The Criminal Justice System:
A Survival Guide

By

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I. Introduction.

This pamphlet provides an overview of the criminal justice system. I call it a "Survival Guide" because I believe that clients are most likely to survive – to obtain a successful outcome to their cases – if armed with knowledge about what lies ahead. I worked with Stephanie Adraktas, an outstanding lawyer and colleague, to put this guide together to provide clients with a starting point and general framework to bring into attorney-client meetings. My feeling is that, the more my clients know about the system, the more productive our meetings are likely to be, and therefore the greater my ability to defend them.

The information provided here is not meant to constitute legal advice for individual clients on individual cases. Nothing in this pamphlet is meant to suggest that I necessarily will take a particular approach to any specific case or issue. Moreover, while this overview is more detailed than found in other similar pamphlets, of necessity it is not comprehensive. For example, state and federal practices are sometimes summarized in a general way that does not distinguish the details and nuances in the respective court systems. If you are interested in additional reading that will help you acquire a more detailed understanding of the process in which your case will be handled, please visit my website at www.iaria-law.com and click the Resources tab.

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II. The Criminal Justice System in a Nutshell.

A. The Courts.

Local courts include municipal courts, traffic courts and small claims courts. These are courts of limited jurisdiction that only preside over less serious cases, including misdemeanors and gross misdemeanors.

State courts include district courts and superior courts. Misdemeanors and gross misdemeanors are filed in district courts and felonies are filed in superior courts.

Federal criminal cases are filed in federal district courts.

B. Law Enforcement Agencies.

Local, county and state law enforcement agencies may investigate any case within their geographical jurisdiction. Federal agents generally will only investigate certain classes of cases; for example bank robbery and bank fraud, domestic terrorism, or organized drug crimes. The key is whether a local ordinance, state statute, or federal statute defines a crime or crimes that cover the activity being investigated. Generally, state and local prosecutors work with state and local police agencies and federal prosecutors work with federal agents. There are exceptions, including some cases that are investigated by joint task forces of federal, state and local officers.

Local law enforcement agencies investigate incidents within cities, municipalities or townships. For example, the Seattle Police Department investigates cases that occur within the Seattle city limits.

The Washington State Patrol is responsible for public safety on the state's public highways. The Patrol investigates traffic incidents and a variety of other matters within the State of Washington. This department also provides crime laboratory services to other Washington police forces.

Federal law enforcement agents work for, among other agencies, the Federal Bureau of Investigation; the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, and Firearms; Homeland Security and Immigration and Customs Enforcement; and the Marshals Service. Many other federal agencies and departments also have their own security agencies, criminal investigation divisions, inspector general offices, or police departments. The FBI maintains national criminal justice information databases, including fingerprint and DNA profile collections as well as nationwide conviction and arrest records.

C. The Prosecutors.

Local prosecutors work for a city attorney or other elected or appointed municipal attorney's offices. They file charges under local municipal codes, including many traffic offenses, DUI, and other misdemeanor crimes such as simple assault and shoplifting.

State prosecutors work for an elected county prosecutor and file misdemeanor charges in state district court and felony charges in superior court. The staff prosecutors are known as deputy prosecuting attorneys or "DPAs."

Federal prosecutors work for the United States Attorney's Office and file federal misdemeanor and felony charges in federal district courts. They are supervised by a District U.S. Attorney who works under the United States Attorney General. Staff U.S. attorneys are known as assistant U.S. attorneys or "AUSAs." The Department Of Justice has a criminal division and other divisions that prosecute crimes.

D. The Probation Department.

The probation department or office, whether local, state, or federal, works closely with the prosecutors, police departments, and the court in monitoring defendants who are on probation.

E. The Right to Counsel and the Role of a Criminal Defense Lawyer in the Process.

Both the United States and Washington State constitutions provide criminal defendants with the right to the assistance of counsel. The U.S. justice system is "adversarial", which means the attorneys are expected to be vigorous advocates, not neutral truth-seekers. Prosecutors are powerful adversaries who often do not look at case facts from the suspect's or defendant's point of view. Moreover, the legal system itself can be complex, arcane, and arbitrary.

The defense attorney's duty is to zealously represent clients during all stages of criminal proceedings. The defense attorney can assist a suspect throughout the investigation process and negotiate with the prosecutor. The attorney will also appear at all court hearings, conduct an independent investigation of the case, and either negotiate a favorable resolution or present the case for trial before a judge or jury.

III. The Code of Professional Responsibility.

All Washington attorneys are bound by an ethical code called the Rules of Professional Conduct ("RPCs") which provide standards for client representation, courtroom conduct, and contacts with the media.

IV. The Code of Judicial Conduct.

The Code of Judicial Conduct is a code of ethics that governs the professional and personal conduct of judges in the State of Washington. The Commission on Judicial Conduct oversees enforcement of the judicial conduct rules and investigates complaints. The Commission does not review court rulings

V. The Investigation Stage of the Criminal Process.

Criminal cases may be investigated by law enforcement agencies for as little as a few hours or as long as many years before a charge is filed. A government investigation may also continue while the case is pending in court and in rare cases after the trial is over. Defense attorneys can protect a client's interests during the investigation by providing advice regarding the risks and benefits of participating in the investigation and by negotiating directly with law enforcement and the prosecutor if necessary. Suspects should never deal directly with law enforcement during an investigation.

A. Investigation by Law Enforcement.

Law enforcement officers respond to reports of suspected criminal activity as well as other matters involving the public safety. They interview witnesses, collect physical or documentary evidence, and submit reports about incidents to prosecutors. They are generally not authorized to conduct plea negotiations with suspects or defendants.

Law enforcement officials use a variety of techniques to investigate suspected crimes. These include line-ups and photo arrays, service of subpoenas or search warrants, telephone wiretaps, and the use of paid or unpaid informants. Some of these techniques are discussed in more detail below.

B. Prosecutorial Participation.

At times, prosecutors will participate in the investigation of suspected criminal activity. They may interview witnesses, observe officers collecting evidence, or direct the investigation itself. Such participation is more frequent in federal cases and in more complex state cases. Prosecutors generally avoid becoming witnesses to the investigation, as this may disqualify them from prosecuting the case.

C. Investigation by the Defense Team.

The defense investigation will target facts and evidence that support an acquittal or a conviction of a lesser offense than the expected charge or that support a favorable sentencing outcome. The attorney may hire a private investigator or hire experts to assist. The investigation may include witness interviews, evidence collection, photography, or document review.

D. Searches.

Generally, law enforcement officers should not search a person or private property without a valid warrant. There are many exceptions to this rule. For example, an officer may search a lawfully arrested person at the time of the arrest and may search private property with the owner's consent.

Police officers may also do a limited "pat down" search of a person during a valid investigative stop. These searches are limited to a quick examination for weapons or destructible evidence.[1]

1. The Fourth Amendment and Article 1, § 7.

The Fourth Amendment to the United States Constitution and Art. 1, Section 7 of the Washington Constitution protect individuals from unreasonable government searches and seizures. The right has traditionally been enforced by a doctrine called "the exclusionary rule" which provides that evidence seized illegally shall not be admitted into evidence at a hearing or trial. This is called "suppression" of the evidence. The exclusionary rule is being eroded at the federal level by the United States Supreme Court. In Washington, the Constitution and thus the state Supreme Court is more concerned with individual privacy than at the federal level, so the rule maintains its vitality.

Judges usually rule on suppression issues during pre-trial motion hearings. They are generally reluctant to suppress evidence in criminal cases. For more information about suppression hearings, see section XIV.B.1, below.

2. Probable Cause.

An officer must have "probable cause" to arrest or search a person or to search or seize private property. Probable cause exists when there is sufficient reason based upon known facts to

believe a crime has been committed and that a certain person committed the crime (or that certain property is connected with the crime). This is not a high standard.

3. The Warrant Requirement.

Government officials must obtain a warrant to search a suspect or private property unless the search falls under one of the exceptions to the warrant requirement. An application for a search warrant must include sworn facts supporting the warrant and a general description of the evidence items to be seized.

An officer who serves a search warrant should leave a copy with the property owner along with an inventory of the items seized.

4. Exceptions to the Warrant Requirement.

Officers may make lawful warrantless searches and seizures under various circumstances, including:

1. An emergency
2. A limited search of a vehicle upon the driver's arrest
3. A search of the area immediately surrounding an arrestee (his or her "wingspan")
4. A pat-down search during an investigatory stop
5. An "inventory" search of an arrestee's property
6. A consent search
7. "Exigent circumstances"
8. "Plain view" (when an officer seizes evidence that he can see from a position where he has a right to be

If officers make a warrantless seizure without a lawful justification, a court could still admit the evidence if the judge finds that the evidence would have been discovered inevitably and seized legally. [2]

E. Investigative Tests and Procedures.

Law enforcement officers use a wide variety of investigative tests and procedures including DNA analysis, hair and fiber analysis and fingerprint comparisons. Some of the more common procedures are discussed in more detail below.

Police or prosecutors may have evidence examined or tested by trained government officers, the State Crime Laboratory, the FBI Crime Laboratory in Quantico, Virginia or private experts. Defense counsel can interview these experts, review test materials and possibly arrange a private retest.

1. Lineups and Photo Arrays.

If a criminal case turns on eyewitness identification of a suspect, the prosecutor or investigator may arrange for witnesses to view a line up or photo array. These are both identification procedures designed to show a witness a suspect along with several other individuals of similar appearance. These procedures are considered more reliable than "show-up" identifications where only a single suspect is displayed to a witness.

A suspect has a right to have defense counsel present at a lineup. The line up should be assembled fairly so that it does not create a likelihood that the suspect will be identified even if he is not the perpetrator. If a court finds that the line-up was unfair, evidence of an identification from the line-up may be excluded from the trial.

A suspect may also refuse to participate in a line up. If he does, the prosecutor is usually entitled to argue to a jury or judge that the refusal indicates the suspect's guilt. As a result, many suspects elect to appear in line- ups even if they are concerned about a possible misidentification.

Photo arrays or "photo montages" are usually presented to witnesses without any notice to the defense. Like a line-up, the photo array should not create the likelihood of a misidentification. If a court finds that the array is unfair, evidence of an identification from the array may be excluded.

2. Breath and Blood Tests.

In DUI cases, and certain serious traffic crimes, the state may request a sample of the suspect's breath or blood for analysis of the suspect's blood alcohol. A DUI suspect may refuse to provide the sample, but her licence to drive may be revoked immediately and she may face additional penalties if she is ultimately convicted of DUI . Persons suspected of vehicular homicide or vehicular assault may have a breath or blood sample taken without their consent. [3]

3. Polygraphs.

Law enforcement officers sometimes ask suspects or witnesses to submit to polygraph or "lie detector" examinations. A polygraph is an instrument that measures the subject's heart and respiration rates and other physiological reactions during questioning. This data is compared to baseline measures to provide information about whether or not it is likely that a suspect is being truthful in response to questions.

Polygraphs are frequently administered to convicted sex offenders to determine their eligibility for and compliance with sex offender treatment programs.

Results from polygraph examinations are not currently admissible at hearings or trials in Washington unless both parties agree to admit them. [4]

4. Fingerprints.

Fingerprints are typically formed by sweat or oils mixed with dust and other particles that collect in the ridged surfaces of the skin. The patterns are believed to be unique to each individual, even identical twins. Fingerprint examiners lift and evaluate prints from evidence and crime scenes to see if there are sufficient "points" of similarity to make an identification. Some newer technologies even allow smudged or obscured fingerprints to be computer-enhanced.

Law enforcement agencies have access to a computer system called the Automated Fingerprint Information System or "AFIS". This system indexes finger prints from arrest and conviction records as well as other sources. Officers sometimes use this system to quickly compare fingerprints from a crime scene or evidence to those in the AFIS database.

F. Talking to Law Enforcement.

Not all law enforcement interrogations take place at the police station. Officers may approach a suspect by telephone or even at the suspect's home or workplace. These interviews may be extremely stressful for the suspect, who may not know the scope or nature of the investigation. The police are under no obligation to reveal any information to the suspect or to explain the reasons for the investigation.

Police interrogation is not designed or intended to be fair to the suspect. For example, law enforcement officers are constitutionally permitted to deceive suspects during interrogation.[5] Officers and detectives are also trained in sophisticated and manipulative interviewing techniques. Suspects should never consent to a law enforcement interview without first consulting with defense counsel.

1. ***Miranda*.**

Under *Miranda v. Arizona,* law enforcement officials may not interrogate a suspect who is in custody without first advising that individual of certain constitutional rights. A person is "in custody" when he is formally arrested or when officers restrict his freedom of movement to a degree associated with formal arrest. Basically, if a reasonable person would not believe he was free to leave, he would be in custody.

The *Miranda* warnings must include:

1 the right to remain silent;
2 notice that anything that a suspect says can and will be used at a hearing or trial;
3 the right to an attorney; and
4 the right to an appointed attorney if the suspect cannot afford counsel.

After reciting the Miranda warnings, the officer should ask the suspect if he understands the warnings and if he wishes to give them up or "waive" them. Although officers frequently

request written waivers, a suspect can waive the rights without signing any formal document. Courts will often find a waiver where a suspect simply chooses to speak to police officers after being advised of Miranda rights. However, the individual must understand the rights and the government may not use threats or coercion to obtain the waiver.

If a suspect waives the *Miranda* rights, he does not give them up permanently. He may choose to stop the interrogation at any time, request an attorney, and remain silent.

In order to assert one's *Miranda* rights, it is best for a suspect to state unequivocally "I do not want to talk. I want an attorney right now." This cannot be held against the suspect in a later trial.

2. Right to Remain Silent Before and After Arrest.

A person who is not in custody has the right to remain silent when questioned by a police officer or other government official, but the police are under no obligation to provide *Miranda* warnings before questioning.

Suspects should always request counsel when they are being questioned by law enforcement, whether or not they are in police custody. Again, the assertion of rights should be unequivocal: "I do not want to talk. I want an attorney right now."

3. Right to Counsel Before and After Arrest.

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution provide that an accused person will have the right to counsel for his defense. This right does not "attach" until the individual is in an adversary position with the government, which usually begins with the filing of formal charges in court.

Washington State Superior Court Criminal Rule 3.1 provides additional protection to state court arrestees. Under that rule, officers are required to provide detainees with access to an attorney at the earliest opportunity after arrest.

In federal court, suspect must be brought before a magistrate or judge without unnecessary delay, in part so that the suspect can be advised of his right to counsel.

4. Does It Make Sense to Talk to the Police?

People who are the targets of a government investigation should only speak to officers after weighing the risks and benefits of providing a statement. There are various criminal charges (called "inchoate crimes") that do not require direct participation in a completed crime. Statements that do not seem incriminating may in fact lead to criminal charges.

In addition, police interviews rarely result in any benefit to a suspect, despite police promises to the contrary. Police officers are generally not authorized to make valid promises about

charging decisions or to conduct plea negotiations with suspects. As a result, an officer's representation that no charges will be filed if a suspect cooperates or gives a statement may not be reliable.

A suspect should review all of these issues with defense counsel before deciding whether to give a statement to law enforcement.

5. "Assertion of Rights" Letter.

People who are under investigation for criminal offenses should sign a letter that sets forth their decision to be represented by defense counsel during all contacts with law enforcement. This letter should be served on the investigating officer or detective and the prosecutor if one has been assigned to the case. Suspects should carry with them a copy of the letter at all times so they can provide the letter to any officer who attempts to begin questioning.

G. The Grand Jury (Federal Court).

In federal court, felony crimes must be charged by a grand jury unless the defendant waives the right. The grand jury consists of 16-23 citizens, who must decide if there is probable cause to charge a suspect with a crime. Defense attorneys and suspects are not permitted to attend grand jury proceedings and the record of the proceedings is secret.

H. Special Inquiry Proceedings (State Court).

A special inquiry proceeding is an investigative hearing in state court under Revised Code of Washington chapter 10.27. These hearings allow the prosecutor to subpoena witnesses or evidence to investigate suspected "crime or corruption." The procedure may not be used to investigate crimes already charged. Special inquiry proceedings are secret unless a court allows the record to be disclosed.

I. Target and Subject Letters.

A target or subject letter is a letter from a federal prosecutor to an individual advising that person that he or she is the target of a federal investigation. Usually the letter will advise the individual of the nature of the charges under investigation.

J. Subpoenas for Testimony.

Witnesses who are subpoenaed to testify at a federal grand jury hearing may retain counsel to represent them for the hearing, but counsel will not be permitted to enter the grand jury room during the testimony. The witness may ask to be excused from the hearing to confer with counsel about the subject matter of the questions as well as about asserting any rights or privileges. Grand jury proceedings are secret. Typically, targets are not subpoenaed to appear

before a grand jury.

Witnesses who are subpoenaed to state special inquiry proceedings may have counsel present with them in court during their testimony. Counsel is present only to advise the witness of rights or privileges he may wish to assert in response to questions from the prosecutor. Counsel may not discuss with the client the subject matter of the questions asked. The proceedings are secret and neither the witness nor the attorney may discuss the proceedings with third parties.

Witnesses who have concerns about incriminating themselves during testimony may refuse to answer questions by asserting the constitutional privilege against self-incrimination.[6]

K. Subpoenas for Records or Other Evidence.

A witness may receive a document called a subpoena *duces tecum,* which is a summons that requires production of documents or evidence in court. At times, these subpoenas are issued without requiring a court appearance, so long as the documents and items are produced to the attorney, court, or grand jury by a specified date.

L. Immunity.

A grant of "immunity" protects an individual from being charged with a crime or from other adverse legal action based on the individual's testimony in court. There are two general types of protection: "transactional" immunity and "use" immunity.

Use immunity prevents the prosecutor from using a witness' testimony to support criminal charges against the witness. Direct use immunity precludes use of the testimony itself while derivative use immunity prevents the prosecutor from using the testimony or any evidence discovered as a result of the information provided in the testimony.

Transactional immunity precludes the prosecutor from charging a witness with any crimes based on the acts described in the protected testimony.

Community can be formal or informal. With immunity is ordered by a judge, it is formal. When it is based on an out-of-court agreement with the prosecutor, it is informal. Law enforcement agents to not have the authority to grant immunity.

Prosecutors frequently seek immunity for witnesses who can provide important evidence at a hearing or trial. However, defendants have no right to demand immunity for defense witnesses, unless the prosecutor has wrongfully intimidated the witness with bad faith threats of prosecution. [7] A witnesses summoned before a grand jury or special inquiry proceeding or to a trial can assert the privilege against self-incrimination and ask a judge to determine the validity of the assertion. If valid, the prosecutor may not question the witness in the absence of an immunity order. The order is entered, the witness may not refuse to answer questions.

M. Arrest.

An arrest occurs when an officer holds a suspect on legal authority. However, a person may be stopped, searched, and questioned by an officer without being under arrest. This is called an "investigative" detention. Investigative stops should be short and limited to brief questioning and a pat-down search for weapons and destructible evidence.

Officers may arrest felony suspects without an arrest warrant. Under Washington State law, officers can generally make warrantless misdemeanor arrests only for crimes committed in the officer's presence. [8] There are many exceptions.

N. Probable Cause.

An officer has probable cause to arrest an individual when the officer knows of facts and circumstances that reasonably tend to prove that the person committed a crime. Arrests made with or without a warrant must be supported by probable cause, a low standard.

1. Arrest with a Warrant.

An officer seeking an arrest warrant from a judge or magistrate must provide facts by affidavit or telephone testimony that demonstrate probable cause to make the arrest.

2. Warrantless Arrest.

An officer who makes a warrantless arrest must set forth the reasons for the arrest in a sworn statement so that a reviewing judge or magistrate can determine whether or not there was probable cause for the detention. If the judge finds that the facts in the sworn statement are insufficient to establish probable cause, the arrestee must be released.

3. "They arrested me without reading me my rights or telling me what I was charged with."

Police officers are not obligated to recite the *Miranda* warnings to an arrested person unless the officer intends to ask the arrestee questions about the crime under investigation. The officer is also under no obligation to tell the arrestee what crime he is suspected of committing. As a practical matter, the officers do not decide what charges to file, they simply make recommendations to the prosecutor who makes the final decision on whether to bring charges and what charges will be filed.

4. The Investigation Calendar (Local and State Court).

Washington Superior Court Criminal Rule 3.2B provides that arrested persons must be brought before a judge on the next "judicial day" or within 48 hours. This rule is based on the requirements of the Constitution. The judge will review the arresting officer's sworn statements about the reasons for the arrest to determine if there is probable cause to detain.

The judge will also either set bail or order a conditional or unconditional release.

5. The "Second Appearance Calendar" (Local and State Court).

Under Washington State court rules, an arrested person may be held only up to 72 hours on an "investigative" detention.[9] This means the State must file charges within 72 hours of a person's arrest, or he must be released. There are rare exceptions to this rule. At the "second appearance" hearing the court must either release the defendant or, if a charge was filed, set the case for an arraignment within 14 days.

The "72-hour rule" is designed to prevent unnecessary or unfair detention of a person; it is not designed to force the State to file charges quickly or forever lose the ability to do charge a person. Thus, even if a defendant is released because charges have not been filed within 72 hours, the State can still charge the defendant at a later time – up to the statute of limitations for the particular crime or crimes involved.

6. The Preliminary Hearing (Federal Court).

In federal court, grand juries make probable cause findings for felony charges and misdemeanors are usually filed with an affidavit establishing probable cause. For a case where there is no prior finding of probable cause, the federal court will hold a preliminary hearing where a magistrate judge hears evidence and determines whether or not there is probable cause to support the charge. Preliminary hearings for in-custody defendants should occur within 10 days of the defendant's first appearance in court absent an agreed extension or extraordinary circumstances.

7. Bail and Pretrial Detention.

Washington state arrestees (excluding those arrested on capital offenses) have a constitutional right to a prompt judicial determination of bail or release. [10] The Eighth Amendment to the United States Constitution prohibits "excessive" bail. In federal court, however, a defendant can be detained without bail under many circumstances.

There are also several options for release in the community while a criminal case is pending. The least restrictive is release on "personal recognizance" or "PR." Other options include secured and unsecured appearance bond's or bonds posted by a surety, typically a bail bond company. There are also programs for home detention, work release, or release under conditions of supervision monitored by a probation officer. These programs may be available depending on the defendant's background and the nature of the accusations pending in court.

a. Who Makes the Decision?

Judges set bail and release conditions in state and federal courts. In some cases, bail is set according to a pre-set bail "schedule" published by the court.

Judges consider the prosecutor's bail request when setting bail on an arrest warrant. If a bail hearing is set, the court will usually hear recommendations from the prosecutor, the defense attorney, witnesses, and a probation or court services officer.

b. When is the Decision Made?

A court may set a bail amount or release conditions upon issuing a warrant for a defendant's arrest, at a preliminary appearance, arraignment or bail hearing. The court may be willing to review or revise the bail amount, consider a personal recognizance release or other alternative even if bail has been previously set.

Many courts only allow a defendant to schedule a single bail hearing, so it is important to reserve issues of bail or release for a time when defense counsel is prepared to address these issues and make a persuasive presentation to the court.

c. I & R.

An "I and R" is an "investigation and release" that occurs when a suspect is detained by the police for a short period of time (less than 72 hours) while she is under investigation for a crime, followed by an unconditional release without charges. People who are investigated and released often believe that charges have been "dropped" or that the government has decided not to charge them with a crime because they have been released. In fact, the State may (and often does) file charges on these cases. Upon filing, a summons or a warrant is issued to compel the defendant's appearance at the arraignment hearing.

A person who receives a summons or learns that there is an outstanding warrant for his arrest should immediately contact defense counsel. The attorney can attempt to schedule a hearing to quash the warrant, assist in making bail arrangements or assist at the hearing on the summons.

d. Types of Release.

Release on personal recognizance or "PR" allows a person to be released from custody while a criminal case is pending without posting cash bail or providing a bail bond. Usually, the judge will set some conditions on this type of release. These conditions can be tailored to the case, such as a requirement that the defendant have no contact with individuals involved in the case. There are many other possible conditions, including monitoring by a court services officer or residing at a certain address while the matter is pending.

Home detention is a program that allows a defendant to reside at home under strict conditions. Many jurisdictions provide for electronic monitoring of the defendant's whereabouts during home detention.

Supervised or pretrial release programs allow some defendants to await trial in the community under strict conditions supervised by a probation or court services officer. These conditions can be tailored to the case, but usually include terms like maintaining a particular residence

and having no contact with witnesses or alleged victims.

A person released from custody under any of these programs must comply strictly with the terms of the release. If there is an allegation that a defendant has violated release terms, he will be arrested or summoned to court to for revocation of the order allowing the release. A person who believes their release may be in jeopardy should immediately contact defense counsel. The attorney can attempt to clear up any misunderstandings with the release supervisor or schedule a court hearing if necessary.

e. Criteria for Determining Bail.

Judges are magistrates typically will consider certain criteria when determining bail and release conditions, including:

- The length and character of the accused's residence in the community;
- The accused's employment status and history and financial condition;
- The accused's family ties and relationships;
- The accused's reputation, character and mental condition;
- The accused's history of response to legal process;
- The accused's criminal record;
- The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- The nature of the charge;
- Any other factors indicating the accused's ties to the community;
- The accused's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- Whether or not there is evidence of present threats or intimidation directed to witnesses;
- The accused's past record of committing offenses while on pretrial release, probation or parole; and
- The accused's past record of use of or threatened use of deadly weapons or firearms, especially to victims or witnesses.

f. Conditions of Release.

Judges are magistrates often set conditions for a defendant’s release pending trial. They may:

- Place the accused in the custody of a designated person or organization agreeing

to supervise the accused;

- Place restrictions on the travel, association, or residence of the accused during the period of release;
- Require the execution of an unsecured bond in a specified amount;
- Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release;
- Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu of the bond;
- Require the accused to return to custody during specified hours; or
- Impose any condition other than detention deemed reasonably necessary to assure appearance as required, assure noninterference with the trial and reduce danger to others or the community.

g. Bail Bonds.

There are many bonding companies or corporate sureties that specialize in securing release for arrested persons. Generally, these companies will issue a bond for the full bail amount in exchange for a non-refundable fee of 10% of the bail sum. Some companies require collateral, such as a home or car, to secure the face amount of the bond. Others will do "signature bonds" that are issued if the defendant passes a credit check or has a valid credit card. Signature bonds require no additional collateral.

h. Detention without Bail.

People charged with capital offenses may be detained without bail. Courts also sometimes issue "no bail" warrants when an offender violates probation or a defendant fails to appear for a hearing or trial.

In federal court, a defendant can be detained without bail if the court finds "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." In certain instances, there is a rebuttable presumption that a defendant should be detained without bail.

VI. How Formal Charges are Brought.

A criminal prosecution begins when a formal charge is filed in court. Charging documents may be called "citations" "complaints" informations" or "indictments." Citations are issued by police officers. Complaints or informations are issued by prosecuting attorneys and indictments are issued by grand juries. Washington State courts do not convene grand juries.

A. Complaint or Citation (Local Courts).

Municipal or district court charges begin when a prosecutor or police officer files a complaint or citation in municipal court or state district court.

B. Information (State Court).

State superior court prosecutors begin criminal prosecutions by filing an "Information" that (like a complaint), accuses a particular individual of a crime and describes the specific charges. Felony complaints often include a certification of probable cause which is a sworn statement of the specific facts supporting the charge. The court may refer to this statement when setting bail or deciding whether to issue a warrant for the suspect's arrest.

C. Indictment or Complaint (Federal Court).

Assistant U.S. attorneys may begin a federal court criminal prosecution by filing a complaint or convening a grand jury. The grand jury considers evidence presented by the prosecutor and determines whether to file charges. An "indictment" is a charging document issued by a grand jury which accuses a person of a crime or crimes.

D. When the Victim Does Not Want to Prosecute - Who Makes the Charging Decision?

Prosecutors make charging decisions in criminal cases, not victims or witnesses. Victims cannot terminate a criminal prosecution by refusing to "press charges." However, prosecutors will usually consider the victim's position when making charging or negotiating decisions.

These issues arise frequently in domestic violence cases, where victims often balk at testifying against a spouse or other loved one. Prosecutors usually resist declining prosecution of such cases based on the victim's wishes alone.

VII. Publicity and the Media.

Defendants are entitled to "public" trials and the First Amendment guarantees freedom of the press. These guarantees are designed to prevent the government from prosecuting suspects in secret and to promote open discussion of important public events.

Most criminal cases proceed through the court system without any media coverage. Some cases generate massive publicity which can compromise a suspect's right to a fair trial. Courts attempt to balance the suspect's right to a fair trial with the public's right to a free press.

A. The Media's Right of Access.

The media has the same right of access to criminal trials as the general public. This right is not

absolute and may be limited to protect other interests, such as the defendant's right to a fair trial. [11] As a result, the court may limit media access by issuing protective orders. The court may, for example, preclude the media from photographing a defendant, exclude the media from certain hearings, or issue "gag" orders that prevent discussion of a pending case.

B. Will the Media be Interested in My Case?

Media interest in a criminal case often depends on the identity of the suspects, witnesses or victims, and the case facts. Cases with unusual or particularly severe allegations may provoke a reporter's interest. The prosecutor's office may also issue press releases regarding the progress of certain cases in their office. These releases may result in news coverage of cases that would otherwise be ignored. Most cases, however, pass through the system without any interest from the media.

C. What to Do If Contacted by the Media.

Suspects and defendants should never respond to media inquiries regarding their case. All inquires should be referred to defense counsel. Working together, the attorney and client should develop a strategy for coping with media attention. These strategies vary from case to case.

VIII. Arraignment.

An arraignment is a court hearing where the government verifies the identity of a charged defendant, presents the defendant with formal notice of the charges (by providing him with a copy of the charging document), and requests entry of a plea. An arraignment is the first formal step in the adjudication of a criminal case after charges are filed.

A. Time of Arraignment.

In Washington state courts, the timing of arraignment is governed by court rules and case law. Arraignments must be scheduled within 14 days of filing, and the government must diligently attempt to bring the defendant before the court.

1. Local and State Court.

Arraignment hearings vary from court to court in Washington State. Some local courts allow a defendant to "waive" arraignment in writing, depending upon the nature of the charge. Misdemeanor defendants may negotiate and enter a guilty plea at the arraignment hearing.

Superior court arraignments on felonies are public hearings where the prosecutor reads and provides the charging document to the defendant and asks the defendant to enter a plea. They generally cannot be waived. Defendants rarely plead guilty at felony arraignments.

2. Federal Court.

Federal court arraignments are also public hearings where the prosecutor reads the charging document to the defendant in open court, gives the defendant a copy, and ask the defendant to enter a plea.

B. Bail and Pretrial Detention.

The judge may consider bail and release issues at the arraignment hearing. See section V.N.7, above, for more details on bail and pretrial detention.

IX. The Defense Investigation.

A defense attorney may hire a private investigator or other expert to interview witnesses, examine evidence or documents and assist the attorney in preparing a case for trial. Criminal defendants have a right to "compulsory process". This means that defendants can compel the attendance of witnesses or the production of evidence by subpoena.

Defense attorneys may also issue subpoenas for documents and evidence, called subpoenas *duces tecum* (in Latin, "bring with you"). These subpoenas require a person to bring the indicated evidence to court.

X. The Government's Continuing Investigation.

The government may continue to investigate criminal cases that are filed and proceeding to trial. The prosecutor may seek statements from defense witnesses or make requests for production of documents or other evidence from the defense or third parties.

XI. Discovery.

"Discovery" is a term used for case-related materials and also for the process of exchanging evidence between the parties.

A. The Defendant's Right to Obtain Evidence from the Government.

While the discovery process is generally governed by court rules, constitutional provisions also require the prosecutor to provide the defendant with access to certain evidence prior to trial.

1. *Brady*.

Brady v. Maryland is a United State Supreme Court case that holds that prosecutors may not suppress evidence favorable to an accused and must produce it upon the defendant's request. They are required to produce material that they are aware of or reasonably should be aware of. This includes material held by police officers or other investigative agents[12].

2. Court Rules.

Washington State Criminal Court Rule 4.7 requires prosecutors and defendants to provide documents, expert reports, witness names and addresses, witness statements and other discovery materials no later than the "omnibus hearing" which usually occurs about 1-2 weeks before trial.

In federal court, the government's obligation to disclose its evidence to the defense is much more limited than in state court. In fact, the prosecutor need not provide witness statements until after the witnesses have testified. Under Federal Rule of Criminal Procedure 16, generally, the defendant is entitled only to copies of his own statements to government agents or a grand jury, his own criminal history records, documents or other evidence that the government may use at trial, and reports of examinations or tests. The defendant must provide reciprocal discovery. There are special rules that apply to expert and alibi witnesses.

B. The Government's Right to Obtain Evidence from the Defendant.

The government's right to obtain discovery from the defense is generally limited to the items described in the court rules. The government may also ask for an example of the defendant's handwriting, fingerprints, or other non-testimonial evidence. The government may not interview the defendant about the case.

1. Special Rules for Some Defenses.

Certain defenses, like an alibi or insanity defense, are called affirmative defenses. The defendant must provide the government with advance notice before raising an affirmative defense at trial. The prosecutor may also be entitled to discovery of witness statements, documents, and other material that will be produced at trial in support of the defense.

XII. The Right to a Speedy Trial.

A criminal defendant has a right to a speedy trial under the federal and state constitutions and certain statutes and court rules.

A. Constitutional Issues.

Defendants have a constitutional right to a speedy trial. This right is applied on a case by case basis. If a defendant asserts that his trial has been unconstitutionally delayed, courts will evaluate the length of the delay, the reasons for the delay, and any prejudice to the defense.

B. Statutes and Rules Providing for a Speedy Trial.

Washington State Criminal Rule 3.3 provides that in-custody defendants must be tried within 60 days of arraignment and out-of-custody defendants within 90 days. The remedy for violation of this rule is dismissal of the charges.

The Federal Speedy Trial Act provides that defendants must be tried within 70 days of either the date of filing or the first appearance in court, whichever is later. If the trial does not begin within this time period, the defendant may move to dismiss the case.

In both the federal and state systems, trials may be lawfully delayed for a variety of reasons, including agreements between the parties. There are so many exceptions to the rule that dismissal is rarely granted.

XIII. "Housekeeping" Hearings.

Most courts conduct hearings after the arraignment but prior to trial where the parties enter various discovery orders, continue the case for further investigation or negotiation, or schedule the case for a trial or plea. These "housekeeping" hearings may be called "case scheduling hearings," "pre-trial hearings," "pre-trial conferences," "pre-jury-trial hearings," or "omnibus hearings" or "status hearings" something similar.

To continue a housekeeping hearing at a defendant's request, courts usually require that the defendant sign a waiver of speedy trial for the number of days that the case is continued.

A. Local Courts: the Pre-Jury Trial Hearing.

Most local courts conduct pre-trial or pre-jury-trial hearings, where large numbers of defendants are summoned to court on the same date and at the same time. These "cattle call" hearings are generally crowded with defense attorneys, defendants, and other interested parties. There may be only one prosecutor and one judge responsible for the entire court calendar.

When the case is called, it may be continued or set for trial. Judges may also take guilty pleas and proceed immediately to sentencing.

B. State Court: The Case Scheduling Conference and the Omnibus Hearing.

State superior courts generally conduct a "case-scheduling" hearing not long after the arraignment hearing. The defense attorney will usually meet with the prosecutor prior to the hearing to discuss resolution of the case. The case scheduling hearing may be continued to allow the parties to continue to negotiate or to prepare for trial. If the parties do not reach agreement, the case is set for trial at the case scheduling hearing and the defendant is advised of the omnibus hearing date and trial date.

C. Status Conferences.

Most state and local court criminal cases are assigned to a trial court very shortly before the trial begins. However, some state and local cases, and virtually all federal cases, are "preassigned" to a particular judge earlier in the process. The judge may choose to conduct hearings from time to time to discuss the progress of the case with counsel for both sides. These "status conferences" may be formal or informal. Formal hearings are held "on the

record" – in open court with a court reporter recording the proceeding. Informal conferences may be held in the judge's chambers, or even by telephone, with or without a court reporter.

XIV. Pretrial Motions.

A motion is an application to the court for an order or ruling. Motions can address many issues in a case, including discovery, the location of the trial, or the decision to try multiple defendants individually or together. A court may decide a motion with or without oral argument by the attorneys. Some motions require witness testimony while others are decided based on affidavits or on undisputed facts.

A. When Held.

Motions can be made during routine hearings or at specially scheduled motion hearings. Some courts have a designated motions court or "calendar" where motions must be set. Motions may also be made to the trial court or the sentencing judge.

B. Issues.

The issues addressed in motions may be complex or very simple. Common motions include motions to suppress evidence or alleged statements of the defendant, motions to sever counts or defendants and motions for discovery.

1. Suppression.

Suppression of evidence occurs when a court precludes otherwise admissible testimony or evidence from being admitted at a hearing or trial. Suppression of evidence may be a remedy if the government violated the defendant's constitutional rights while collecting the evidence. Defense attorneys may submit motions to suppress evidence to the trial judge or to a judge who hears motions on a separate court "calendar."

2. Severance.

The prosecutor may attempt to try several defendants together or to try separate criminal charges against one individual in a single trial. This is called "joinder" of defendants or counts. Courts generally support joinder because it allows the court system to process cases more efficiently. There are many tactical reasons for a defendant to support or oppose joinder, depending on the case facts.

A defense attorney may choose to file a motion to sever joined defendants or counts. Severance must be requested before trial, and the motion should be renewed when necessary to preserve the issue for appellate review.

3. Discovery.

Discovery motions are applications for a court order requiring a party to provide documents, witness interviews, or other evidence to the other party. These motions are governed by the court's discovery rules and are usually filed before trial.

XV. Plea Bargaining.

A plea bargain is a contract between a defendant and the government that generally specifies that the defendant will admit either guilt or some form of culpability and that the prosecutor will either (1) recommend a certain sentence; (2) dismiss or not file certain charges; (3) reduce the current charge or (4) some combination of these three.

A trial by judge or jury can be a risky process for both parties to a dispute, depending upon all of the facts and circumstances. Plea bargaining provides an opportunity for a negotiated outcome that avoids unattractive risks.

A. The Decision Whether to Go to Trial or to Plead Guilty.

The decision to go to trial or negotiate a plea can be the most important decision a defendant will make. The decision must be made with as much information as possible regarding the risks of a trial and the benefits of potential plea bargains. In rare cases, the prosecutor is unwilling to engage in any plea negotiations. Prosecutors typically make an offer early in the case. If the offer is declined and the case set for trial, negotiations may or may not continue. This depends on several factors including the prosecutor's office policy, the case facts, and the position of other interested parties such as law enforcement investigators and witnesses or victims.

1. Assessing the Risks.

Defendants must be aware of the potential for amended or additional charges at trial when assessing the risks and benefits of a negotiated plea. Prosecutors may "amend" a criminal charging document to charge a more severe crime or additional crimes if the case facts support the amendment. They frequently threaten to make such amendments if a defendant does not agree to a negotiated plea. Defendants must be aware of the potential sentences for both the current charges and potential amended charges when making a trial risk assessment.

a. The Magnitude of the Risk: The Difference Between the Likely Sentence Pursuant to the Plea Bargain and the Likely Sentence if Convicted and Sentenced After a Trial.

Defendants who exercise their right to a jury or judge trial create a significant burden on prosecutors and the judicial system. As a result, defendants found guilty after trials usually receive a harsher sentence than those who negotiate a plea to the same charges. A defendant who does not face additional charges at trial must still weigh the risk of an increased sentence if the judge or jury returns a guilty verdict.

(1) "Likely" versus "Possible" Sentences.

Judges listen to the prosecutor's recommendation and may also be swayed by a strong presentation from the defense. A defense attorney, based on skill and experience, can give an estimate of the likely sentence a defendant will receive. However, the sentencing judge will ultimately decide the sentence for a crime after listening to the recommendations and presentations of the parties.

No one can predict with absolute certainty what a sentence will be. In federal court, the parties sometimes negotiate plea agreements with so-called "lids," which allow a defendant to withdraw his plea if the judge feels that the lid is too low. A lid is not allowed in Washington state courts.

(2) Direct versus Indirect (or Collateral) Consequences of Conviction.

A criminal conviction may carry many penalties in addition to time in jail or prison. These include financial penalties, payments of damages to victims (called "restitution") or court costs, time on probation or other type of government supervision. Punishments that flow inevitably from the judgment and sentence are called "direct consequences" of the conviction. A person who enters a guilty plea must be advised of these consequences or the plea may be voidable.

"Indirect consequences" of a conviction are those that may or may not occur as a result of the conviction. These include, for example, revocations of a professional license or deportations.

(a) Immigration Consequences.

Non-citizens who are convicted of crimes in the United States face possible deportation or exclusion, even if they are lawful permanent residents with the right to work here. Immigration status can be one of the most important considerations in negotiating a criminal case. As a result, defendants should promptly inform their attorney of their immigration status and discuss the possible immigration consequences of a conviction.

(b) The Right to Travel.

People who are convicted of crimes may have various restrictions placed on their activities even after their release from jail or prison. These restrictions vary from case to case, but can include a restriction on the individual's ability to travel. Individuals have a constitutional right to travel, so restrictions may not be overbroad. Travel to foreign countries may also be affected, according to the laws of the particular country in issue. Thus, for example, if you frequently travel to Canada, you would be wise to consider whether a particular case outcome will result in a barrier to entering that country.

(c) Employment and Licensing.

Lawyers, accountants, doctors and other professionals can face revocation of their professional license if they are convicted of a crime. Even non-licensed employees may face termination upon conviction. Most non-union employees are employed "at will" which means they may be terminated for any reason or no reason at all. Possible termination is one factor to consider when evaluating a plea offer in a criminal case.

In addition, a criminal conviction may affect an individual's ability to obtain employment in the future. Most employment applications require disclosure of criminal convictions and many employers conduct their own background checks to verify an applicant's history.

Finally, some criminal convictions result in revocation of the license to drive. The right may be reinstated under certain conditions.

(d) Gun Rights.

People convicted of felonies and certain misdemeanors (e.g. domestice violence offenses) may not legally possess a firearm until the right is restored by a court. A person who violates this law by possessing a firearm (physically or "constructively") may be charged with an additional felony offense which carries severe penalties.

(e) Forfeiture.

State and federal laws allow law enforcement officers to seize property that is believed to be connected to drug-related crime, even if no criminal charges are filed against the property owner. The owner of the property may be entitled to contest the forfeiture at a hearing. A person whose property has been seized should never attempt to retrieve the property by dealing with law enforcement directly.

b. The Likelihood of Success or Failure at Trial.

Trial is a risky process because no one can predict the outcome of any trial with absolute certainty. Nevertheless, an experienced attorney can help a defendant make an assessment of the likelihood of success or failure at trial. The most important factors include: (1) the strength and availability of government and defense evidence (2) the nature of the charges; (3) the composition of the jury pool in light of the other case facts; (4) the trial judge; (5) the defendant's background, appearance, and likely jury "appeal." Of substantial importance in many cases is the relative skill and especially the degree of preparation of the respective attorneys. Sometimes, preparation and investigation by defense counsel will result in the government taking a different view of the case than it did originally and thus agreeing to dismiss the charges.

Every case is unique and each defendant, with the assistance of counsel, must ultimately determine whether the case requires resolution by trial.

2. The Guilty Plea.

Most negotiated settlements of criminal cases require the defendant to plead guilty to one or more criminal charges. There are rare exceptions where, for example, the defendant surrenders a professional license or pays restitution in exchange for dismissal of all counts.

A guilty plea is a surrender of trial and appeal rights and an admission that the accused is guilty of the crime charged. A plea agreement is a contract between the prosecutor and the defendant that sets the terms of the plea. Usually, the prosecutor agrees to *recommend* a particular sentence in exchange for the defendant's guilty plea. The judge is not bound by this recommendation, but it usually carries great weight.

a. Admissions of Guilt versus *Alford* Pleas.

A guilty plea requires a statement by the defendant admitting the charged crimes and describing the events that constitute the crimes. At times, defendants choose to accept a negotiated guilty plea even though they do not believe they are guilty of the charged crimes or they do not know (because of mental illness or intoxication, for example) whether they are guilty or not. In such cases, a defendant may offer an *Alford* plea.

With such a plea, the defendant does not admit guilt, but nevertheless also enters a plea of guilty. To enter such a plea, the defendant must 1) demonstrate his understanding of the charges and the evidence against him, 2) acknowledge how a fact finder could apply the law to the evidence and find him guilty, and 3) make a voluntary choice between going to trial and taking advantage of the plea offer.

Sometimes, prosecutors will not make a plea offer if the defendant insists on proceeding with an *Alford* plea instead of openly admitting his guilt.

An *Alford* plea, if accepted, opens the defendant to the same punishment and direct consequences as would be allowable if he had admitted his guilt with a regular guilty plea. Sometimes, some of the indirect or collateral consequences may be different, which may be a reason to explore entering such a plea.

b. The Plea Hearing.

A plea hearing is a formal court hearing where the judge, the defense and the prosecutor review the terms and conditions of a guilty plea and where the judge decides whether to accept the plea. Before the hearing, the defendant and defense attorney will review a standard guilty plea form and modify it to suit the case facts and the negotiated plea agreement. Alternatively, the parties negotiate a case-specific plea agreement that includes many standard sections.

The purpose of a guilty plea hearing is to establish that the defendant does in fact wish to plead guilty, that she intends to waive trial and appellate rights and that she understands the

consequences of a criminal conviction. The judge and the prosecutor will question the defendant about these issues and the questions and answers (called the "colloquy") will be recorded on tape or by a court reporter. If the judge is satisfied with the plea, it will be accepted and the case will be scheduled for a sentencing hearing or proceed immediately to sentencing.

B. Other Resolutions.

Some criminal cases are resolved by alternative disposition programs that may offer some benefits to the parties. These programs are only available to qualified defendants charged with particular crimes.

1. Deferred Prosecution.

A "deferred prosecution" is a program where the state agrees to defer or delay prosecution of a criminal case while the defendant completes a rehabilitative or probationary program. Only misdemeanors and gross misdemeanors qualify for such a program.

The defendant must waive speedy trial rights to participate, since the case is not adjudicated while the defendant attempts to complete the program conditions. If the defendant succeeds, the charges may be dismissed or reduced, depending on the particular program. First-time DUI offenders are commonly offered deferred prosecution programs if they qualify. Some jurisdictions offer similar programs for drug possession charges.

Deferred prosecutions require that a defendant give up trial rights in exchange for the opportunity to participate in the program. That means that the defendant faces possible summary conviction of the charged crime, with little or no opportunity to contest the charges if he fails to meet the program conditions.

2. Stipulated Orders of Continuance.

Stipulated Orders of Continuance or "SOCs" are programs where the defendant agrees to waive speedy trial rights to continue a criminal case while he completes conditions of probation. Some SOC programs also require the defendant to waive trial rights. While the case is pending, the defendant must complete rehabilitative programs, make restitution payments, or fulfill other case-related conditions. If the defendant succeeds, the charges may be reduced or dismissed. SOCs are commonly offered to qualified first-time domestic violence defendants.

3. Pretrial Diversion.

Pre trial diversion is a program that allows a defendant to avoid criminal prosecution by completing rehabilitative conditions, paying restitution, or other case-related conditions. Pre-trial diversion is frequently offered to first-time misdemeanor and gross misdemeanor defendants charged with non-violent crimes. Some jurisdictions have programs fo non-violent

first felony offenders.

4. Civil Compromise of Misdemeanor.

Washington State law (RCW 10.22) allows adult misdemeanor and gross misdemeanor defendants to attempt to resolve certain property crimes by paying civil damages or making other restitution. The victim must acknowledge in writing that she has received satisfactory compensation for the injury. The court may order that the case be "discontinued" and the defendant discharged from any further proceedings. The court may also order payment of costs. The trial judge may also reject the compromise and order that the case proceed to trial despite the compromise.

XVI. Trial.

Trials are held to resolve disputed issues of fact and to apply the law to those facts. A jury is empaneled to hear the evidence, decide the facts, and apply the law to the facts. The judge's role at trial is to resolve disputed issues of law and to ensure that the proceedings are orderly and fair.

A. Jury versus Judge Trial.

Some defendants decide to waive jury and try their case before a judge alone in a "bench trial." Bench trials are generally much faster than jury trials, since time consuming jury selection and instruction are waived.

Defendants should never waive jury unless there is a very strong tactical reason to do so. While judges may strive to be fair, the fact remains that it is generally harder for a prosecutor to convince twelve (for felonies) or six (for misdemeanors) jurors than it is to convince a single judge of the defendant's guilt. Moreover, in Washington state courts, judges are elected and therefore necessarily part of the political process that requires them to be re-elected. Federal judges are appointed for life, based on the theory that this will isolate them from public opinion that might tend to make them biased.

B. Motions.

Motions are applications to the court for an order. Attorneys may make motions before, during or after a trial. Pre-trial motions *in limine* are motions to limit or exclude the introduction of certain evidence. Attorneys will usually make these and other motions outside the jury's presence to avoid confusing the jury or disrupting the trial.

C. Jury Selection.

Jury selection can be the most important phase of a criminal case. Usually, the court will seat one or more alternate jurors who deliberate only if a regularly seated juror is unable to proceed with the trial.

During jury selection, the judge and the attorneys will question the pool of potential jurors to determine their biases and to gather information so they can intelligently exercise their juror challenges. In federal court, most judges handle the questioning themselves and limit attorney participation to suggesting questions for the judge to ask. Each party is permitted to challenge (or strike) a certain number of jurors from the panel without giving any reason. Attorneys may ask the court to excuse any juror who is disqualified from serving due to a statutory "cause."

D. Opening Statement.

After a jury is selected, the attorneys have an opportunity to provide opening statements. The purpose of the opening statement is to give the jury a preview of the evidence to be presented at trial. Attorneys are not permitted to use opening statements to argue the merits of the case. Defense attorneys are permitted to make an opening statement immediately after the prosecution, or to wait until after the State has presented its evidence. However, there are exceedingly few, if any, valid reasons for the defense to wait that long.

E. The Government's Case-in-Chief.

Since it has the burden of proof in a criminal case, the government presents its evidence and witnesses first. The defense has the right to cross-examine the witnesses and to make objections to exhibits and testimony. At the close of the government's case, the defense may move to dismiss the charges if the government fails to present sufficient evidence of each element of the charged crime.

F. The Defense Case.

When the government has finished presenting its case, the defense may present witnesses and evidence, although the defense has no obligation to do so. The prosecutor may cross-examine the defense witnesses and make objections to defense evidence.

G. The Government's Rebuttal Case.

Should the defense present evidence or witnesses, the government is entitled to present evidence or witnesses to respond to or "rebut" the defense evidence. This presentation is generally limited to issues that were introduced by the defense. Depending upon the facts and circumstances, the defense may be permitted a brief "surrebuttal" case. At the conclusion of all of the evidence taking, the defense again may challenge the sufficiency of the government's case. It is not difficult for the government to present "sufficient" evidence for the case to go to the jury, as the legal standard is quite low.

H. Witnesses.

Witnesses may be called by either party to testify to relevant facts or opinions. The party calling the witness generally issues a subpoena compelling the witness to attend the hearing.

1. Exclusion of Witnesses.

Witnesses should testify to their own experiences and memories of events and not those of others. As a result, courts usually issue an order forbidding witnesses from attending trial during the testimony of other witnesses or from discussing the subject of their testimony with other witnesses.

2. Presentation of Evidence.

Both parties have the opportunity to present evidence at trial, although the defense has no obligation to present any evidence. The judge controls the flow of evidence at trial by ruling on objections and entering orders admitting or excluding evidence.

a. Rules of Evidence.

The presentation of evidence at trials is governed by formal evidence rules. Federal Courts use the Federal Rules of Evidence (FRE) while Washington State Courts are governed by the State Evidence Rules (ERs). These rules have the force of law and they set standards for the admissibility and scope of evidence admitted at trials. For example, hearsay is generally excluded with several exceptions.

b. Privileges.

Certain relationships, such as husband and wife, doctor and patient or attorney and client are protected by testimonial privileges. Privileged communications between these individuals may not be admitted at a hearing or trial over the objection of the party asserting the privilege. Privileges are personal, which means that one person cannot assert a privilege on behalf of another.

An individual may also assert a Fifth Amendment privilege to refuse to provide testimony if it would be incriminating.

c. Constitutional Issues.

The federal and state Constitutions provide trial rights to defendants that at times conflict with state and federal evidence rules. Those rights are discussed in more detail below.

(1) Confrontation.

Defendants have a constitutional right to "confront" their accusers. As a result, defendants have a right to be present in court while the witnesses are testifying and to cross-examine the witnesses about their testimony. Attorneys conduct the cross examination unless the defendant has chosen to represent himself.

(2) The Defendant's Right to Testify or Remain Silent.

Defendants have the right to remain silent at trial under the federal and state constitutions. The Washington Constitution confers the additional right to testify at trial. [13] Defendants who choose to testify must submit to cross examination by the prosecutor.

(3) Due Process and the Right to a Fair Trial.

The Due Process clauses of the federal and state constitutions protect basic procedural and substantive rights. Procedural rights are those that dictate how a government authority may deprive an individual of liberty or property. Substantive rights provide individuals the power to do certain things, like own a firearm or associate with social groups. Procedural due process requires that trials be fair.

(a) Prosecutorial Misconduct.

Prosecutors have a duty to seek justice, rather than to win trials at any cost. Prosecutors must refrain from using inflammatory arguments at trial or attempting to win a verdict based on prejudice. Prosecutors must also provide the defendant with access to evidence that could prove his innocence, if the prosecutor has such evidence or is able to obtain it. Prosecutors who violate these and other rules for their conduct may violate the due process clause.

(b) A Fair Judge.

The due process clause also guarantees a fair tribunal, which means the trial judge must not only be fair and impartial, but must also appear to be fair and impartial.

(c) The Right to Present a Defense.

A defendant has a right to present his version of the facts of a case at trial. The right is not absolute, as the court may preclude evidence or witnesses who are not material to the defense or for other legitimate reasons.

d. Direct Examination.

Direct examination is the questioning of a witness by the party who called the witness. The examination normally may not include leading questions, that is, questions that suggest the answer. For example, “The sun is hot today, isn’t it?” suggests the answer while “How is the weather?” does not.

e. Cross-Examination.

Cross examination is the questioning of a witness by the opposing party. The questioner is permitted to (and should) ask leading questions of the witness. Cross examination should test the truthfulness and accuracy of the witness’ direct testimony, but the right cannot be abused

and the court may limit the scope of questioning. Not every witness needs to be cross-examined, particularly if the witness testified to facts that are not legitimately in dispute.

f. Expert Witnesses.

Unlike other witnesses, expert witnesses are permitted to express broad opinions during their testimony, but they are limited to the area of their expertise. Non-expert witnesses are only allowed to testify about events they personally observed and generally not their opinions about those events. Either party may call experts.

3. Subpoenas.

A subpoena is a process by which a witness is summoned to appear on a certain date and give testimony. Either party may subpoena witnesses or the court may issue a subpoena.

I. Exhibits.

An exhibit is a thing received into evidence that tends to assist in proving or disproving a fact at issue in the trial. Exhibits can be documents, photographs, weapons, videotapes or other objects. "Demonstrative" exhibits are received solely to assist the attorneys in illustrating testimony or arguments during the trial. Evidence exhibits are taken to the jury room during jury deliberations while demonstrative exhibits are not.

J. Jury Instructions.

These are the judge's written directions to the jury about the law that applies to the case and the definitions of important terms. The court may use standard form instructions, craft original instructions, or choose instructions proposed by the attorneys in the case. The instructions must fairly state the law to be applied because they guide the jury's deliberations.

K. Closing Arguments.

At the end of a criminal case, each party makes a speech arguing the merits of the case, called a closing argument or a "summation." The lawyers are given great latitude in closing argument to make inferences and draw conclusions from facts. There are some restrictions on closing arguments. For example an attorney may not refer to facts not in evidence and may not express personal opinions about the case facts.

L. The Verdict.

A verdict is the jury's formal decision on the issues presented in the instructions. It may include a guilty or not guilty finding, as well as findings on special allegations such as whether the defendant possessed a firearm at the time of the charged events. In criminal cases in federal court and in Washington state courts, jury verdicts must be unanimous.

When a jury is unable to reach a unanimous verdict, they are "hung" and the trial judge may declare a mistrial. The prosecutor may re-try, re-negotiate, or dismiss the case after a trial ending in a hung jury.

XVII. Post-Trial Motions.

Post trial motions are applications to the court for a new trial or for an order vacating a guilty verdict. They are brought to correct errors during the trial without resorting to the appellate courts. Grounds for a new trial or for relief from a judgment include: prosecutorial misconduct, jury misconduct, lack of jurisidiction over the case or newly discovered evidence.

XVIII. Sentencing.

A court enters a judgment of conviction and imposes a penalty at the sentencing hearing. The court first hears recommendations on sentencing from the prosecutor, the defense attorneys, and any interested witnesses or victims. If the Probation Office or the Department of Corrections has prepared a recommendation, the court will also consider that information. In most felony cases, a probation officer prepares a written report on the case, which is provided to the court and the parties prior to the hearing. The defendant has a right to speak at sentencing, called the right of "allocution."

Sentencing practices vary depending on the severity of the crime and the court system where the judgment is entered. A judge may not sentence a person to a term of confinement or fine that exceeds the certain statutory maximum.

A. Local and State Prosecutions.

1. Misdemeanors and Gross Misdemeanors.

The process for entering judgment and sentence on misdemeanors and gross misdemeanors may be expedited. Sometimes, no formal judgment and sentence document is entered in court. Instead, the verdict or guilty plea is the record of the conviction and the sentence is handed down orally by the court and recorded in the court clerk's notes of the proceeding.

a. Maximum Punishments.

The maximum term of incarceration for a gross misdemeanor is one year in jail and for a simple misdemeanor is 90 days.

b. Deferred Sentence.

People convicted of misdemeanors or gross misdemeanors in State courts may be eligible for a deferred sentence. A defendant who successfully completes all of the conditions of a deferred sentence may request dismissal of the case. Despite the dismissal, these adjudications are considered to be "convictions" by some courts.

c. Suspended Sentence.

A suspended sentence is a sentence that is imposed but that the defendant does not have to serve if he satisfies certain probation conditions.

2. Felonies.

Felonies are crimes punishable by a sentence of more than one year served in a state prison facility rather than a county or municipal jail. State and federal felony sentencings are governed by laws that set guidelines for judges to follow when they make sentencing decisions.

a. Maximum Punishments.

Class A felonies carry a maximum term of life in prison; Class Bs carry a 10 year maximum and Class Cs carry a five year maximum. There are certain exceptions, including some drug crimes with sentencing enhancements and Class B and C crimes that are the offender's last "strike" under the Washington State "three strikes" and "two strikes" laws.

b. The Sentencing Reform Act.

In the 1980's legislators enacted comprehensive sentencing laws designed to standardize the sentencing process for felony offenses, so that offenders convicted of similar offenses with similar criminal histories receive comparable sentences. Under these laws (called the "Sentencing Reform Act" or "SRA"), a judge must use a complex set of rules to calculate the presumptive sentence for a felony offense. Judges may depart from these ranges only under extraordinary circumstances, so the presumptive sentence ranges or "standard ranges" are good estimates of the likely sentence a person would receive for a particular offense.

c. Deferred Sentences, Suspended Sentences, Probation and Parole Abolished.

State legislators abolished certain felony sentencing alternatives as part of the comprehensive sentencing "reform" legislation. As a result, people convicted of felonies may not receive a deferred or suspended sentence, with minor exceptions. They must be sentenced to a "determinate" sentence which means a sentence that states exactly the number of months, days or years the offender will be confined and the exact amount of any fine.

The SRA also abolished the probation and parole system in favor of "community supervision," "community placement" and "community custody" programs. Under these schemes an offender is sentenced to a determinate term of community custody or supervision which begins upon the offender's release from confinement in a prison or jail.

d. The Standard Range Sentence.

The SRA contains rules for calculating a "score" for each felony offense. Generally, the score is based on the number and nature of the offender's current felony offenses, the offender's criminal history, and community placement status. The score may be modified for various reasons too numerous to list here.

The score determines the standard range for individual felony offenses. A range is stated in months or days of confinement, for example: 0-90 days or 21-24 months.

e. Exceptional Sentences.

A sentence above or below the standard range is called an "exceptional sentence." These sentences, if above the range, must be supported by specific facts, found by a jury beyond a reasonable doubt or admitted to by the defendant, which justify the departure from standardized sentencing. The specific facts for a sentence below the range are determined by the judge. Unlike standard range sentences, exceptional sentences may be reversed on appeal.

The sentencing statutes contain "illustrative" non-exclusive lists of factors which may support sentences above or below the standard range. These are called statutory aggravating or mitigating factors. Judges must recognize one or more of these factors (or a compelling factor not listed in the statute) to impose an exceptional sentence.

(1) Aggravating Factors.

Illustrative state court aggravating factors include commission of a crime:

- against an exceptionally vulnerable victim
- with deliberate cruelty
- classifiable as a "major economic offense" based on the financial loss to the victim, the number of victims or other factors
- classifiable as a major drug offense based on various factors
- of violence against a pregnant woman
- that was committed with "sexual motivation"
- of domestic violence combined with certain exceptional circumstances such as the presence of children or deliberate cruelty to the victim
- of child rape resulting in a pregnancy

An aggravated sentence may also be imposed for other reasons, including the presence of a large number of current or prior offenses that are not accounted for in the offender score.

(2) Mitigating Factors.

State statutory mitigating factors include:

- the crime was initiated or provoked by the victim
- the defendant made restitution to the victim for damages sustained *before* the crime was detected
- the defendant committed the crime under significant compulsion or duress
- the defendant's ability to control his behavior was impaired, but not by drugs or alcohol
- the crime was principally accomplished by another, and the defendant showed extreme caution or concern for the victim
- the defendant or the defendant's children were victims of domestic violence or abuse

A mitigated sentence may also be imposed for other reasons, including the possibility that a large number of counts in the current charge results in a clearly excessive sentence.

f. Concurrent and Consecutive Sentences.

Concurrent sentences are sentences for more than one crime which are served at the same time. Consecutive sentences are sentences for more than one crime where the period of confinement for each crime is served separately. Generally, multiple felony counts sentenced at the same time are served concurrently, unless exceptional circumstances justify a consecutive sentence.

g. Earned Early Release Time.

Earned early release time, also known as "good time", is a statutory system for reducing an offender's jail or prison sentence for good behavior while in custody.

h. Credit for Time Served.

The sentencing court must credit every day that an offender serves in custody on a particular offense toward the sentence on that offense. For example, days served in jail, home detention, a state treatment facility or on work release are computed and credited to an offender's term of confinement[14].

i. Mandatory Minimum Sentences.

Some offenses carry mandatory minimum terms which must be imposed no matter what the circumstances of the case. For example, convictions for murder in the first degree carry a 20-year mandatory minimum term.

j. Work Release.

Work release is a program whereby a person detained pre-trial or serving a sentence of less than one year may work or attend classes in the community and report to a jail facility for the rest of the day. Eligibility for such a program varies.

k. Work Ethic Camp.

Work ethic camp is a Washington State program whereby a qualified prison inmate may reduce his or her prison term by participating in a Department of Corrections program designed to prepare the individual for employment in the community. The program includes employment skills, citizenship skills, self-esteem building, and drug rehabilitation. Eligibility for this program is restricted by statute.

l. Electronic Home Monitoring.

Electronic Home Monitoring is a program that permits certain offenders or pre-trial detainees to reside in a private home while under electronic surveillance.

m. Court-Ordered Financial Obligations.

Court-ordered financial obligations are the sums an offender is ordered to pay as part of a sentence for a felony offense. The court system monitors payments on these obligations. These payments include, for example, fines, restitution to victims, court costs and assessments for the general fund for the compensation of crime victims.

n. Community Supervision.

Community Supervision is the period of time that a convicted person is subject to court orders directing him or her to follow rules set forth as part of the offender's sentence. These rules must be related to the conviction and may not require participation in rehabilitative programs or any other "affirmative" conduct. This program is similar to probation.

o. Community Placement.

Community Placement is the period of time that a person is subject to supervision in the community under either "community supervision" or "community custody" provisions. A person is on "community placement" when he is released into the community either on expiration of his entire term of confinement or as part of the earned early release or "good

time" program. A person on "community custody" is technically in custody for certain purposes, such as the ability of a community corrections officer to return him to prison, withotu going before a judge, for a violaton of conditions.

p. Conditions of Sentence.

Conditions of a sentence are rules for the conduct of a convicted person while he is under a sentence for a crime. These rules govern during a prison or jail commitment and community placement. The conditions are part of the judgment and sentence entered by the court at sentencing though the court may allow the Department of Corrections to set some conditions at a later date.

q. Violations of Terms of Sentence.

If a State court felony offender violates the terms of his sentence while he is on community placement, the Department of Corrections may issue a warrant for his arrest and request a court hearing. If the court finds that a person has wilfully violated a sentence condition, the court may impose up to 60 days confinement per violation. The total time served on an offense may not exceed the statutory maximum sentence for the crime. A person on community custody will not be brought before a judge for a revocation hearing.

r. Sex Offenses.

People convicted of certain State sex offenses may be eligible for a Special Sex Offender Sentencing Alternative or "SSOSA". This program allows the court to suspend most of the confinement time for the offense while the offender completes a sex offender treatment program in the community. People on this program are monitored closely by the Department of Corrections. If there are any violations of the program conditions, the court may revoke the SSOSA sentence and order the offender to serve the remainder of the confinement term.

s. Drug Court.

Drug court is a state court diversion program for people charged with possession of a controlled substance or certain other crimes in which substance abuse played a role. People who choose to participate in drug court must obtain a substance abuse evaluation and complete a treatment program under close supervision by the court. The charges are dismissed if they successfully complete the program.

3. Where the Sentence is Served.

Misdemeanor and gross misdemeanor sentences, as well as felony sentences of less than one year, are usually served in a county or municipal jail. However, some sentences may be served in alternative placements in the community. Generally, the correctional system screens offenders for eligibility for these programs and may reject offenders based on their own policies.

Felony sentences of more than one year are served in a state facility or institution. There are various facilities within the prison system that are more or less restrictive.

a. Length of Sentence.

The length of the actual sentence, not the statutory maximum or the potential sentence, determines the possible placement options for an offender.

(1) Misdemeanors.

Since misdemeanor sentences must be one year or less, all misdemeanor sentences may be served in a county or municipal jail facility. People sentenced on misdemeanors may be eligible for work release, home monitoring, suspended sentences, conversion of detention to community service hours, and inpatient treatment in lieu of detention.

(2) Felonies, if Twelve Months or Less.

People sentenced to less than 12 months on a felony offense will serve their sentence in a county or municipal jail facility. They are also eligible for work release, home monitoring, work crew and conversion of up to 30 days of confinement to community service hours.

b. Felonies, if Over Twelve Months: Classification by the Department of Corrections.

A person sentenced to one year and one day of confinement or more must serve their sentence in a government-run facility. When the sentence begins, the Department of Corrections will "classify" the individual based on his perceived security risk and other factors. The person is placed within the DOC system based on this classification.

Unfortunately, the DOC rarely accepts input from family members or others in the community when they make decisions regarding where a convicted person will be housed.

B. Federal Prosecutions.

The federal sentencing scheme is similar in many respects to the Washington state scheme. For example, there are Federal Sentencing Guidelines that set standard sentence ranges, much like in state court. However, in federal court the guideline ranges are advisory rather than mandatory. That is, the judge must consider them but need not follow them in fashioning a sentence.

The basics requirements of the federal scheme direct the to consider the sentencing range calculated under the Guidelines, together with the other factors set forth in Title 18, United States Code, Section 3553(a), including: (1) the nature and circumstances of the offense; 2) the history and characteristics of the defendant; (3) the need for the sentence to reflect the

seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) the need for the sentence to afford adequate deterrence to criminal conduct; (5) the need for the sentence to protect the public from further crimes of the defendant; (6) the need to provide the defendant with educational andvocational training, medical care, or other correctional treatment in the most effective manner; (7) the kinds of sentences available; (8) the need to provide restitution to victims;and (9) the need to avoid unwarranted sentence disparity among defendants involved insimilar conduct who have similar records.

The details and complexities of the federal sentencing system will be included in the next edition of this Survival Guide.

XIX. What to Expect in Jail or Prison.

Jail conditions are usually much more crowded and unpleasant than conditions in prison facilities. Prison inmates are generally permitted to go outdoors, participate in employment and educational programs, use library facilities, and reside in private or two-man cells. People in jail are usually housed in crowded "dorms" with no outdoor recreation and little opportunity to participate in programs.

Violations of jail and prison rules are punished harshly, usually by revocation of privileges.

A. Prisoner's Pamphlet.

Jails and prisons issue prisoner handbooks or "pamphlets" to people who are booked into their facilities. The pamphlet will describe the rules and routines for the facility, the procedures for making requests and complaints, and available privileges such as recreation or snacks and sundries that are available for purchase at the facility "commissary." It will also usually provide important information on how and when inmate visits are allowed.

B. DOC and BOP Web Sites.

The Resources tab on my website includes links to varioous corrections, jail, and prison websites. The following links are to the State Department of Corrections and the Federal Bureau of Prisons:

- Department of Corrections http://www.doc.wa.gov/
- Bureau of Prisons http://www.bop.gov

Of particular usefulness on the State DOC site is the page captioned "Family and Friend Services", found at http://www.doc.wa.gov/family/default.aspa .

On the BOP site, the "Inmate Matters" page, found at http://www.bop.gov/inmate_programs/index.jsp , has much useful information for inmates and their families.

XX. The Appeal.

Every person convicted at trial is entitled to at least one appeal of the conviction to a higher court. People convicted by guilty plea may only appeal particular issues, such as the procedures used at sentencing or the term of an exceptional sentence.

A. Direct Appeal or Appeal of Right.

A direct appeal or appeal of right is the first appeal of a conviction to an appellate court that must consider and rule on the appeal. In Washington state, this court is called the Court of Appeals. In federal cases in Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands, this court is the Court of Appeals for the Ninth Circuit.

1. The Record.

An appellate court reviews the record of the trial which includes the court file, the court reporter's transcript, and evidence and exhibits introduced at trial. Information not contained in the record is generally not considered by an appellate court reviewing a case on direct appeal.

2. Issues of Law Not Fact.

Appellate courts rule on legal issues, not factual disputes. The purpose of an appeal is to correct legal errors by the trial judge, not to reargue the credibility of witnesses or the merits of the jury's verdict (although the legal sufficiency of the evidence to convict, which is a very low standard, can be addressed on direct appeal).

B. Discretionary Appeal.

After the direct appeal has been exhausted, a case may be appealed to a higher court (for example the Washington State Supreme Court or the United States Supreme Court). These courts only review a very small fraction of the cases sent to them. This is called "discretionary" review because the appellate court chooses which cases to review.

XXI. Post-Conviction.

A person can challenge a conviction by filing a "post-conviction petition", which is a challenge other than by a direct appeal. These are in the nature of civil challenges to a conviction, subject to special filing requirements. They generally must be filed within one year from the date the conviction is final. There are some exceptions to this deadline.

A. Personal Restraint Petition.

A personal restraint petition is the name for the most common post-conviction petition filed in Washington state courts. It is a request for relief from a court judgment or order that is subjecting the petitioner to some form of unlawful restraint. The petitioner must be incarcerated or under some form of court-ordered restraint to file the petition.

B. Habeas Corpus Petition.

A person convicted in either state or federal court can challenge his conviction by filing, in federal district court, a petition for a writ of habeas corpus. Writs of habeas corpus direct an officer to bring a prisoner before the court so a judge may determine the legality of the prisoner's detention. Habeas corpus petitions are rooted in the ancient common law, but are still filed in modern courts.

Congress and the courts have shown a great deal of hostility toward habeas corpus petitions, and the rules governing them, designed to limit access to the courts at every turn, are very complex. Indeed, a prisoner may not be allowed into federal court if he has not followed the rules pertaining to state court post-conviction petitions.

XXII. Expungement, Vacation of Record, Pardon and Commutation.

If a convicted person has completed all of the terms of a judgment and sentence, the sentence is "discharged." However, the conviction still appears in court files and government records. Some criminal convictions can be "expunged" which means that the government records and files for the conviction are destroyed.

A conviction can also be "vacated" if the conviction was invalid. A vacated conviction is void, but the court files and other government records of the conviction remain unless they are expunged.

A pardon occurs when the governor or President forgives a person for a crime and releases that person from any penalties. A pardon removes the conviction from the offender's record as though it had not occurred.

Commutations apply only to the sentence an offender received. A sentence is "commuted" when a governor or President shortens the term of incarceration by an executive order.

Pardons and commutations are rarely granted.

Footnotes

1. Terry v. Ohio, 392 US 1 (1968).

2. Nix v. Williams, 467 U.S. 431 (1984)

3. RCW 46.20.308

4. State v. Rupe, 101 Wn.2d 664 (1984).

5. State v. Bradford, 95 Wn.App. 935 (1999)

6.United States Constitution, Amend. V; Washington State Constitution, Article 1, Sec. 9

7. State v. Carlisle, 73 Wn.App. 678 (1994)

8. Revised Code of Washington 10.31.100

9. Washington Criminal Court Rule 3.2B

10. Washington State Constitution, Article 1, Section 20; Westerman v. Cary, 125 Wn.2d 277 (1994) .

11. Seattle Times Co. v. Ishikawa, 97 Wn..2d 30 (1982)

12. Kyles v. Whitley, 514 US 419 (1995).

13. Washington State Constitution, Article 1, Section 22

14.State v. Speaks, 119 Wn.2d 204 (1992).