CHAPTER 8

The Trial

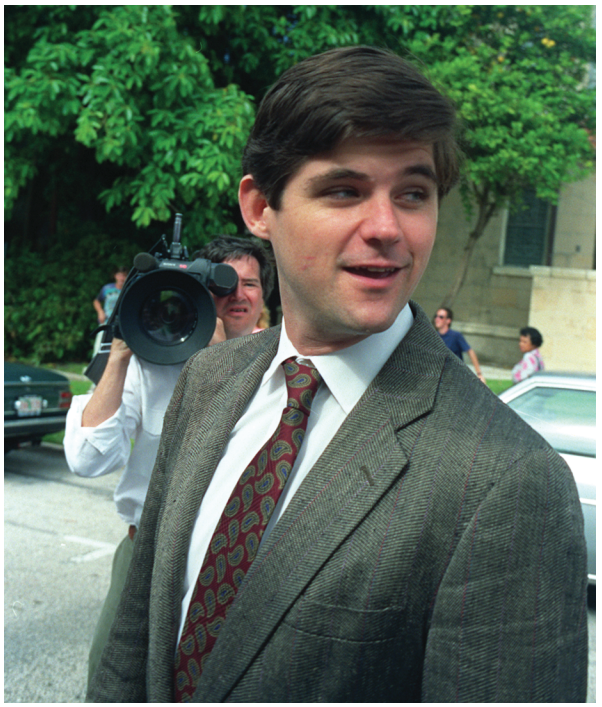
OBJECTIVES

- Identify the nature and functions of the various pretrial motions.
- Know the procedures and constitutional issues surrounding a defendant's right to a speedy, public, and fair trial.
- Grasp the advantages and disadvantages of both bench and jury trials.
- Understand the nature of the contemporary jury system.
- Recognize the basic procedural steps of a trial and understand the importance of the concepts of innocence and reasonable doubt.
- Explain the dynamics of jury deliberations and describe how verdicts are reached.

The first national live, televised criminal trial aired in the United States in 1991. It covered the trial of William Kennedy Smith, a nephew of Senator Edward Kennedy, who was charged with the rape of Patricia Bowman. Before then, the public relied on news accounts or brief taped footage of testimony to learn about the events at a trial. Now, the public was able to watch the jury selection process, presentation of evidence, cross-examination, instructions to the jury, and reading of the verdict.

Smith's trial did not resemble the highly dramatized events aired in television programs such as *Law and Order: SVU, How to Get Away with Murder, and Suits, or in films such as The Judge, Legally Blonde, and The Lincoln Lawyer*. These fictionalized trials present a much more polished—and ultimately less realistic—process than occurs in actual trials. With the goal of entertainment and excitement, these programs and films exaggerate the questioning of witnesses and their testimony, the introduction of surprise witnesses at the last moment, and the ability of defense attorneys to outwit prosecutors.[1] Prior to the Smith trial, the public's beliefs about the trial process had been based on such fictionalized presentations and were far from the reality of what actually

Opener image: © rubberball/Brand X Pictures/Getty; Texture: echo3005/Shutterstock..



William Kennedy Smith's 1991 rape case was the first live, nationally televised trial in the United States.

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Jodi Arias was convicted in 2013 for the murder of her ex-boyfriend, Tavis Alexander. Her sentencing was broadcast and streamed live, and watched by people across the United States.

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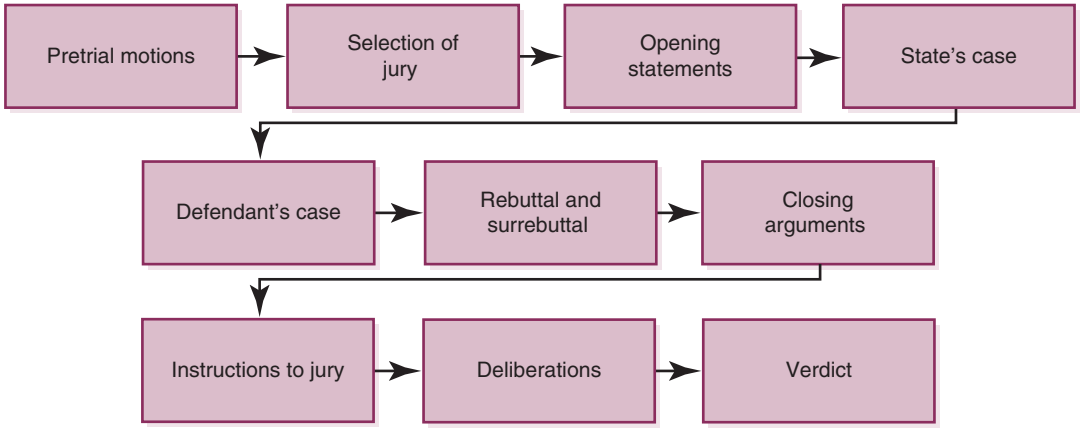

Figure 8.1 The Trial Process

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occurs as defendants go through the stages of a trial from pretrial motions to jury selection, trial, and, for many, appeal of conviction (see **Figure 8.1**). Today, televised criminal trials have become much more commonplace, including the trials of George Zimmerman, Jodi Arias, Dr. Conrad Murray, Casey Anthony, and O.J. Simpson, which were broadcast and/or streamed live for the general public.

Pretrial Motions

Although the vast majority of cases are resolved by the plea-bargaining process, some defendants choose to have their cases decided through a trial. Once a case has been set for trial, the prosecutor may re-evaluate the strength of the case based on the outcome of various pretrial motions raised by the defense. **Pretrial motions** are written or oral requests to the judge to make a ruling or to order that action be taken in favor of the applicant. By definition, they are made before any opening statements or presentation of evidence and usually even before jury selection, although the timing of these motions varies widely among the states.

KEY TERMS

pretrial motion
A written or oral request to a judge for a ruling or action before the beginning of trial.

Motion for Dismissal of Charges

A motion to dismiss is often one of the first motions made by the defense before trial and is based on the defense's claim that the indictment is not sufficient to justify a trial. The prosecutor may also file a motion to dismiss the case by entering a *nolle prosequi* (a Latin term meaning that the prosecutor "will not further prosecute" the case). The reasons that prosecutors cite to dismiss cases vary but often result from a discovery that the original allegation is unfounded, that evidence produced by the police was unlawfully obtained, or that critical witnesses are no longer available.

Motion for Change of Venue

Typically, criminal cases are tried in the county (or, in federal cases, the district) in which the crime was committed. Sometimes, however, the defense may move for a change of venue if there has been excessive pretrial publicity about the case or if there is reason to believe that substantial prejudice exists that would deny the defendant a fair trial. An example of this occurred when the judge ordered a change of venue in the highly publicized Scott Peterson murder case (*People of the State of California v. Scott Peterson*). If the trial judge agrees to this motion, the trial is moved to another county or district. However, not all change of venue motions are granted. In 2014, the defense attorney for Aurora, Colorado, movie theater shooter James Holmes filed a motion to change the venue, citing prejudicial publicity. Judge Samour denied the request. Analysts indicated the move would have been a logistical nightmare and that granting such a motion would be premature because they needed to assess the jury pool in Aurora first.[2] The prosecution frequently objects to motions for a change of venue because of the difficulty and expense in transporting staff and witnesses to another city.

Motion for Severance of Defendants

When two or more defendants are jointly charged with the same offense, most states require they be tried together. The savings in time and money from conducting a single trial are obvious, and, in many cases, a joint trial generally presents no problems to the defendants. On some occasions, a defendant may file a motion for severance of defendants if it is in his or her best interest to do so. For example, evidence presented against a codefendant may not apply to the defendant, and the jury may have difficulty in keeping the cases separate in their minds.

Motion for Severance of Charges

Sometimes, multiple charges are filed against one defendant. It is to the prosecutor's advantage to try the defendant on all of these charges at the same time: It saves time and effort, and the collective weight of the charges may have a greater negative impact on the jury. Because the defense may wish to use different strategies to deal with each charge, and to avoid the prejudicial effect on the jury owing to the existence of multiple charges, the defense may file a motion for a *severance of charges* in such a case, requesting a separate trial for each charge.

Motion for Discovery

In jurisdictions that do not allow discovery at the preliminary hearing or in cases where the defendant was indicted by a grand jury, it is critical for the defense to file a pretrial motion for discovery to request access to evidence and the list of witnesses who the prosecutor plans to present at trial.

Motion for a Bill of Particulars

Similar to a motion for discovery, a motion for a *bill of particulars* asks for a written statement from the prosecutor revealing the details of the charge(s), including the time, place, manner, and means of commission of the crime. Having this information allows the defense to prepare a more accurate defense, set limits on the evidence that the prosecutor may present at trial, avoid surprise claims of criminal acts, and establish the basis for a claim of double jeopardy if the defendant has already been tried for the same crime.

Motion for Suppression of Evidence

The *exclusionary rule* prohibits the introduction at trial of any evidence obtained illegally. Through motions for discovery, the defense may become aware of evidence that the prosecutor plans to introduce. If the defense believes that this evidence was unlawfully acquired, it may file a motion to suppress the evidence. In response to such a motion, the court may hold an evidentiary or suppression hearing to determine whether the evidence has been tainted by any illegal search or seizure.

Motion of Intention to Provide an Alibi

The use of an alibi defense typically requires the filing of a pretrial motion indicating the intent to use this defense. A motion of intention to provide an **alibi**

KEY TERMS

alibi
Assertion that the defendant was somewhere other than the crime scene at the time the crime was committed.

(an assertion that the defendant was somewhere else at the time the crime was committed) states that the defendant's attorney plans to present a defense based on this notion. The motion must place the defendant in a location different from the crime scene at the time of the crime in such a way that it would have been impossible for him or her to be the guilty party. An alibi can be provided with an eyewitness, surveillance videos, and sometimes time-stamped receipts or documents (e.g., boarding pass).

Motion for Determination of Competency

If the defense counsel questions his or her client's sanity while preparing for trial or at any time during the trial, the attorney should file a motion for *determination of competency*. A defendant who lacks the capacity to understand the charge or the possible penalties if convicted, to assist or confer with counsel, or to understand the nature of the court proceedings is considered not competent to stand trial.[3]

Motion for Continuance

One of the most frequently filed pretrial motions is the *motion for continuance*, or postponement or adjournment of the trial until a later date. This kind of request is typically filed by the defense. Why would the defense choose to delay a trial, especially if the defendant is confined in jail during this process? The defense is likely to claim the need to prepare for the trial, but requests for a continuance are often part of a defense strategy to wear down victims and to allow for the possibility that prosecution witnesses may move away, be unable to be located, forget details of the crime, or die by the time the trial begins. In addition, when the trial is delayed, public outrage over a particularly heinous crime may have subsided by the time the trial gets underway.

The Right to a Speedy, Public, and Fair Trial

The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This statement raises several issues: How soon after a person is arrested must a trial be held? How much access to pretrial hearings and the trial itself should the public have? How do we ensure that the jury is untainted by prejudice?

The Right to a Speedy Trial

Few people would argue with the proposition that "justice delayed is justice denied." The plight of a defendant who languishes in jail for months while the state prepares its case is clearly objectionable. Nevertheless, many defendants must wait a long time to have their day in court. How long they wait from arrest to sentencing varies greatly across jurisdictions and even from court to court within particular jurisdictions. However, the greatest influence on case processing is the seriousness of the charge. For example, for cases involving larceny, the median number of days between arrest and sentencing is only 220; by comparison, it is 282 days for robbery and 505 days for murder (see **Figure 8.2**).

Defining the Limits of a Speedy Trial

The Sixth Amendment does not mean that a defendant may demand an immediate trial following his or her arrest. Both the prosecutor and the defendant have a

Headline Crime

Texting an Alibi

Some criminals have attempted to establish alibis by sending themselves text messages from their victims' cell phones. For example, Gary McGurkher sent a text message to his own cell phone from his girlfriend's cell phone stating: "Out walking try to think. You want me to stop by?" The problem was, she was already dead, having been tied up and bludgeoned to death. In another instance, Leah Walsh failed to show up one morning at her job as a teacher. A text message was sent from her cell phone to her husband, William, saying: "HAVE A GREAT DAY. LOVE YOU BUNCHES. MWAH." Two days later she was found strangled to death. The message would seem to suggest she was not with William around the time of her death. William Walsh eventually pleaded guilty to murdering Leah.

In this specific case, technology provided evidence to debunk both McGukher's and Walsh's alibis. Today, most cell phones are equipped with GPS capability, which allows law enforcement to view time-stamped geographic coordinates. As technology continues to evolve, law enforcement's use of such innovations will also expand.

Source: Gardiner, S. (2010, June 4). Text messages on rise as alibis. *The Wall Street Journal*. Retrieved from http://www.wsj.com/articles/SB10001424052748704025304575284501726547986. Smith, K. (2016). GPS Technology in Policing: Ride the Wave to Make Better Decisions. *The Police Chief*. Retrieved from http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1778&issue_id=42009.

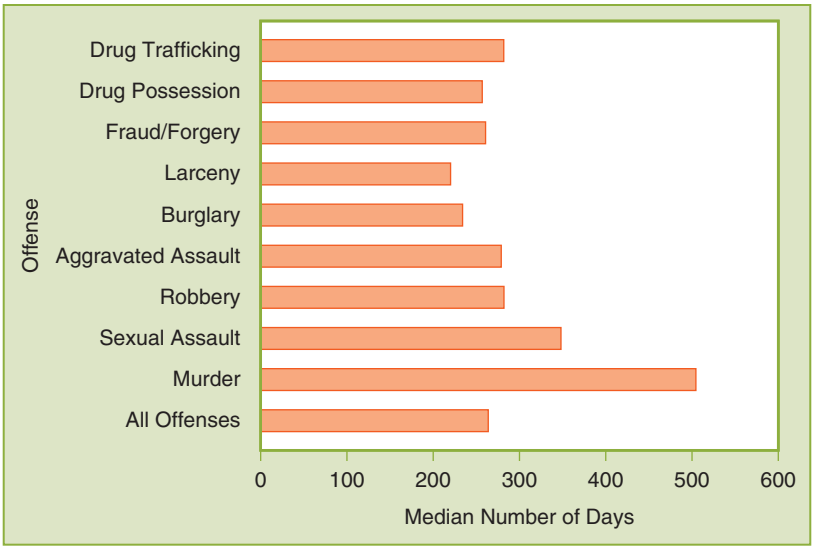


Figure 8.2 Median Number of Days from Arrest to Sentencing

Source: Rosenmerkel, S., Durose, M., & Farole, D. (2009). *Felony sentences in state courts, 2006—statistical tables*. Washington, DC: U.S. Department of Justice; Table 4–5.

right to prepare their cases before the trial begins. In attempting to define the meaning of "speedy trial," both federal and state governments have established rules limiting the time between arrest and trial. For example, in Illinois, the defendant must be brought to trial within 120 days if in custody or within 160 days if he or she is free on bond. By comparison, a defendant in California must be brought to trial within 60 days for either a felony or a misdemeanor, and in federal cases the trial must begin within 70 days. If the prosecutor exceeds that limit, the defendant may file a motion to have the charge(s) dismissed.

In *Barker v. Wingo*,[4] the U.S. Supreme Court held that a defendant's right to a speedy trial is not necessarily infringed upon by prosecutorial requests for continuances; rather, such decisions should be made on a case-by-case basis. If the defense files a motion for continuance, it is considered a waiver of the right to a speedy trial. If neither the defendant nor the defense counsel has done anything to cause the delay, and the trial has not begun within the designated number of days, the judge may dismiss the case.

Speedy trial rules only deal with the time between an arrest and commencement of trial. Once the trial begins, there can be substantial variation in the pace of the litigation. In 2004, the American Bar Association established recommendations for a speedy trial, including that 100% of felony cases be resolved in less than one year, 98% within 180 days, and 90% within 120 days.[5] How closely actual criminal courts come to meeting these standards varies around the country. The pace of case processing depends on the local legal culture (attitudes and expectations of judges, prosecutors, and defense attorneys), and certain factors in cases, such as violent felony charges, issuance of bench warrants, pretrial release of defendant, and trial (versus plea bargain), can lead to significant increases in case processing time.[6] There are times when the clock stops, so to speak—when the delay is beyond the prosecutor's control and therefore not counted under the speedy trial deadline. Such a situation may include a natural disaster. During Hurricane Katrina, when most of New Orleans was overrun with water, the clock stopped for defendants because such a situation delayed proceedings and was beyond a prosecutor's control (see **Figure 8.3**).

The Courts, the Public, and the Press

The Sixth Amendment to the Constitution also guarantees defendants the right to a public trial. This

Figure 8.3 A natural disaster such as Hurricane Katrina can be enough to delay criminal court proceedings but not violate a defendant's Sixth Amendment right to a speedy trial.

right was established to ensure that people who were accused of crimes were treated fairly by the government by allowing the public full access to information regarding the proceedings. The Constitution does not tell us what makes a trial "public," how many people must be allowed to view a trial, or how they might view it, nor does it say whether a defendant may waive this right and request a private trial. Furthermore, there has been extensive debate over the conflict among the press's First Amendment right to report information about a case, the defendant's Sixth Amendment right to an impartial jury, and the right of victims and witnesses to privacy, as implied by the Fourth Amendment.

Over the years, a common-sense definition of a public trial has come to mean one that the public is free to attend, and the limit on the number of people allowed or required has been determined by the size of courtrooms. Other questions have not been so easily resolved.

The Public's Right to Attend

A number of U.S. Supreme Court decisions have addressed the question of just how open trials must be. In *Gannett Co., Inc. v. DePasquale*, the Supreme Court held that the public and press could be barred from pretrial hearings.[7] Because many pretrial hearings involve sensitive matters such as determining the admissibility of evidence, access of the public and press to these hearings could pose special risks of unfairness. In 1986, the Supreme Court ruled that the press and public should not be excluded from the jury selection stage of the trial, even though the decision of the lower court in question was based on a desire to protect the privacy of potential jurors and to promote their candor during questioning.[8]

Freedom of the Press and Pretrial Publicity

In 2004, Santa Barbara County Superior Court Judge Rodney Melville issued a blanket gag order that prohibited singer Michael Jackson, his accuser, and attorneys on both sides from publicly commenting on Jackson's child molestation case. Representatives of the media and Jackson's attorneys appealed to the California Supreme Court to have the gag order lifted, but the judge refused to drop the order.

Judges in high-profile cases have frequently issued gag orders to prohibit the reporting of highly inflammatory information based on comments from attorneys outside the court or testimony during a trial. Until relatively recently, the U.S. Supreme Court had not clearly defined the limits of gag orders designed to prevent extensive or prejudicial pretrial publicity that could deny a defendant a fair trial. In 1976, in *Nebraska Press Association v. Stuart*, the Supreme Court finally set forth guidelines for the use of prior restraint by lower trial courts.[9] The Supreme Court held that prior restraint should be used only when absolutely necessary and only when the court can show all of the following:

- There is a clear threat to the fairness of trial.
- Such a threat is posed by the actual publicity to be restrained.
- No less restrictive alternatives are available.

Some evidence suggests that general pretrial publicity may, indeed, influence jurors. As they consider the testimony at hand, jurors may remember what they have heard about similar but unrelated cases and may draw upon this knowledge to evaluate the case before them.[10] For example, jurors who have seen news coverage of rape cases and heard defendants' claims that the victims consented to have sex may apply their understanding of those cases to the case they are hearing, thereby influencing their evaluation of the testimony.

Cameras in the Courtroom

Prior to 1977, if the news media wished to report on a criminal trial, they had to assign a reporter to attend the trial, take notes and perhaps make drawings, and then write the news story. Newspapers, radio, and television could then report the story. That situation changed in 1977, when television cameras were first admitted into the Florida courts on a regular basis. Since then, all 50 states have developed rules permitting cameras into their courts under certain circumstances.

In 1977, Florida pioneered the use of cameras in the courtroom when it passed a new law that presumed

Despite several accusations and financial settlements with alleged victims, Michael Jackson was never convicted of child molestation.

Headline Crime

Cell Phones and Cameras Banned Near Criminal Trials

Hadley Jons, age 20 years, was serving on a jury hearing a case in which a man was accused of felony resisting arrest and a misdemeanor. While on an off-day during the two-day trial, Jons posted a comment on her Facebook page stating that she was "actually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY." Judge Diane Druzinski ordered Jons to pay a fine of $250 and to write a five-page essay on a defendant's right to a jury trial after finding Jons in contempt of court for violating the court's order for jurors to keep an open mind, not prejudge the case, and not discuss the case with any other person.

The American Bar Association indicates that cell phones are a nuisance in the courtroom. To illustrate this point, they reference a case in which the defense counsel's phone started to ring during summation. The ringtone was the famous Internet meme "Peanut Butter Jelly Time," which prompted the lawyer to frantically search to silence his phone. The incident ended with him embarrassingly running out of the courtroom. Although some in the courtroom found the ordeal funny, the defendant was on trial for rape, and the victim's family was present in the courtroom. The sequence of events "changed the atmosphere of the courtroom, and it is possible that the chance for justice may have been affected." To prevent such disruptions, many courts post signs and have established their own procedures banning such devices in the courtroom.

In one such example, the criminal court judges in Allegheny County, Pennsylvania, unanimously voted to ban the use of cell phones, cameras, personal digital assistants, and audio recorders on the third and fifth floors of the courthouse near where criminal proceedings occur. The ban applies to lawyers, defendants, victims, witnesses, news reporters, and jurors. A 20- by 40-foot area at the end of the halls was designated for use of cameras and recording devices. The judges imposed the ban after becoming concerned about witness intimidation. A visitor in one of the courts had recently used his cell phone to take pictures of witnesses, a visitor at the trial of a man charged with killing a state trooper was arrested after taking a picture of a witness, and yet another visitor was caught taking photographs of an undercover police officer assigned to make drug purchases.

Source: Cook, J. (2010, August 30). Facebook post gets Macomb County juror in hot water. *Oakland Press*. Retrieved from http://theoaklandpress.com/articles/2010/08/30/news/doc4c7bcd97e68d9537104843.txt; Hall, C. (2010, August 31). Judge removes juror after 'guilty' Facebook post. *CNET*. Retrieved from http://www.cnet.com/news/judge-removes-juror-after-guilty-facebook-post/; Banks, G. (2007, November 30). Judges ban cell phones, cameras near criminal trials in courthouse. *Pittsburgh Post-Gazette*. Retrieved from http://www.post-gazette.com/pg/07334/837974-85.stm; Markgraf, K. (2012, January 9). Regulating cell phones in the courtroom. Retrieved from http://apps.americanbar.org/litigation/committees/technology/articles/winter2012-cellphone-courtroom.html.

news media have the right to present live or taped coverage of trials unless the court finds compelling reasons to ban such a broadcast. However, rules permitting cameras in the courts have not been uniformly accepted by all the states. Congress is currently considering legislation that would permit cameras in all federal courts, including the Supreme Court. In addition, the U.S. Court of Military Appeals has permitted television coverage of a number of important cases since 1989.

In 2010, the Judicial Conference authorized a three-year pilot study to evaluate cameras in district courtrooms. The pilot study started in 2011 and was limited to civil cases across courts in 14 states. The pilot study was extended an additional year, thus ending in 2015; the results have yet to be released.[11]

KEY TERMS

bench trial
Trial before a judge alone; an alternative to a jury trial.

Bench Trial Versus Jury Trial

One of the more critical decisions a defendant must make along the path to trial is whether to ask for a trial by jury. Of all criminal defendants convicted at trial (about 6% of all convictions), about 80% are convicted by juries; the other 20% are tried and convicted before the judge alone in a **bench trial**[12]

There are several reasons why a defendant might choose to waive his or her right to a jury trial and request a trial before a judge:

- The crime may be so heinous that it could generate a greater emotional reaction in jurors, who are generally less familiar with such crimes than are judges.
- A defendant's unusual appearance may create a bias in the minds of jurors.
- Excessive media coverage of the crime may make it difficult to ensure a fair and impartial jury.
- The case may be too complex for a jury to understand.
- Attorney fees may be lower because a bench trial generally involves less total attorney time than a jury trial.[13]

Trial by Jury

The right to a jury trial is found only in the handful of countries with criminal justice systems operating under common law procedures, such as the United Kingdom, Canada, and Australia. However, there has been a push away from the jury system in some of these locations, including countries that historically have built their criminal justice system on a model that incorporates juries. For example, in Britain, only 1% of cases are heard by juries. Conversely Japan, China, and South Korea, locations that historically have not used juries in criminal prosecutions, are continuing to increase their use of the jury system.[14] Today, the United States accounts for nearly 80% of all jury trials that take place around the world.[15]

Constitutional Right to a Trial by Jury

The Sixth Amendment guarantees not only the right to a jury trial, but also the right to a trial by an impartial jury. However, early Supreme Court interpretations of this provision limited those rights to federal cases. In 1937, the Supreme Court held in *Palko v. Connecticut*[16] that only those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[17] and considered essential to the "principle of justice" were to be applied to the states through the due process clause of the Fourteenth Amendment. Jury trials were not deemed to be a fundamental right.

In 1968, the Supreme Court held that jury trials were fundamental to the criminal justice process "to prevent oppression by the government." Any serious crime that would qualify for a jury trial in federal court entitles a defendant to a jury trial in state court.[18] In 1989, however, the Supreme Court held that defendants do not have the right to a jury trial in minor criminal cases that carry punishments of less than six months in prison or jail.[19] Furthermore, the right to a jury trial is not considered a fundamental right in juvenile proceedings.[20]

Jury duty is one of the primary ways that citizens engage in civic activities.

Size of the Jury

Most states and the federal courts use 12-person juries; however, the Sixth Amendment does not establish a required size for juries. In 1970, the Supreme Court ruled on the constitutionality of juries with fewer than 12 people.[21] The justices held that the number 12 was only a "historical accident, unnecessary to effect the purposes of the jury system and wholly without significance." They determined that juries should be "large enough to promote group deliberations and . . . to provide a fair possibility for obtaining a representative cross section of the community."

The size of juries is determined by each state, and juries with as few as six people have been held to be constitutional, except in death-penalty cases. Reaffirming the Supreme Court's belief that at least six people were needed to achieve reasonable deliberations,[22] in 1978 the Court, in *Ballew v. Georgia*, struck down a conviction by a five-person jury.[23] Contemporary research has produced mixed results on whether 6-person juries make decisions differently than 12-person juries,[24] the potential disadvantages of smaller juries (the possibility of negative changes in jury dynamics and less diversity among jurors) appear to be outweighed by their measurable advantages (e.g., saving time and resources by requiring fewer citizens to report for jury duty, less time in jury selection, and lower costs of juror fees—see **Table 8.1**).[25]

Jury Selection

Although the Sixth Amendment guarantees trial by an impartial jury, neither the prosecutor nor the defense really desires a fully impartial jury; that is, each party generally attempts to select people who they believe will favor their side. The complex jury selection process is designed to eliminate certain people from serving while retaining others. Both the prosecutor and the defense attorney, and sometimes the judge, ask questions of potential jurors. Once a sufficient number of jurors are found acceptable by both sides, the jury is established.

Eligibility for Serving on Juries

There are few requirements for jury service. Minor variations exist among the states, but the basic qualifications are the same. A prospective juror must meet the following requirements:

- U.S citizenship
- Eighteen years of age or older
- Minimum residence in the jurisdiction in which the trial is being held (generally one year, but may be one month in some states)

Table 8.1 State-Mandated Initial Juror Compensation

Initial or Flat Daily Rate	State
$0.00*	Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Massachusetts, Nevada
$5.00	Alaska, Georgia, New Jersey
$6.00	Missouri
$9.00	Pennsylvania
$10.00	Alabama, Idaho, Iowa, Kansas, Maine, Ohio, Oregon, South Dakota, Washington
$11.00	Tennessee
$12.00	Montana, North Carolina
$12.50	Kentucky
$15.00	Indiana, Maryland, Rhode Island
$16.00	Wisconsin
$18.50	Utah
$20.00	Arkansas, Delaware, Minnesota, New Hampshire, Oklahoma
$25.00	Louisiana, Michigan, Mississippi, North Dakota
$30.00	Hawaii, Vermont, Virginia
$35.00	Nebraska
$40.00	New York, Texas, West Virginia, Wyoming
$41.50	New Mexico

*Many states provide compensation or a graduated compensation when trials go longer than one day. For example, Massachusetts provides $50/day after the third day.

Source: n.a. (2015). *Jury Pay.* Williamsburg, VA: National Center for State Courts.

- Possession of natural faculties (be able to see, hear, talk, feel, and smell, and be relatively mobile) to be able to evaluate evidence
- Ordinary intelligence
- Knowledge of the English language sufficient to understand the proceedings and communicate with the other jurors

Many jurisdictions also exempt people from jury duty because of their occupation or duties they perform within the community; for example, attorneys, clergy members, teachers, physicians, firefighters, law enforcement and correctional officers, military personnel, many public officials, caregivers of young children, and those with proven hardship are generally exempt from jury service (see **Table 8.2**), although they may serve if they wish to do so.

Table 8.2 Number of States Using Particular Statutory Exemption from Jury Duty Categories

Statutory Exemption	Number of States
Previous jury service	47
Age	27
Political office holder	16
Law enforcement	12
Judicial officers	9
Healthcare professionals	7
Sole caregiver	7
Licensed attorneys	6
Active military	5
Other exemptions	12

Source: Mize, G., Hannaford-Agor, P., & Waters, N. (2007). *The state of the states survey of jury improvement efforts: A compendium report.* Williamsburg, VA: National Center for State Courts.

Selection Process

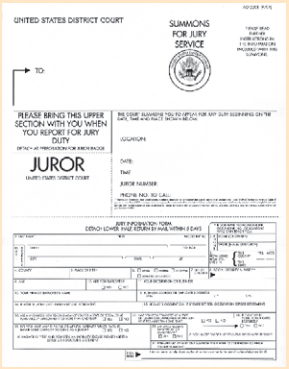
The selection of people to serve on a jury involves a number of steps (see **Figure 8.4**). The first step is the construction of a master list, called the **jury pool**, which contains approximately 1000 names of citizens randomly selected from the community. In an attempt to ensure the broadest inclusion of people, most communities cull jury pools from several sources, such as voter and welfare lists, property tax rolls, lists of licensed drivers, telephone directories, and even utility records.

Each person in the jury pool receives a questionnaire that asks basic questions about residency, occupation, ability to understand English, prior felony convictions,

KEY TERMS

jury pool
The master list of community members who are eligible to be called for jury duty.

Construction of jury pool



Summon random persons from jury pool (*venire*)

Examination of potential jurors (*voir dire*)

Impaneling of jury

Figure 8.4 The Process of Jury Selection

and physical impairments that might automatically exclude the person from jury duty. In addition, the questionnaire is designed to elicit information about the respondent's possible biases in a criminal trial, such as prior jury duty, involvement in lawsuits, or familiarity with police officers in the community.

The second step is to randomly select a group of people from the jury pool to establish the jury panel, called the ***venire***. The venire (from a Latin word, meaning "to come") is composed of people who are sent a summons (a legal document notifying them to report for jury duty). The number of potential jurors summoned is usually determined by the expected difficulty in obtaining a qualified jury. These people then become the panel from which the final jury is selected.

Unfortunately, not all potential jurors show up for jury selection. In many jurisdictions, as few as 40% of the venire report to the courthouse.[26] The problem of no-shows is extreme in some jurisdictions. For example, researchers report that only 20% of the persons summoned to report for jury duty in Dallas County, Texas, and only 13% of persons summoned in Miami-Dade County, Florida, actually reported for jury service.[27] Many people fail to show up because they do not want to take the time or effort to participate. Consequently, it is not unusual for juries to have disproportionate numbers of homemakers with grown children, retirees, and the unemployed.

Once assembled in the courtroom, the venire is sworn in and the ***voir dire*** begins. The voir dire (derived from the Latin words, *verum dicere*, meaning "to speak the truth") is a preliminary examination of potential jurors. It seeks to answer two questions:

1. Is this person qualified to serve on the jury?
2. Is he or she capable of making a determination of guilt or innocence without prejudice?

During the voir dire, the prosecutor, the defense counsel, and often the judge ask questions to elicit information about the person's familiarity with the case and possible biases that might affect his or her judgment and willingness to listen impartially to all the evidence before making a decision. There are a few limits on the kinds of questions that may be asked during this process, however. For example, potential jurors may not be asked specific questions about their sexual orientation or their religious affiliation and beliefs.

KEY TERMS

venire
A group of people who are selected from the jury pool and notified to report for jury duty.

voir dire
Preliminary examination by the prosecution and defense of potential jurors.

After the voir dire, prosecutors, defense attorneys, or the judge may excuse people from jury duty using one of two methods—challenge for cause or peremptory challenge.

Challenge for Cause

A **challenge for cause** is a call by the prosecutor or the defense to dismiss a person from a jury panel for a legitimate cause. Any number of people may be challenged for cause and dismissed from the panel. For example, if a prospective juror has vision or hearing problems that could interfere with observing or understanding the proceedings; if he or she indicates an existing bias toward one of the parties in the case; if the individual is worried about a sick family member; or if the person has knowledge of the defendant, witnesses, or attorneys involved in the case, then, with the agreement of the judge, that person may be excused.

Peremptory Challenge

Peremptory challenges allow attorneys to eliminate people from the jury who they believe are not likely to be sympathetic to their arguments. Because both the prosecutor and the defense attorney may challenge a limited number of prospective jurors without giving any reasons for doing so, the use of peremptory challenges has become a controversial part of the jury selection process.

Whereas the process of excusing people based on personal characteristics or views introduces a form of bias into the jury and may deny a defendant or the state a representative jury,[28] government statutes limit the number of peremptory challenges allowed for each side. The minimum number of challenges in felony cases is usually 3, but both sides may be allowed as many as 20 in highly publicized murder cases or cases in which several defendants are being tried together.

When a sufficient number of jurors (usually 12) and one or two alternates have been accepted by the defense and prosecution, they are impaneled—that is, sworn in.

Bias in Jury Selection

Can a person be excused from serving on a jury simply because of his or her race or gender? Does a defendant have a right to a jury composed of people with particular racial, ethnic, or gender characteristics? Must the jury be a cross section of the community? The Supreme Court has tried to answer these questions. In 1947, it ruled as follows:

> There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross section of the community.[29]

The requirement of a representative cross section of the community is met only if there is no systematic exclusion of any particular group of people. Of course, owing to peremptory challenges, when no reason for the challenge is given, it may be difficult to determine whether a particular race or gender is being deliberately excluded from the jury.

Race

In 1986, the Supreme Court held, in *Batson v. Kentucky*, that the Fourteenth Amendment's equal protection clause "forbids the prosecutor to challenge potential jurors solely on account of their race or on the presumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[30] Excluding members of a certain racial group would deny the defendant the right to be tried by an impartial jury that is representative of a cross section of the local community. In 1991, the Supreme Court, in *Hernandez v. New York*,[31] extended the *Batson* rule to the ethnicity of defendants.

Race, however, continues to affect jury selection. A recent study of racial discrimination in eight Southern states by the Equal Justice Initiative reports systematic exclusion of African Americans from juries. For example, in some counties in Alabama, more than 80% of African American jury pool members have been struck in criminal trials. Such a discrepancy has been routinely documented in death penalty cases.[32]

Gender

In 1994, in *J.E.B. v. Alabama*, the U.S. Supreme Court ruled that peremptory challenges based on gender were unconstitutional.[33] The Court, in a 6–3 decision, held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." The justices ruled that, "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."

Religion

Even though jurors may not be asked specific questions about their religious affiliation or beliefs during the voir dire process, indirect indicators or responses

KEY TERMS

challenge for cause
Challenge by the prosecutor or the defense to dismiss a person from a jury panel for a legitimate cause.

peremptory challenge
A challenge by the defense or the prosecution to excuse a person from a jury panel without having to give a reason.

during questioning may provide information about the religion of potential jurors. The constitutionality of using peremptory challenges based on a potential juror's religion has not yet been resolved. For example, Connecticut and New Jersey have both prohibited religion-based peremptory challenges.[34] In contrast, courts in both Texas and Minnesota have ruled that *Batson* does not apply to such challenges.[35]

Scientific Jury Selection

In an attempt to make effective decisions about potential jurors, many attorneys are turning to psychological and sociological studies designed to correlate background characteristics, personality profiles, courtroom behaviors, body language, and facial expressions with particular biases. Such studies include community surveys conducted before a trial to identify characteristics of people who are more inclined to be sympathetic toward either the prosecution or the defense. People on the venire exhibiting those characteristics are more likely to be either challenged or accepted as attorneys try to build a favorable jury.

The Trial

Jury trials account for only 5% of criminal prosecutions today.[36] Most trials are rather routine and highly regulated in terms of procedure, and are typically completed in a matter of hours or days. Only the most complex and celebrated cases take a week or more to conclude. Jury trials catch the attention of news media, films (e.g., *Twelve Angry Men*) focusing on jury dynamics are produced, and some jurors write books about their experience.

Opening Statements

Once the jury has been sworn in and seated and the formal charges against the defendant have been read, the prosecutor presents an **opening statement** to the jury. (The prosecutor goes first because it is the state's burden to prove the defendant's guilt.) The length of the statement depends on the complexity of the case, but its purpose is always to provide a factual outline of the case the prosecutor intends to prove. The opening statement may include a restatement of the charges, a general overview of why the prosecutor believes the defendant is guilty, and a brief listing of the witnesses the prosecutor intends to call and what each will testify to.

Nothing said by the prosecutor in the opening statements may be considered by the jury as evidence or facts in the case. Rather, it is commentary designed to help jurors follow the case as it develops. Prosecutors are not allowed to make statements considered inflammatory or prejudicial against the defendant, such as commenting on evidence already known to be inadmissible.

The defense is then given an opportunity to make its opening statement. Often, the defense may choose to delay its opening statement until after the prosecution's case has been fully presented. In any event, the defense will usually stress during this statement that the prosecutor must prove his or her case beyond a reasonable doubt, given the presumption of innocence.

Presentation of Evidence

Evidence is presented by witnesses, not by the attorneys. The prosecutor and the defense attorney call various witnesses to present different kinds of evidence. Ideally, each witness will present evidence that lays a foundation for the evidence offered by subsequent witnesses.

Types of Evidence

All evidence submitted must be relevant, competent, and material; that is, it must relate directly to the issue at hand and to the material elements of the crime, and it must be provided by someone considered competent or qualified to testify. Although there is often overlap, most evidence falls into one of the following categories:

- **Real evidence** includes physical objects such as fingerprints, clothing, weapons, stolen property, documents, confiscated drugs, and genetic material. Sometimes the original real evidence is not convenient to present to the jury, so photographs or reconstructions may be used.
- **Testimonial evidence** includes the testimony of witnesses who are qualified to speak about specific real evidence; for example, an expert witness such as a forensic chemist may be called to testify to the fact that drugs confiscated by the police are what they are purported to be.
- **Direct evidence** is provided by eyewitnesses to the crime about what they directly observed.
- **Circumstantial evidence** requires that the jury draw a reasonable inference from the testimony. A

KEY TERMS

opening statement
The initial presentation of the outline of the prosecution's and the defense's cases to the jury.

real evidence
Physical evidence introduced at the trial.

testimonial evidence
Sworn testimony of witnesses who are qualified to speak about specific real evidence.

direct evidence
Testimony by an eyewitness to the crime.

circumstantial evidence
Testimony by a witness that requires jurors to draw a reasonable inference.

witness may testify that he or she heard a scream followed by a gunshot coming from a victim's apartment; moments later, the witness saw the defendant leave the apartment. Although the witness did not directly observe the shooting, absent any other suspects in the apartment, it is reasonable to infer that the defendant was involved in the crime.

- **Hearsay evidence** includes testimony based on something that the witness does not have direct knowledge of but has heard or been told. Generally, hearsay evidence is considered inadmissible. For example, if Chantel were to testify, "Morris told me that Tyrone sold Tony a kilo of marijuana," it would be considered hearsay evidence because Chantel had no direct knowledge of the alleged sale. However, several exceptions to this rule exist:
  1. *Dying declarations:* Because it is assumed that dying people will not lie when they believe themselves close to death, such testimony may be admitted for the jury's consideration.
  2. *Statements made by victims of child abuse:* Such statements made to a caseworker, teacher, or doctor may be admitted.
  3. *Admission of a criminal act by the defendant to a witness:* Because both the witness and the defendant are in court and the defendant may rebut the statement, it may be admitted as evidence.

KEY TERMS

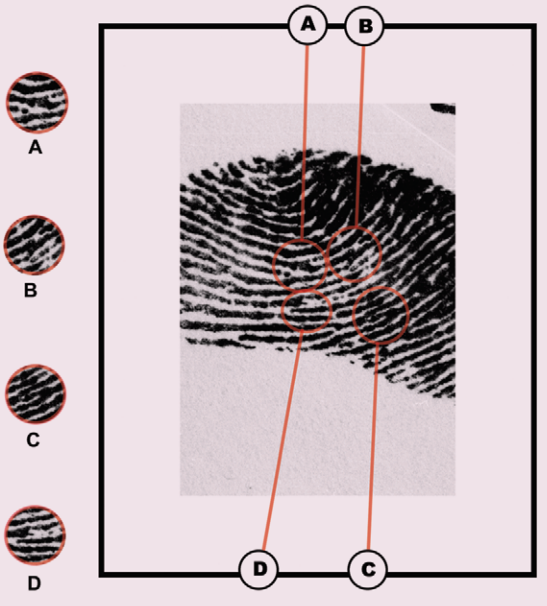
hearsay evidence
Testimony involving information the witness was told but has no direct knowledge of.

Focus on Criminal Justice

Real Evidence: Fingerprints and DNA

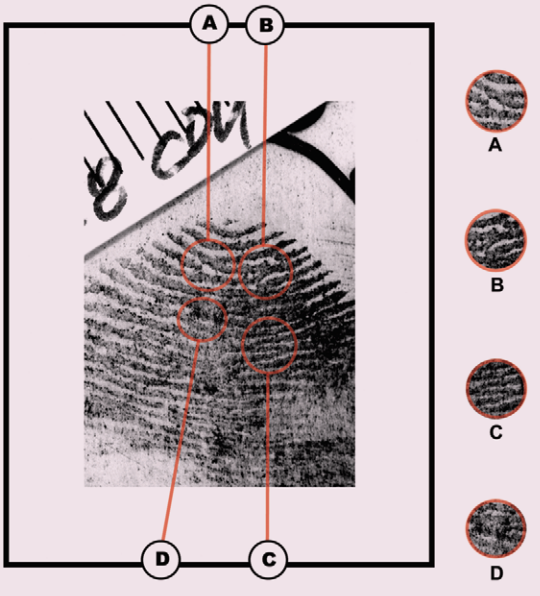
Rick Jackson was arrested in Upper Darby, Pennsylvania, for a gruesome murder and was told that the police had solid evidence against him—photographs of his bloody fingerprints taken from the crime scene. Even though experts agreed that the fingerprints were a match, Jackson insisted that they could not be his. He was found guilty and sentenced to life in prison without possibility of parole. Two years later, other fingerprint experts testified that the prosecution had been wrong and that the prints, in fact, did not belong to Jackson. He was released after spending two years in prison.

Although fingerprints have long been considered the "gold standard" of identification at trial and frequently are the key evidence used to obtain convictions, their reliability is increasingly being questioned, especially with the growing refinement of DNA technologies. DNA samples are often retrieved from crime scenes and used by prosecutors in minor property crimes. These samples



"Known" Print

Courtesy of Cynthia D. Homer, Maine State Police Crime Laboratory.



"Unknown" Print

Courtesy of Cynthia D. Homer, Maine State Police Crime Laboratory.

Real Evidence: Fingerprints and DNA (*continued*)

may consist of small amounts of blood on broken glass in burglaries, sweat on a hat or mask, or skin cells left behind on a drinking glass, cigarette butt, chewing gum, or food. All of these materials are real evidence and are admissible in court.

The DNA of offenders collected at crime scenes is matched against the nearly 2 million DNA samples contained in the Combined DNA Index System (CODIS) maintained by the Federal Bureau of Investigation (FBI). The CODIS database includes both state and federal DNA samples collected from convicted felons, prison inmates, and adults and juveniles charged with serious crimes. One such DNA match helped to solve a "cold case" involving the murder of an 11-year-old girl in 1986 in Fort Worth, Texas, as well as 9 rapes and 22 homicides in Kansas City, Missouri. However, DNA samples have also been used to establish that individuals were wrongfully convicted when reexamination of their cases revealed mishandling of evidence. The Innocence Project often relies on DNA evidence to help prove the wrongful incarceration of innocent individuals. Experts claim that a DNA match is conclusive evidence because less than 1 in 200 million matches is likely to be faulty. Nearly all states now admit DNA evidence at trial, although the specific standards for analysis and testing vary. Both prosecutors and defense attorneys look for DNA evidence to strengthen their cases.

Matches identified when known or rolled prints—which are often digitally scanned with livescan technology—are compared to other known prints and generally considered valid. There is much less certainty about matches made by comparing known prints to latent prints—those obtained from surfaces of objects at the crime scene.

Agreeing upon how many points are needed in fingerprint comparisons to declare a match has not been widely settled upon. Some police labs may require a minimum of six ridge characteristics for a match, whereas other labs may require a minimum of 12 similar points to establish a match. The variability in standards is compounded when fingerprint examiners are lax or sloppy in their work. For example, a 2009 audit of the Houston Police Department fingerprint lab found examiners failed to analyze or missed matches in more than half of a random sample of fingerprint cases.

Source: Stahl, L. (2004, June 6). Fingerprints: Infallible evidence? CBS News 60 Minutes. Retrieved from http://www.cbsnews.com/stories/2003/07/16/60minutes/main563607.shtml; Office of Justice Programs. (2004). *DNA in "minor" crimes yields major benefits in public safety*. Washington, DC: U.S. Department of Justice; Lyons, D. (2006). Capturing DNA's crime fighting potential. *State Legislatures*, *32*, 16–18; Kreeger, L., & Weiss, D. (2003). *Forensic DNA fundamentals for the prosecutor*. Alexandria, VA: American Prosecutors Research Institute; *United States v. Plaza*, Eastern District of Pennsylvania, No. 98–362 (2002); Lawson, T. (2003). Can fingerprints lie?: Re-weighing fingerprint evidence in criminal jury trials. *American Journal of Criminal Law*, *31*, 1–67; Mendoza, M. (2009, December 14). Fingerprint trouble plagues others besides HPD. Retrieved from http://chron.com/disp/story.mpl/metropolitan/6768400.html.

The Prosecution's Case

The prosecutor presents the state's case through a succession of witnesses and introduction of evidence. Questioning is usually straightforward, with each witness being asked to discuss what he or she knows to be the facts of the case. The defense attorney may object to a question on several grounds:

- The question is irrelevant (immaterial) or incompetent (not admissible).
- The question calls for speculation on the part of the witness. (Only expert witnesses may offer opinions.)
- The prosecutor is leading the witness's response (presenting the desired response in the question itself).

The judge either sustains (consents to) or overrules the objection. If the objection is sustained, the question must be rephrased or replaced; if it is overruled, the witness is asked to answer the question.

When the prosecutor is finished questioning a witness, the defense may cross-examine the witness but may cover only those issues raised in the prosecutor's direct examination. The **cross-examination** is designed to discredit the witness by identifying inconsistencies or contradictions in his or her testimony. If the defense attorney believes the witness was telling the truth and any further questioning might strengthen the state's case, he or she may waive the right to cross-examine the witness.

Once cross-examination is complete, the prosecutor may ask additional questions through redirect examination. The purpose of redirect examination is to clarify any issue brought out in response to questions posed by the defense. If the prosecutor chooses to redirect, the defense is given a final opportunity to ask clarifying questions based on the redirect examination through recross-examination. Thus each side has a maximum of two opportunities to question a witness.

Once the prosecutor has presented the state's evidence, the prosecution rests. At this point, the defense may ask for a **judgment of acquittal**, claiming

KEY TERMS

cross-examination
Questioning of a witness by counsel after questions have been asked by the opposing counsel.

judgment of acquittal
A defense motion for dismissal of a case based on the claim that the prosecution failed to establish that a crime was committed or that the defendant committed it.

Headline Crime

Questionable Expert Testimony

Expert witnesses testifying about real evidence are assumed to provide honest and accurate descriptions of the evidence being presented to juries. Sometimes, however, the testimony may be far from accurate, whether intentionally misleading or not. For example, the expert testimony of a dentist who was considered to be an authority on forensic odontology (bite-mark evidence) has been called into question. At least two recent murder convictions were obtained in part on the strength of his testimony. In 1995, the dentist testified that bite marks on a three-year-old girl were, without question, made by the defendant; the defendant was subsequently convicted of rape and murder. Three years earlier, the dentist testified in another case involving rape and murder and again tied bite marks to the defendant. However, a confession by a third man to both killings and DNA analysis connecting that defendant to one of the rapes has led to an investigation of more than 100 cases involving the dentist's testimony.

In the first case, the dentist had testified that bite marks on the victim's arm were made by the defendant. However, in 2007 a panel of experts examining the case concluded that the marks were not human bites, but rather were likely the result of insects and crawfish nibbling on the corpse, natural decomposition, and marks made when the body was pulled out of the pond where it had been found. The panel also stated that the bite marks the dentist had testified to in the earlier case were only scrapes, not bites at all.

The Innocence Project's panel of experts from the United States, Canada, and England believe that forensic odontology is a solid science in cases where it is applied properly. However, they believe that in these two cases, and perhaps dozens of other cases, it was not applied properly.

Source: Little, R. K. (2009). Addressing the evidentiary sources of wrongful convictions: Categorical exclusions in capital murder cases. Retrieved from http://www.swlaw.edu/pdfs/lr/37_4little.pdf.

that the state failed to establish that a crime was committed or that the defendant committed it. In most states, if the judge believes that the prosecutor has not established a sufficient case, he or she can take the case out of the hands of the jury and enter a directed verdict—a judgment of acquittal—which bars any further prosecution of the defendant on the crime charged. In some states, a directed verdict means that the judge directs the jury to return a not guilty verdict; however, a few states allow the jury to disregard the instruction and return a guilty verdict.

The Defense's Case

In the United States, a defendant is innocent until proven guilty. Thus the prosecution must prove its case to win a conviction. The defense is not required to present any case at all, although this is rarely done. If the defense does decide to present its case, it calls its own witnesses to testify on the defendant's behalf after the prosecution rests.

The defendant is not required to testify. This right is protected by the Fifth Amendment, which states that no one "shall be compelled in any criminal case to be a witness against himself." There are many reasons why a defendant might decline to testify, such as a prior criminal record or the desire not to give the jury a bad impression. In any event, a prosecutor may not comment on the refusal of a defendant to testify.[37]

In most cases, the defense attempts to present sufficient evidence to cast doubt on the prosecutor's case, thereby creating reasonable doubt about guilt in the minds of the jurors.

KEY TERMS

rebuttal
The presentation of additional witnesses and evidence by the prosecutor in response to issues raised in the defense's presentation of witnesses.

surrebuttal
Questioning by the defense of witnesses who were presented by the prosecutor during rebuttal.

closing arguments
The final presentation of arguments to the jury.

Rebuttal and Surrebuttal

Once the defense has completed its case and the cross-examination and redirection of defense witnesses are complete, the prosecutor may present additional evidence in a **rebuttal** to issues raised in the defense's case. Witnesses called by the prosecutor may then be questioned by the defense in **surrebuttal**.

Closing Arguments

After the defense rests its case, both sides present their summation, also called **closing arguments**. This statement gives each side an opportunity to review and summarize the facts of the case, highlight the significant weaknesses in the opposing case, and, if

necessary, make an emotional appeal to the jury in a final attempt to win them to their side.

Typically, the prosecution presents its closing argument first, arguing that guilt has been established and emphasizing to the jury the wrongness of the crime, the impact of the crime on the victim, and the jury's responsibility to return a guilty verdict. The defense then presents its closing argument, in which it summarizes facts presented in direct and cross-examination, and likely argues that it is the prosecutor's responsibility to prove the guilt of the defendant. After the defense makes its closing argument, the prosecution is allowed to make a final rebuttal.

Judicial Instruction

The judge's instructions, or **charge to the jury**, provide the members of the jury with guidelines for making their decision. Most states have developed standard jury instructions covering the issues of standards of proof, the responsibility of the state to prove guilt, the rights of the defendant, the elements of the crime that must be proven, possible verdicts, restrictions on communicating with others during jury deliberations, and suggestions for determining the credibility of witnesses. In addition, the judge may give special instructions regarding the nature of the offense and any lesser charges that are included. Often, the prosecutor and the defense attorney will confer with the judge before the charging of the jury to discuss additional instructions that they wish to include.

Many studies suggest that a large percentage of jurors do not understand the judicial instructions.[38] Other studies suggest that jurors who receive standard instructions comprehend their responsibilities no better than jurors who receive no instructions at all—both groups appear to make similar decisions and to raise similar questions of the judge after beginning to deliberate.[39]

The Presumption of Innocence and Reasonable Doubt

One of the most important instructions a judge gives to jury members is to remind them that a defendant is considered innocent and that the state must prove its case beyond a **reasonable doubt**. In other words, the burden of proof is on the state; the defense is not required to put on their own case if they believe the prosecution has failed to prove its case. The **presumption of innocence** means that a person is presumed to be innocent until the state proves beyond a reasonable doubt that he or she is guilty of the crime charged. This is the principle under which the process of determining guilt operates.

Many people believe that because there was probable cause to arrest and charge a suspect, the suspect must be guilty. In reality, probable cause means only that there are reasonable grounds to believe the accused committed certain acts. A fine line exists between the grounds necessary to make an arrest and those necessary to convict.

The requirement that the accused be judged guilty beyond a reasonable doubt means that the finder of fact (jury or judge in the case of a bench trial) must find the evidence entirely convincing and must be satisfied beyond a moral certainty of the defendant's guilt to convict him or her. Fanciful or imagined doubt, or doubt that arises in the face of the unpleasant task of convicting or acquitting a defendant, is not sufficient. This standard does not require that the case be proved beyond *all* doubt—a situation generally unlikely given human nature. In civil cases, the burden of proof is initially on the person who brought the case (the plaintiff) and the standard of proof is a **preponderance of the evidence** (greater than 50% certainty that the state made its case, or more likely than not).

This requirement of proof beyond a reasonable doubt protects defendants from being convicted of crimes when the case against them is not very strong. In essence, the Supreme Court has held that it is better to let a guilty person go free as a result of less than adequate proof than to convict an innocent person solely on the basis of the probability of guilt. When much of the evidence presented against a defendant is circumstantial, or when testimony by both prosecution and defense witnesses appears reasonable and yet contradictory, it is better for the jury to err on the side of setting the defendant free than to send him or her to prison.

Jury Deliberations

After hearing the judge's instructions, the jury retires to the jury room to begin deliberations. If the case has generated much public attention or deliberations are likely to take some time, the judge may request that members of the jury be sequestered (segregated from all outside contact). In some highly publicized

KEY TERMS

charge to the jury
Judge's instructions to the jury, which are intended to guide the jury's deliberations.

reasonable doubt
The requirement that the jury (or the judge in the case of a bench trial) must find the evidence entirely convincing and must be satisfied beyond a moral certainty of the defendant's guilt before returning a conviction.

presumption of innocence
The notion that a person is presumed to be innocent unless proved guilty beyond a reasonable doubt.

preponderance of the evidence
More likely than not; greater than 50%.

Focus on Criminal Justice

The Judge's Instructions to the Jury

After reading a statement of the formal charges against the defendant, the judge defines the charge(s) according to state (or federal) statute and indicates the elements that must be proven to the jury. The judge then delivers instructions regarding the finding of guilt or innocence.

The following instructions deal with the issues of reasonable doubt and weighing of evidence in a typical felony case. Although university students may find these instructions easy to understand, they are likely to be difficult for many average citizens serving on juries to fully comprehend. According to the Flesch-Kincaid Grade Level scale, the instructions are written at the 12th-grade level.

> If you are convinced beyond a reasonable doubt that the defendant is guilty of the offense charged, or one of the lesser included offenses, but have a reasonable doubt as to which of such offenses he is guilty, then it is your duty to resolve such doubt in the defendant's favor, and you can only convict him of the least serious offense.
>
> The defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption prevails until the conclusion of the trial, and you should weigh the evidence in the light of this presumption of innocence. It should be your endeavor to reconcile all the evidence with this presumption of innocence if you can. But if this cannot be done, and the evidence so strongly tends to establish the guilt of the defendant as to remove all reasonable doubt of the guilt of the defendant from the mind of each juror, then it is the duty of the jury to convict. A "reasonable doubt" is a fair, actual, and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be doubt based upon reason and common sense and not upon imagination or speculation.
>
> If, after considering all of the evidence, you have reached such a firm belief in the guilt of the defendant that you would feel safe to act upon that conviction, without hesitation, in a matter of the highest concern and importance to you, when you are not required to act at all, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.
>
> If, after careful consideration of all the evidence in this case, you are left with two different theories: one consistent with the defendant's innocence, and the other with his guilt, both reasonable; and you are not able to choose between the two, you must find the defendant not guilty.
>
> You are the exclusive judges of the evidence, the credibility of the witnesses, and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all the evidence in the case.
>
> In considering this case you will no doubt meet with conflicts in the evidence. It is a matter of common knowledge that witnesses to an event rarely see or hear all the circumstances alike. Whenever you meet with such conflicts, reconcile them, if you can, on the assumption that each witness has testified truthfully. If you cannot so reconcile the conflicts, it is for you to determine what you will believe and what you will not believe.

trials such as the Casey Anthony trial, juries have been sequestered from the point at which they were impaneled. The jury members are kept together for the duration of their deliberations, sometimes receiving temporary housing and meals, to protect them from outside influences. In most cases such precautions are not needed, and jurors simply take an oath to stay together during breaks and to refrain from talking to others about the case. This may help filter outside opinions from the jury decision; however, researchers indicate sequestering may actually perpetuate **group think**, a psychological phenomenon in which people conform and dissenting views go unspoken to maintain consensus within the group.[40]

KEY TERMS

group think
Psychological phenomenon in which people conform and dissenting views are unstated to maintain consensus.

The jury selects a jury foreperson to act as the leader. It is this juror's responsibility to conduct the voting, to communicate with the judge regarding requests for clarification or additional instructions, and to read the verdict once it has been made. Generally, before the members of the jury begin deliberating, they take a straw vote (an unofficial vote) to get a sense of how each person feels about the case. With few exceptions, the initial vote is indicative of the final vote.[41] Mock jury experiments confirm these findings, showing that jurors reversed the vote only 6% of the time.[42] Recent research indicates that what is influential in how jurors make decisions is emotion. Scholars have found that our emotional states can influence our decision-making processes, which in the role of a juror can translate to judgments on guilt.[43]

Hung Jury

Because a jury generally must reach a unanimous verdict, if the jury is split (even if it is 11 to 1) and no verdict can be reached, it is considered a **hung jury**. Hung juries do not occur frequently; the National Center for State Courts reports the average hung jury rate in state courts is only 6.2% (although it ranges from less than 1% to nearly 15%, depending on the jurisdiction). The average hung jury rate in the federal courts is much lower, averaging only 2.5%.[44] The federal trial of ex-Illinois Governor Rod Blagojevich illustrates that even a single juror can produce a hung jury (see the following Headline Crime box).

Disagreement often exists among jurors at the early stages of deliberations. Indeed, it is not unusual for the judge to call the jury back to the courtroom if deliberations have taken more than a few days (or longer in complex cases) to ask whether the foreperson believes that a verdict can be reached. However, the judge may not intervene to push the jury for a verdict. Because a hung jury is considered by law to be a legitimate outcome in a trial, any attempt to put undue pressure on the jury to reach a verdict is viewed as inappropriate. It is considered coercive and improper for judges to emphasize the expense and inconvenience that will result from a retrial or to require a jury to continue deliberations for more than 24 hours without sleep.[45] If there is a hung jury, the judge may declare a mistrial. It will then be up to the prosecutor to decide whether to go to trial a second time.

If only a few jurors are dissenting from the majority's position, the judge may instruct the jury to continue deliberations. After this step, if the jury again reports that it cannot reach a verdict and that further deliberation would be futile, the judge may once more instruct them to continue. Generally speaking, the longer a judge keeps the jury deliberating, the more likely it becomes that the jury will reach a verdict.[46]

In some jurisdictions, the judge may give the jury *Allen* instructions, which are designed to push them to reach a verdict. Such instructions are based on the 1896 Supreme Court decision in *Allen v. United States*.[47] The judge may lecture dissenting jurors about the importance of listening to other jurors' opinions and considering whether the doubt in his or her own mind is reasonable. The purpose of such instructions is to encourage a compromise that will allow the jury to arrive at a verdict.

Jury Nullification

In recent years juries have acquitted a number of defendants in very high-profile criminal cases, including George Zimmerman, Amanda Knox, and Casey Anthony, in spite of perceptions that the evidence against the defendants was simply overwhelming. How might this happen?

In the judge's instructions to the jury, jurors are typically told that when they were sworn onto the jury they took an oath to uphold the law; that they are only to be finders of the facts and are not to interpret the law. Historically, however, juries have been allowed to be finders of the law, a situation known as **jury nullification**. Rooted in common law rights transported to America from England,

KEY TERMS

hung jury
A jury that is deadlocked and cannot reach a verdict. As a result, the judge may declare a mistrial.

jury nullification
When juries decide to be finders of the law, not just determining guilt or innocence.

Headline Crime

Hung Jury on 23 of 24 Counts Against Ex-Governor Blagojevich

Former Governor Rod Blagojevich was tried in federal circuit court, charged with 24 counts involving corruption and lying to federal prosecutors who were investigating whether he had attempted to sell an appointment to fill the Illinois Senate seat vacated by President Obama. Blagojevich was convicted on only one of the least serious counts, lying to the FBI. The jury was unable to reach a unanimous verdict on the other 23 counts. On the charge that he had tried to sell the Senate appointment, the jury was split 11–1 in favor of a guilty verdict. On most of the other charges, the jury was divided 6–6 or 7–5. Blagojevich was retried and found guilty on 17 of 20 public corruption charges against him and sentenced to 14 years in prison. He has since petitioned to appeal his case to the Supreme Court.

Source: Davey, M., & Saulny, S. (2010). Blagojevich, guilty on 1 of 24 counts, faces retrial. Retrieved from http://www.nytimes.com/2010/08/18/us/18jury.html; Sweeney, A., Healy, V. & Ahmed-Ullah, N.(2010). Many Blagojevich jurors disappointed. Retrieved from http://articles.chicagotribune.com/2010-08-18/news/ct-met-blagojevich-verdict-jury-20100818_1_female-juror-deliberation-senate-seat; Blagojevich convicted on corruption charges. Retrieved from http://www.cnn.com/2011/POLITICS/06/27/blagojevich.trial/; Meisner, J. (2015, November 18). Blagojevich appeals to Supreme Court to overturn conviction. Retrieved from http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-supreme-court-appeal-met-20151117-story.html.

juries, until recently, were able to acquit a defendant because they believed the particular law in the case was wrong. By acquitting the defendant, they nullified the law.

Jury deliberations are held in secret, and many jurisdictions prohibit testimony based on what went on in the jury room in an appeal challenging the verdict. Thus, actual instances of jury nullification are rarely discovered. Why do jurors decide to not follow the law when instructed to?

- Jurors may believe that a law they consider to be fair is being unfairly applied to the defendant in this particular case (e.g., the defendant is too old or lacking in mental capacity).
- Jurors may believe that the particular law is unfair when applied to anyone (the law is simply a "bad" or "wrong" law).
- Jurors may be protesting particular injustices unrelated to the present defendant or law (e.g., refusing to convict minority defendants because of the perceived racial injustice in the criminal justice system).
- Jurors may believe the prosecutor acted unscrupulously or unfairly and deny the prosecutor a conviction even though they also believe the defendant to be guilty.[48]

Jury nullification is controversial and condemned by the federal courts, which claim that a jury that nullifies the law has greatly exceeded its authority.[49] At the local level, citizens appear to be increasingly supportive of the idea of nullification. For example, in 2002, South Dakota voters considered, but then voted down, a proposed amendment to the state constitution that "would have allowed the accused in all criminal prosecutions to argue the 'merits, validity, and applicability of the law.'"[50]

Judgment or Verdict

The federal courts and most states require unanimous verdicts. Two states allow for nonunanimous decisions in non-death-penalty felony cases: Louisiana allows convictions to be based on agreement of 10 of 12 jurors for less serious felonies, and Oregon accepts an agreement of 10 of 12 jurors in all felony cases except for murder. The U.S. Supreme Court has held that such verdicts are constitutional.[51]

KEY TERMS

double jeopardy
Once a person has been tried and acquitted of a criminal charge, he or she may not be recharged and retried for the same offense.

harmless error
An error, defect, irregularity, or variance that does not affect substantial rights of the defendant.

Upon arriving at a verdict, the jury returns to the courtroom. The jury foreperson gives the signed verdict to the bailiff, who then gives it to the judge. The judge glances at the verdict and gives it to the court clerk, who reads it to the court. Next, the judge asks the prosecutor or the defense attorney whether they would like the jury polled; if so requested, the judge asks each juror to state his or her vote on the verdict. Sometimes jurors feel pressured to go along with the majority, even though they may believe the defendant is innocent. If a juror states that he or she did not really agree with the verdict, the judge will send the jury back to the jury room to deliberate again in an attempt to reach a unanimous verdict.

Appeal of the Verdict

If the verdict is "not guilty," the defendant is acquitted and released. The state may not appeal a verdict of not guilty because the Fifth Amendment guarantees that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." This prohibition against **double jeopardy** means that once a person has been tried and acquitted of a criminal charge, he or she may not be recharged and retried for the same offense. By contrast, if the verdict is "guilty," the defendant has the right to appeal. He or she may or may not be released on bail while awaiting the outcome of that appeal.

An appeal of the verdict is a request to the state appellate court to correct mistakes or injustices that occurred in the trial process, such as a judge's error in permitting certain evidence to be introduced, misconduct by the prosecutor, or jury tampering. The U.S. Supreme Court has held that indigent defendants have the right to be represented by counsel on appeal.[52] This right is limited to the defendant's first appeal only. The Supreme Court has also held that a defendant loses the right to counsel in a first appeal if he or she delays in filing the appeal with the court.

The issues raised in an appeal must be based on objections raised by the defense in pretrial motions or at the time of the trial, such as a motion for a change of venue or a motion to suppress evidence. With two exceptions, issues not raised in pretrial motions or during the trial may not be considered. Issues that are the result of plain error and those that affect substantial rights of the defendant may be appealed—for example, a claim that the court lacked legal jurisdiction to hear the case is grounds for an appeal. An appeal may also be based on the claim that the defendant's attorney was incompetent.

Appeals are sometimes rejected because they are based on **harmless error**—an error, defect, irregularity, or variance that does not affect substantial

rights of the defendant. Harmless errors include the following:

- Technical errors having no bearing on the outcome of the trial
- Errors corrected during trial (for example, when testimony was allowed but then ordered stricken and the jury admonished to ignore it)
- Errors resulting in a ruling in the appellant's favor
- Situations in which the appeals court believes that even without the error, the appealing party would not have won at trial

Very few appeals result in an overturned conviction; most produce only minor modifications, leaving the conviction itself undisturbed.[53] Nevertheless, if the appellate court finds that a significant error did occur, it may reverse the conviction, thereby setting aside the guilty verdict and sending the case back to the trial court. If the conviction is reversed, the prosecutor may appeal the decision of the appellate court.

Contrary to widely held perceptions, only a minority of criminals are eventually set free as a result of errors in the original trial. Approximately half of all offenders who are retried after appeal are convicted again.[54]

Other Postconviction Remedies

Once a defendant has exhausted all appeals through the state appellate courts and is incarcerated, he or she may still seek postconviction relief by filing a petition for a writ of **habeas corpus** with the federal courts of appeals or directly with the U.S. Supreme Court. A petition of habeas corpus asks the federal court to release the defendant from an alleged illegal imprisonment or confinement by the state.

Habeas corpus petitions differ from appeals in several ways. For example, they may be filed only by people who are actually confined, and they must raise constitutional issues rather than issues of error. They may be broader in scope than appeals; for example, an inmate may claim that the current conditions in his or her prison constitute cruel and unusual punishment. Since the 1960s, courts have granted writs of habeas corpus in several instances:

- To release defendants on bail when the bail amount was considered excessive
- To release inmates from prison when the sentence was considered excessive
- To overturn capital punishment sentences
- To release inmates who claimed their attorneys did not provide competent counsel

In 1963, in *Fay v. Noia*, the Supreme Court required federal courts to consider habeas corpus petitions even from inmates who had failed for some reason to appeal their case properly in the state courts, as long as the inmate had not deliberately bypassed the state's appeal process and the allegation of newly discovered evidence was not irrelevant, frivolous, or incredible.[55] By the early 1990s, with nearly 10,000 habeas corpus petitions being filed annually and the justices having a decidedly more conservative bent, the Supreme Court placed severe restrictions on the conditions under which federal courts would hear such petitions.

One of the first attempts to reduce the burden placed on federal courts by habeas corpus petitions came in 1991, in *Coleman v. Thompson*.[56] In this case, the defendant's lawyer filed the habeas corpus petition with the Virginia Supreme Court three days after the 30-day time limit had expired. The Virginia court held that, although there was "no doubt an inadvertent error . . . the petitioner must bear the risk of attorney error" and barred any further review in the federal courts. The next year, in *Keeney v. Tamayo-Reyes*,[57] the U.S. Supreme Court ruled that the federal courts are not obligated to grant a hearing on a state prisoner's challenge to his or her conviction, even if the prisoner can show that the defense attorney did not properly present crucial facts in a state court appeal. In 1993, in *Herrera v. Collins*, the U.S. Supreme Court ruled that a Texas court's rejection of a defendant's late claim of innocence based on new evidence did not necessarily violate the petitioner's right to due process.[58] Texas—as well as several other states—requires that such a claim be filed within 30 days; other states allow up to a few years for such an appeal, and nine states have no time limit for filings based on new evidence.

The implications of these decisions are far-reaching, affecting the lives of inmates who may have been incorrectly convicted. At the same time that the Supreme Court has tightened the reins on the numerous frivolous petitions from prisoners, it has also significantly reduced the rights of prisoners to postconviction relief from judicial errors and wrongful imprisonment.

KEY TERMS

habeas corpus
A judicial order to bring a person immediately before the court to determine the legality of his or her detention.

WRAP UP

CHAPTER HIGHLIGHTS

- Few events draw more public attention than a criminal trial. As an alternative to the less public plea-bargaining method of obtaining justice, the trial epitomizes the adversarial process in which the prosecution and the defense present evidence and arguments in their attempts to convince a jury of their side of a case.
- The prosecutor and the defense attorney typically submit pretrial motions to the judge before the beginning of the trial. Some of these motions must be decided before the start of the trial, but the judge may choose to rule on other motions, such as those to suppress evidence, later during the trial when the evidence is actually submitted.
- The Sixth Amendment guarantees defendants the right to a speedy, public, and fair trial. State time guidelines differ widely, but the federal Speedy Trial Act of 1974 requires that charges be filed within 30 days of a suspect's arrest and that the trial begin within 70 days of the filing of charges.
- Approximately 40% of all cases that go to trial are tried before juries. The remaining 60% involve bench trials.
- Defendants charged with either a felony or a misdemeanor are entitled to a trial by jury. Most states, as well as the federal government, use juries composed of 12 people, although juries with as few as six members have been deemed constitutional except in death-penalty cases.
- The prosecutor and the defense attorney ask questions during the voir dire to determine which people will make the best jurors.
- During the trial, the prosecution and the defense alternate in presenting evidence, questioning the evidence introduced by the opposing side, and then submitting the evidence to the jury. After both sides present their closing arguments, the judge gives his or her charge (instructions) to the jury.
- After receiving its charge, the jury retires to the jury room to begin deliberations. The federal courts and most states require unanimous verdicts, although the Supreme Court has held that nonunanimous verdicts are constitutional in non-death-penalty cases. A jury that cannot arrive at a verdict is called a hung jury.
- If the verdict is not guilty, the defendant is acquitted and released and may not be retried on the same charge (double jeopardy). The defendant may appeal a guilty verdict to an appropriate appellate court based on objections raised by the defense in pretrial motions or at trial.
- Defendants who have exhausted the appeal process and are incarcerated may still seek post-conviction relief by filing a writ of habeas corpus. The Supreme Court has restricted the grounds on which such petitions may be filed.

DIGGING DEEPER

1. Should the defense or the prosecution be limited in the number of continuances requested? Why?
2. Should the public and the press be allowed to attend criminal trials? Why or why not?
3. How much control should the court exercise over the media in the reporting of trials?
4. What are the benefits of peremptory challenges of potential jurors? Why do some critics argue they should be abolished?
5. Should all jury verdicts be unanimous? Why or why not?
6. In your view, who is the most powerful person in the courtroom? Why?
7. Could jurors rely too much on forensic evidence based on what they see in crime dramas and other forms of media?
8. Does scientific jury selection allow for a true representation of one's peers? Do you see any problems with scientific jury selection?