're subsequently charged in Federal Court.

If you received YO on a prior felony case, it's as if you were not convicted of that felony. If you're charged with another felony you will not be considered a *predicate felon*. If you got YO on a prior case, it won't save you from extra jail time for violation of the probation or parole from that case, if you're convicted of something else after that.

WHAT TO DO IF YOUR PROPERTY IS SEIZED

If the police take property from you when you're arrested, they will indicate on the voucher whether they took it for evidence, for safekeeping, or for forfeiture. If they have taken it for safekeeping, it's not hard to get it back when you're released from custody. If you expect to be in custody for a long time, you should arrange for someone else to get the property for you, because the police will not hold it for more than a year. Whoever you send to get your property will need proof that you're incarcerated, a notarized letter authorizing her to act on your behalf, a picture identification, and the receipt (*voucher*) for the property. It's best to call the property clerk's office before going there to make sure you have all the correct documents. If the property was held for evidence, you will also need a release from the DA's office indicating that they do not need the property anymore as evidence.

The prosecutor can seek forfeiture of the instrumentality or proceeds of certain crimes. They can even attach this property before you're convicted if they can show that you'll probably be convicted.

In Federal cases, forfeiture has been a frequent tool of the government. They will take your car, boat, airplane and/or real estate if they can. The State Courts have just begun to use this powerful tool against defendants. In State Court, the Police Department can seek forfeiture even if the DA doesn't. If you're arrested for a drug related offense and law enforcement takes your vehicle or cash they think is related to the drug case, you'll have a hard time getting it back. In the State system, if the police take your property, you often start the process of getting it back by making a demand for the return of the property to the police property clerk's office. You may need a *certificate of disposition*, indicating what happened to your case; a release from the DA's office, indicating that they do not need the property for evidence; the voucher you received from the police when they took the property; and two pieces of identification. Even if your case is resolved in your favor, you may have to sue to get your property back. If you're convicted, you can pretty much forget about getting it back.

APPEALS

If you're convicted after trial, your lawyer must file a *Notice of Appeal* for you within 30 days of the sentence date to protect your right to appeal. In Federal Court the *Notice of Appeal* must be filed within 10 days. If you're indigent, you are entitled to have a lawyer assigned to do your appeal. In State Court you get a different lawyer assigned to your appeal than the lawyer who represented you in the trial court. In Federal Court you usually have the same lawyer appointed to do your appeal that represented you for trial or plea. Appeals usually take longer to be heard in State Court than in Federal Court. Part of the delay, especially if you're indigent, is the length of time it takes the appeals lawyer to get the minutes of the trial. Assigned lawyers usually handle a lot of cases, so it usually takes longer for them to get to your case. If you can afford to pay privately for the appeal and the minutes of the trial you can speed up the process. Sometimes you can get bail pending appeal, but most defendants wait in jail until their appeals are heard.

Useful Phone Numbers & Websites

Federal Courts:
United States Court of Appeals Second Circuit - 212-857-8500 - www.ca2.uscourts.gov
Eastern District of New York - 718-613-2600 - www.nyed.uscourts.gov
Southern District of New York - 212-805-0136 - www.nysd.uscourts.gov
Western District of New York - 716-332-1700 - www.nywd.uscourts.gov
Northern District of New York - 315-234-8500 - www.nynd.uscourts.gov

(Federal) Bureau of Prisons – www.bop.gov - to locate an inmate in federal custody.
Metropolitan Detention Center (Brooklyn) - 718-840-4200
Metropolitan Correctional Center (Manhattan) - 646-836-6300

State Courts (NYC):

Appellate Division 1st Department - 212-340-0400 - www.courts.state.ny.us/courts/ad1
Appellate Division 2nd Department - 718-875-1300 - www.courts.state.ny.us/courts/ad2

Supreme Courts – Criminal Term (NYC):
Bronx - 718-590-2858
Brooklyn - 347-296-1076
Manhattan - 646-386-4000
Queens - 718-520-3542
Staten Island - 718-390-5201

Criminal Courts (NYC):
Bronx - 718-590-2858
Brooklyn - 718-643-4044
Manhattan - 646-386-4511
Queens - 718-520-3855
Staten Island - 718-390-8409

Department of Corrections (NYC) – 718-546-0700 – to get information about inmates in NYC custody.

Webcrims - http://iapps.courts.state.ny.us/webcrim_attorney/Login - to locate a pending state case in New York.

Background Materials

This is the *20th Anniversary Edition* of Joyce David's book, What You Should Know if You're Accused of a Crime, having originally been published in 1986. Since that time each edition has changed as the laws in New York have changed.

Over the last 20 years, Ms. David's book has found its way into law libraries in prisons throughout New York State. It has been provided by the Courts in New York City to teachers whose students were touring the Criminal and Supreme Courts.

This book was also used as a resource for the Criminal Justice System Handbook published by a Joint Committee of the Association of the Bar of the City of New York and the New York County Lawyers' Association, and Ms. David's assistance was acknowledged therein.

This book has also been used as a resource and part of the training materials by the New York City Department of Probation.

On the following pages you will find articles and other materials about Joyce David, and a small fraction of the criminal cases she has handled. There have been many other cases, equally as interesting and complex, which never attracted media attention, but were just as important to her and to her clients.

ASSERT YOUR RIGHTS CARD

If you're arrested, you can tell the police your name, address, date of birth, etc. (*pedigree information*), but don't answer questions about the crime or where you were when it happened.

To protect yourself, cut out the card below and keep it with you, just in case. If you borrowed this book from your library, please just photocopy this card. Hand it to the police if they want to question you; search you or your property; or place you in a line-up. This card could save you years in jail.

I hope you've found the information in the book useful. If you would like my office to represent you, or if you would like a consultation, you can call 718-875-2000.

Respectfully Submitted,

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I do not wish to answer any questions without speaking to an attorney first I do not consent to a search of my home, my car or my person. I do not consent to being in a line-up or a show-up. I will not waive any of my constitutional rights.

Thank You

ABOUT THE AUTHOR

Joyce David has been a criminal defense lawyer for almost 30 years. She has defended thousands of clients accused of every type of crime in State and Federal Courts, including many high-profile cases. She is a frequent lecturer and is often consulted by the media about the criminal justice system. Ms. David has also published law-related articles. You can call her for a free phone consultation or to set up an appointment - (718) 875-2000.

Ms. David's professional achievements include:

Kings County Criminal Bar Association "Person of the Year Award" – 2006;

Faculty Member - Cardozo Law School "Intensive Trial Advocacy Program" (over 15 years);

Certified as Lead Counsel for Death Penalty cases;

Author of "What You Should Know If You're Accused Of A Crime";

AV Rated - Martindale Hubbell;

Court TV - Guest Commentator - 1993-1998;

President - Kings County Criminal Bar Association - 1993, 1994;

Vice President - New York State Association of Criminal Defense Lawyers - 1986-1995;

Featured in Documentary about the GUARDIAN ANGELS;

Chair - Brooklyn Women's Political Caucus - 1990-92;

Author of "Preliminary Hearings On Felony Complaints - Whatever Happened To Them?"

- New York Law Journal - Sept. 29, 1988;

Member of Society of Professional Journalists - Deadline Club;

Member of Mensa;

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