

Constitutional Considerations in Criminal Proceedings

Presented by: Judge Mark A. Speiser

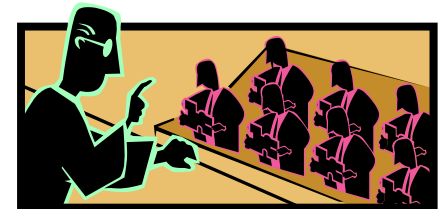
Source of law from Constitution of the United States

- ▶ Amendments
- ▶ First 10 amendments called "**Bill of Rights**" the most important source of limitations on the federal government's power
- ▶ Not all constitutional amendments are applicable to Criminal Law



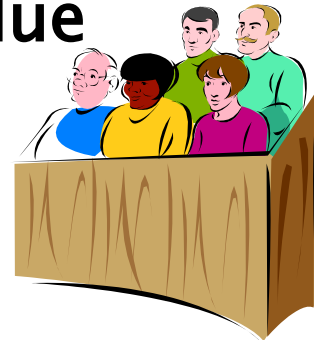
Right to Trial By Jury

- ▶ Guaranteed by the SIXTH AMENDMENT
- ▶ Only for "**serious offenses**"
- ▶ Means imprisonment for **more** than six months
- ▶ Not for petty offenses **less** than six months
- ▶ Not for juvenile cases
- ▶ No constitutional right to jury of 12
- ▶ Must be at least **six jurors**
- ▶ Six or twelve person jury vote has to be **unanimous**



Right to Trial By Jury

- ▶ Sixth and 14th amendment guarantee right to a **Public Trial**
- ▶ Press and public have a right to attend trial. Judge can't exclude without initial finding **closure** is necessary for a fair trial
- ▶ Right to unbiased judge: can't have actual malice or **financial interest**
- ▶ State can't compel accused be tried in **prison clothing** (accused needs to make timely objection)
- ▶ Right to have jury free from conflict or **undue influence**.



Right to Counsel

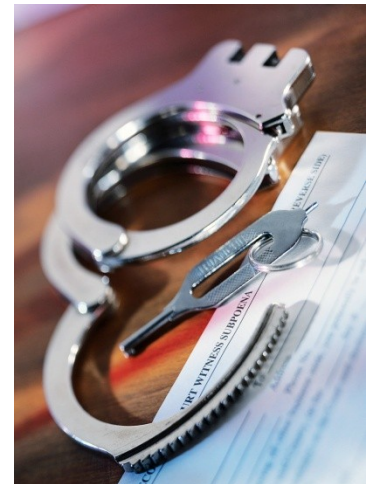
- ▶ Guaranteed by the fifth and sixth amendment
- ▶ Fifth Amendment applies to **custodial interrogations**
- ▶ Sixth amendment applies to all critical stages of prosecution after formal proceedings have begun
- ▶ Defendant has the right to be represented by privately retained counsel or, to have state appointed if he is **indigent**



Right to Counsel:

Stages When Applicable

- ▶ Custodial police interrogation – Fifth Amendment
- ▶ Post-indictment interrogation – custodial or not -- fifth and sixth amendment
- ▶ Preliminary hearings to determine probable cause to prosecute
- ▶ Arraignment
- ▶ Post-charge lineups
- ▶ Guilty pleas and sentencing
- ▶ Felony trials
- ▶ Misdemeanor trials—where jail is imposed
- ▶ Overnight recesses during trial
- ▶ Appeals (as a matter of right)
- ▶ Appeals of guilty and nolo contendere pleas



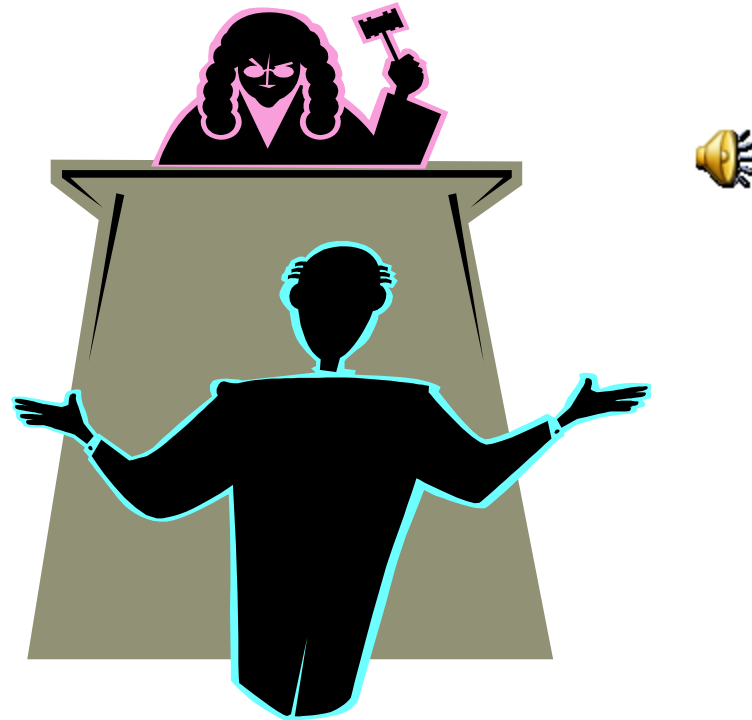
Right to Counsel:

Stages When Not Applicable

- ▶ Blood samples
- ▶ Breath samples – DUI investigations
- ▶ Handwriting or voice exemplars
- ▶ Investigative (pre-charge) lineups
- ▶ Photo identifications
- ▶ Preliminary hearings to determine probable cause to detain
- ▶ Discretionary appeals
- ▶ Parole and probation revocation hearings

RIGHT TO REPRESENT YOURSELF AT TRIAL

- ▶ Waive
intelligent



RIGHT TO CONFRONT WITNESSES

To ensure the following:

- ▶ Finder of fact and defendant observe the **DEMEANOR** of the witness
- ▶ Defendant has opportunity to cross-examine the witness
- ▶ **Exception:** to insulate a child victim from trauma, but must ensure **reliability** of witness's testimony

Codefendant's confession implicating codefendant:

- ▶ When two defendants tried together for committing the crime together, a confession is prohibited for admission in trial unless the codefendant **takes the stand** and subjects himself to cross examination
- ▶ **BRUTON PROBLEM**

RIGHT AGAINST COMPELLED SELF INCRIMINATION

(to be forced to say something against yourself)

- ▶ Fifth and 14th amendments
- ▶ Before an **admission** made during custodial interrogation by an accused can be used against him, he must have the proper warnings and the appropriate waiver.

MIRANDA WARNINGS:

Miranda versus Arizona (1966)

- ▶ Fifth Amendment privilege against compelled self-incrimination became the **basis** for ruling on the admissibility of a confession
- ▶ A person in custody, arrested, must be advised that **BEFORE** any questioning
 - He has the right to remain silent
 - Anything he says can be used against him in court
 - He has the right to an attorney
 - If he can't afford an attorney one will be provided for him if he wants
- ▶ What constitutes "**custody**" can be an issue
- ▶ **Traffic stop** is generally not custodial
- ▶ Doesn't apply to "**spontaneous statements**": statements made by a suspect not in response to questioning but simply volunteered

WAIVER

- ▶ Accused can *Waive* his constitutional rights
- ▶ It is the state's burden to show by a preponderance of evidence that the accused did so knowingly, voluntarily and intelligently

RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE

- ▶ ~~unreasonable, the reason for the search~~
- ▶ Evidentiary searches and seizures must be reasonable to be valid
- ▶ **SEARCH** : government intrusion into an area where a person has a justifiable expectation of privacy
- ▶ **SEIZURE** : exercise of government control over person or thing
- ▶ **REASONABLE**: depends on circumstances
- ▶ "Reasonable" usually means police should have obtained a warrant before the search

What is a WARRANT?

- ▶ Physical, _____ that is to be searched and specifically gives a police agency *authority* to conduct the search. It bears the signature of a judge.
- ▶ **What makes a warrant VALID?**
- ▶ A warrant must be issued by an impartial judge
- ▶ A warrant must be based on "**probable cause**"
- ▶ A warrant must be based upon facts that are **sworn** to and submitted in a separate **affidavit** to the judge by the officer
- ▶ The affidavit can't simply be conclusions of the police officer but must **articulate** (specifically state) **reliable facts and circumstances** for the judge to make an independent evaluation as to whether or not probable cause exists

PROBABLE CAUSE

(for the purpose of a warrant)

- ▶ /
circumstances sufficient to allow a reasonable person to believe that a crime is or about to be committed.
- ▶ A warrant must **specifically and accurately describe** the place to be searched and the items to be seized
- ▶ A warrant can be **defective** on its face if the description of the premises to be searched is not accurate

Six Exceptions to Warrant Requirement

1. **SEARCH INCIDENT TO LAWFUL ARREST.** If an arrest is based upon probable cause, a search upon that arrest is permissible
Example: suspect arrested for DUI -- entire vehicle can be searched, including its contents – closed containers etc..
2. **Automobile exception:** if police have probable cause to believe a car contains evidence of a crime it can be searched

Six Exceptions to Warrant Requirements

3. **Plainview:**

- ▶ Police must legitimately be on the premises
- ▶ Discover evidence of a crime or contraband
- ▶ See such evidence in plain view
- ▶ It must be immediately apparent items are evidence of a crime or contraband

4. **Consent:**

- ▶ If police are given consent voluntarily and intelligently
- ▶ Scope of consent can limit the scope of the search

Example: threats by police to suspect can negate voluntariness of consent

Six Exceptions to Warrant Requirements

5. **Stop and Frisk:**

- ▶ A police officer can stop someone without probable cause if he has a specific and **reasonable suspicion** of criminal activity
- ▶ Likewise if officer has reasonable belief someone is armed and dangerous he may conduct a protective **Frisk**
- ▶ "**Pat down**" – officer may reach into suspects clothing and seize an item he reasonably believes is a weapon or contraband

6. **Hot pursuit:**

- ▶ Officers chasing a **fleeing felon** can search as much as reasonably necessary to prevent the suspect from resisting or escaping
- ▶ Officers also can seize evidence of a crime if the evidence is likely to **disappear** before a warrant can be obtained
- ▶ **Example: blood sample containing alcohol or fingernail scraping**

EXCLUSIONARY RULE

- ▶ This is a judicially created doctrine that prohibits the use in a criminal trial of any evidence obtained by the government (police, prosecutors, etc.) in violation of an individual's constitutional rights under the fourth, fifth and sixth amendments of the Constitution. This includes not only **tangible evidence** but **confessions** as well.
- ▶ The purpose of this doctrine is to discourage law-enforcement from violating an individual's constitutional rights

EXCLUSIONARY RULE

- ▶ If the government isn't permitted the use of such improperly obtained evidence police will be less likely to violate those rights to begin with
- ▶ Not only is illegally obtained evidence excluded but any evidence that is derived from the illegally obtained evidence is also excluded. This is known as the "**tainted fruit of the poisonous tree**"
- ▶ How is the exclusionary rule enforced?

MOTION TO SUPPRESS EVIDENCE

- ▶ **Motion to suppress evidence** is normally a pre-trial hearing held before a judge before a jury is empaneled
- ▶ The judge listens to the facts surrounding the search/seizure of the evidence or the obtaining of a confession through the presentation of state and defense witnesses.
- ▶ The **state has the burden** to establish the legal admissibility of the evidence or confession
- ▶ The defendant has the right to testify without his testimony being subsequently used against him in a trial
- ▶ At the conclusion of the testimony presented both the state and the defense have an opportunity to present the appropriate case law to argue their respective positions on the motion.

MOTION TO SUPPRESS EVIDENCE

- ▶ If the judge rules that the evidence or confession is obtained in violation of the defendant's rights he can "**exclude**" it's use at trial. (This is why this is referred to as the **EXCLUSIONARY RULE**)
- ▶ By eliminating the ability of the state to introduce evidence at trial or the defendant's confession, the result may effectively prevent the state from being able to successfully prosecute its case.
- ▶ This is why the "exclusionary rule" can be used as a **powerful tool** in defending a case where an individual's rights have been violated by law enforcement.
- ▶ If judge excludes the evidence or confession, State can appeal that decision to an intermediate court of appeal, prior to the initiation of the trial

MOTION TO SUPPRESS PHYSICAL EVIDENCE SUMMARY

- ▶ Useful **analysis** of the law of "SEARCH AND SEIZURE" asks:
- ▶ Does the defendant have a fourth amendment right ?
- ▶ Was there governmental (versus private) conduct ?
- ▶ Did the defendant have a **reasonable expectation of privacy** (example: his home or apartment) ?
- ▶ Did the police have a **valid warrant** ?

MOTION TO SUPPRESS EVIDENCE

- ▶ If no warrant was there a **valid exception**?
- ▶ It is easy to see, with an infinite number of unique factual situations, subject to legal interpretation and the applicable legal principles, why **search and seizure law** is so complex. There are volumes and volumes written about it in thousands of cases rendering legal opinions
- ▶ It can literally “make or break” the case for the defendant and is a **hotly and frequently litigated issue**

DUE PROCESS AND EQUAL PROTECTION

- ▶ Fifth and Fourteenth Amendments, we hear through the courts, **due process** is essentially a guarantee of **fairness** of the law, while **equal protection** guarantees that **similarly situated people** shall be treated **equally**
- ▶ **Example:** if a law prohibits use of gasoline lawnmowers on a Sunday this would be a due process issue. The law could be argued to be unfair and arbitrary.
- ▶ If a law prohibits only unmarried persons from using the lawnmower that would be an equal protection issue, because it would unfairly single out a specific group of people
- ▶ Both guarantees have their roots in principles of **FAIRNESS.**

BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

- ▶ criminal cases that the state (the prosecution who is bringing the charges and making the accusation of a criminal offense) has the sole burden of proving each and every element of the crime charged (all crimes have essential elements of proof) beyond a reasonable doubt.
- ▶ **PRESUMPTION OF INNOCENCE** – Not mentioned in the Constitution but it is an essential component in a fair trial

- ▶ Since Accused is presumed to be innocent of the crime charged, the Accused never has to prove their innocence, the Government must prove the Defendant guilty beyond and to the exclusion of every reasonable doubt
- ▶ Probable cause v. Reasonable doubt standards

DOUBLE JEOPARDY

- ▶ The fifth a defendant can't be tried for the same offense twice.

Jeopardy attaches:

- ▶ When a jury is given the oath or "sworn in"
- ▶ If no jury, when the first witness is sworn in
- ▶ This applies **only in a criminal case**

Retrial is permitted and not considered as Double Jeopardy:

- ▶ Hung jury
- ▶ Mistrial of necessity
- ▶ After a successful appeal

Note: a defendant can be tried for a federal offense and a separate but similar state offense and punished consecutively. This is not double jeopardy as they are actually different laws.

CRIMES

- ▶ No discussion of the criminal justice system would be complete without at least a basic concept of what we define as a crime
- ▶ Today, **STATE STATUTES**, enacted by state legislatures are the primary source of what constitutes a **CRIMINAL ACT** and therefore considered a violation of the law
- ▶ The **FEDERAL SYSTEM** has its own set of laws enacted by Congress, called **US CODE**, entirely statutory, there are no common law crimes

THEORY OF PUNISHMENT

- ▶ About 100 years ago there was a general trend to designate criminal courts strictly as courts of **PUNISHMENT**
- ▶ **REHABILITATION** was no longer to be a major factor in determining or imposing a sentence
- ▶ With the passage of time we have returned to a more **enlightened** approach of the criminal court
- ▶ The majority of dispositions in criminal court still dole out punishment, but alternative considerations have become once again significant factors in an increasing number of cases.
- ▶ Potential **rehabilitation and specialized treatment** is no longer ignored or irrelevant

THEORY OF PUNISHMENT

- ▶ Emergence of specialty or **PROBLEM SOLVING COURTS**
- ▶ The underlying concept is that punishing crime accomplishes several things for society as a whole:
- ▶ While imprisoned a criminal **can't commit more crimes** to hurt society
- ▶ Punishment **deters** criminals from committing **future** crimes
- ▶ Punishment may **deter other people** from committing similar crimes for fear of similar punishment
- ▶ Punishment is appropriate to satisfy society's need for **revenge**
- ▶ Rehabilitation to mold or reform the criminal to return to society and behave properly
- ▶ Each of these two theories could be discussed, challenged, and argued at length, but are **generally** how our society justifies punishment for committing crimes

CLASSIFICATION OF CRIMES

- ▶ Most states define:
- ▶ **FELONY** -- -- a crime for which punishment can be death or imprisonment for more than one year
- ▶ **MISDEMEANOR** -- -- a crime where punishment is less than one year or simply a fine

CONSPIRACY

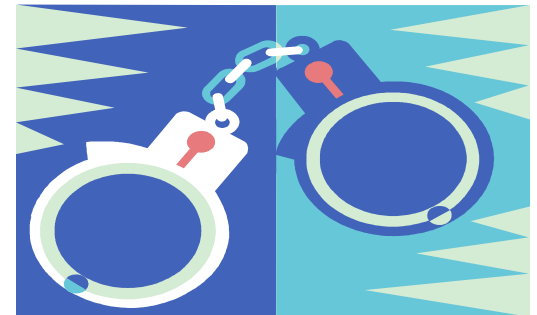
- ▶ Sometimes a conf
- ▶ Example a) -- --
- ▶ Versus
- ▶ Example B.) -- -- conspiracy to deliver cocaine
- ▶ Both are punishable up to 15 years in prison
- ▶ What is the difference?
- ▶ Example a – delivery is the actual sale or distribution to another of a quantity of cocaine whereas a conspiracy to deliver cocaine. is simply an agreement between two or more individuals to sell or distribute cocaine to another
- ▶ Essentially in example A. the law punishes for the actual ACT
- ▶ Example B– the law punishes for the AGREEMENT to do the unlawful act whether it's completed or carried out or not

CONSPIRACY

- ▶ Today, the majority of states require some actual OVERT ACTS in furtherance of the conspiracy-- mere acts of preparation are sufficient
- ▶ CONSPIRACY is often easier for the government to prove when the actual deed fails to materialize
- ▶ Example: DRY CONSPIRACY (no actual drugs) more sweeping in who can be prosecuted
- ▶ Example: wife who brings husband to the phone to speak with a co-conspirator to plan the delivery of drugs
- ▶ This is why you will see in an INDICTMENT or INFORMATION that the defendant is charged with conspiracy to deliver cocaine AND a second count of delivery of cocaine
- ▶ This gives the government a second opportunity to obtain a conviction especially if the proof of the actual crime is weak
- ▶ Conspiracy to commit a crime in most cases carries the **same penalty** as the crime itself.

Outline of Criminal Process from Arrest to Conclusion

- ▶ L stages of its progression to see the key elements of how the system functions:
- ▶ Remember, every state has its own body of laws and procedure. Terms and procedure can vary. This is why each state has its own bar admission exam requirements.
- ▶ Common type of state felony prosecution: the **arrest** of a defendant for criminal activity police become aware of occurring or having just recently occurred



Example Case

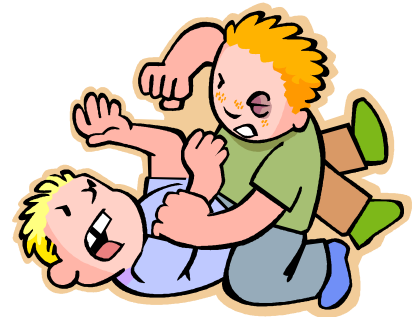
- ▶ **Ivan** and **Boris** are drinking and socializing at the Hard Rock Lounge. There is music, alcohol, and dancing. Throughout the course of the evening **Big Pete** and his buddy **Curley** seem to be drinking too much and trying to provoke a fight with Ivan and Boris claiming they were staring at their women!
- ▶ Ivan and Boris repeatedly ignore engaging in any argument with Big Pete and Curley.
- ▶ Big Pete and Curley are significantly **bigger** than either Ivan or Boris and are clearly intoxicated. As the evening comes to an end Ivan and Boris go outside to a seating area and are engaged in conversation with the owner of the lounge.

Example Case

- ▶ Big Pete and Curley are seen exiting the lounge and heading directly towards where Ivan and Boris are seated.
- ▶ As Big Pete is approaching Ivan he is clearly heard to be swearing at Ivan and making **threats**.
- ▶ As big Pete continues towards Ivan and comes within arm's distance, he makes an **aggressive move** with his fist seen by witnesses as an attempt to strike at Ivan.

Example Case

- ▶ Before any blows connect Ivan rises out of his chair and meets Big Pete's attempted strike with a **punch** to Big Pete.
- ▶ Notwithstanding the significant difference in their size, blows are exchanged and Big Pete goes down.
- ▶ While on the ground Ivan hits Big Pete several times **in the head** to ensure that he doesn't get back up to continue the fight.



Example Case

- ▶ Boris and Curley have engaged in a fistfight while Ivan was fighting with Big Pete
- ▶ Witnesses called the police. Upon their speedy response to the scene paramedics are called to treat Big Pete who was still on the ground with a concussion.
- ▶ After a quick determination of what happened, the police **arrest** Ivan and charge him with committing **aggravated battery**, a felony
- ▶ Ivan is transported to the **County Jail** and **booked** on one count of aggravated battery



Example Case: What happens from here?

- ▶ Ivan's fingerprints and photographs are taken to check the system to ensure Ivan's true identity
- ▶ Most crimes have a schedule or list of **Standard Bonds** to be posted for release.

ints



What is a Bond?

- ▶ A bond is essentially a **guarantee** made through money or property to ensure defendant's appearance in court.
- ▶ Not all charges automatically have a bond
- ▶ **First degree felony punishable by life: no bond**
- ▶ **Capital cases: no bond "Arthur Hearing"**
- ▶ **Domestic violence: no immediate bond, must see a **magistrate** who will set bond**
- ▶ If one is unable to "**bond out**" after arrest, they will see a judge (magistrate) within 24 hours of their arrest.



Magistrate Process

- ▶ The Magistrate System was created as a **safeguard** to ensure a legitimate reason exists to have someone held in custody.
- ▶ Magistrate must establish the amount of the bond, and further determines **Probable Cause** (the facts and circumstances that lead one to reasonably believe the suspect has committed a crime). This is **not** a terribly high standard of proof, but at least establishes some basic **reason** for someone to have been arrested.
- ▶ If the magistrate can't reduce or set a bond as in a first-degree felony punishable by life, or a drug trafficking case, the defense lawyer can apply for relief to the judge assigned to the case. This usually takes a week or more to get the "**motion for a bond reduction**" on the judge's calendar.

Example Case

- ▶ In our case, Ivan gets booked in on a standard bond for **aggravated battery** of \$5000
- ▶ Ivan doesn't want to wait for magistrate court the next day. He has access to a phone in the jail to call his family. Family contact a **Bondsman**, who for a fee will post the bond.
- ▶ Ivan is therefore released early the next morning on a \$5000 bond and does **not** see the magistrate

Example Case:

Bond Reduction

- ▶ If Ivan didn't have money for a bond, the next day the magistrate could have reduced the bond:
- ▶ Placed him on **pretrial reporting** – on his own **recognizance**
- ▶ Require an **electronic monitor** –a device placed on his ankle, or a **GPS**, and require him confined to his home other than for work and necessities.
- ▶ Require any **additional conditions** or requirements the court deems appropriate, such as– random alcohol or drug testing, no victim contact, psychological evaluation and recommended treatment.

Example Case: Bond Reduction

- ▶ There are **two main considerations** for a magistrate or any judge regarding a bond reduction and conditions of release:
- ▶ Is the defendant in a **danger** to the community?
- ▶ Is the defendant a **flight risk**?
- ▶ If the magistrate refused to reduce Ivan's bond or consider any other conditions of release Ivan would **remain in custody** pending the conclusion of this case. Three months to a year or longer, there is no time limit.

Example Case

- ▶ Once Ivan is released or if it determined he must remain in jail, what is the first thing that he should do?
- ▶ Of course, hire a **lawyer**. (If he could not afford one, a **public defender** would be appointed)
- ▶ It is generally agreed that the services of a private lawyer will be of better quality than from a public defender.

Example Case:

What is the progress of Ivan's Case?

- ▶ In the state of Florida we have prosecutors who are called "**State Attorneys**". There is one for each judicial circuit generally. They are elected officials and have numerous assistant state attorney's hired to help prosecute cases.
- ▶ Broward County has in excess of 250 assistant State attorneys working in juvenile misdemeanor and felony courts.
- ▶ Special assistant state attorney's work in "**Intake Unit**"
- ▶ It is their responsibility to **analyze** the new cases sent to them by the various police agencies in the county.

- ▶ The Intake Unit of the Prosecutor's office serves as an intermediary between the police and the court system. They decide which defendants the police arrest, merit prosecution and which do not due to:
 - Lack of evidence
 - Illegality of arrest:
 - Physical evidence illegally seized
 - Confession unlawfully obtained

Example Case:

What is the progress of Ivan's case?

- ▶ They **review** police reports, witness statements, lab reports, photos, and any and all evidence submitted to them by the arresting police agency.
- ▶ Once they examine and evaluate all of this information it is within their sole discretion as to **what** charges, if any, to file against the defendant. This is a very critical and powerful position
- ▶ These prosecutors are completely **independent** from the police agencies. They are not bound to nor are they obligated in any way to agree with or follow the police agency's evaluation of the case.

Example Case:

What is the progress of Ivan's Case?

- ▶ The criteria they follow as to what charges to file is essentially whether **they can reasonably expect to successfully obtain convictions**.
- ▶ In Ivan's case the prosecutor believes from the facts that have been submitted to him through the police reports, that **one count of aggravated battery** would be the appropriate charge.
- ▶ This intake process usually requires several weeks to proceed. During this time there is a **window of opportunity** prior to a formal filing decision, that a defense attorney can, on occasion use to his client's advantage.

Example Case:

What is the progress of Ivan's Case?

- ▶ Facts not included in the police report or otherwise not known to the prosecutor can be presented to the prosecutor by defense counsel, that may alter his opinion as to what charges to file.
- ▶ **Example: the fact that Big Pete's dad was a police detective and that Big Pete had a severe drinking problem and extensive history for violence.**
- ▶ On occasion, facts such as this can be very effective in persuading an assistant state attorney to file a **less serious charge** or **decline** the filing of criminal charges altogether.

Example Case:

What is the progress of Ivan's Case?

- ▶ Ivan however was not so fortunate. In this case despite Big Pete's history, there existed a video from a surveillance camera that showed Ivan **kicking** Big Pete several times after he was down. These were facts that the intake prosecutor would not ignore.
- ▶ It was the conclusion of the Assistant State Attorney that Ivan should have **retreated** once the victim was on the ground. He therefore filed one count of aggravated battery, a **second-degree felony** with a maximum penalty of 15 years in Florida State prison.
- ▶ Based upon the filing of charges, Ivan's lawyer sent to the court a **Notice of Appearance**, which officially stated that he was to be the "**attorney of record**" defending Ivan.
- ▶ The prosecutor had already filed a **formal document** with the court which set forth the fact that Ivan was being charged with the crime of **aggravated battery**.

Example Case:

What is the progress of Ivan's Case?

- ▶ This document is called an "**Information**", and officially describes what Ivan is charged with by the State of Florida. This document is simply an **accusation** and carries no more evidentiary significance than a **speeding ticket**.
- ▶ Remember, regardless of the allegation, there is a **presumption of innocence** that remains with Ivan throughout this case until such time as he either is found guilty or pleads guilty to the charge.
- ▶ The Clerk of Court sent Ivan's lawyer a "**Notice of Arraignment**". This informs Ivan and his attorney **where and when** Ivan is to appear in court to be formally advised by the presiding judge of the criminal charge.

Example Case: At the Arraignment

- ▶ Ivan appears in court with his attorney before a Circuit Court Judge to be formally advised by reading of the "**information**" that accuses him of his crimes.
- ▶ At that time Ivan's attorney will ask the judge to enter a plea on behalf of his client of "**Not Guilty**" and will demand a "**Trial by Jury**".
- ▶ This does not mean that the case will **actually** be tried by a jury, but **preserves** Ivan's right in the event he elects to proceed to trial

Example Case:

Demand for Discovery

- ▶ Ivan's attorney will also file at that time a "**Demand for Discovery**"
- ▶ This demand requires the prosecutor to provide to defense counsel, within **14 days**, a witness list, police reports, witness statements, reports of experts, lab reports, DNA or fingerprint analysis, video or audio recordings, **exculpatory evidence** known as "**Brady Material**", essentially everything the prosecutor has in his case file that he plans to use in the prosecution. Nothing can be **hidden**, the state has a continuing obligation to disclose any **new information** it discovers.

Example Case:

Reciprocal Discovery

- ▶ Defense counsel has a **similar obligation** to advise the prosecutor as to any witnesses, experts, and tangible evidence he expects to use in the defense of the case.
- ▶ Both the defense and the state as a result of reciprocal discovery have the right to **examine** each other's evidence: including but not limited to, reports of expert's, tangible evidence, and to interview each other's witnesses, by way of "**deposition**".
- ▶ **Deposition** : taking the **sworn statement** of a **witness** by opposing counsel: **broad area** of inquiry allowed. Can later be used in trial to show **inconsistent statement** of the witness.
- ▶ Not all jurisdictions allow the taking of depositions. **The Federal System** does **NOT** allow depositions. "**TRIAL BY AMBUSH**"

Notice of Alibi

- ▶ It is also the obligation of the defense to place the state on notice if they plan to allege an **Alibi**.
- ▶ An alibi is essentially a claim that the defendant did not commit the crime charged because he was in a **different place** when the crime was committed. Names and addresses of witnesses who will testify as to the defendant's location **must** be disclosed to the state.

Pre-Trial Motions

- ▶ Motion to suppress
- ▶ Motion to dismiss
- ▶ Motion to disclose confidential informant



Plea versus Trial

- ▶ An effective defense attorney will evaluate his case at the **conclusion** of the discovery process in order to properly **advise** his client of his options. (A defense attorney needs to be careful when asked by his client for recommendations as to how to proceed.) The decision to go to trial must be the defendant's and **NOT** the attorney's.
- ▶ Frequently asked question: **What would you do?**
- ▶ **Considerations: Plea versus Trial**

Plea versus Trial

- ▶ **Plea offer**: supervision or incarceration (“**Plea Negotiation**”: an offer by the state to resolve the case **prior** to trial or sometimes prior to a motion to suppress that secures the defendant a plea of a punishment usually, significantly **less** than his possible punishment after trial)
- ▶ **Strengths and weaknesses** of the case
- ▶ Defendant's **personal situation** // risks to defendant in terms of the plea versus trial.

Types of Pleas

- ▶ **Negotiated** versus **Open**
- ▶ **Guilty** versus **No Contest**
- ▶ **Alford plea**: "plea of convenience "
- ▶ If a plea is not an acceptable option and there are no successful pretrial motions to dismiss or otherwise resolve the case, **TRIAL** is the only remaining option.
- ▶ 90% of criminal cases result in a **Negotiated Plea** because of cost, and more importantly, risk of **Conviction**

Example Case: Trying the Case

- ▶ Some cases, just **need** to be tried:
- ▶ Ivan's attorney meets with him and thoroughly reviews the case and Ivan's options. It is the attorney's opinion that they have a **solid defense** and the case is worth trying before a jury. The state has offered Ivan in exchange for his plea of guilty, a five-year prison sentence and \$25,000 in restitution to the victim.
- ▶ After thorough discussion and understanding of his options, Ivan **rejects the plea offer** and elects to go to trial.

Trial Outcomes

- ▶ Acquittal or Conviction– Hung Jury– Lesser Included Offense
- ▶ If convicted, the *probability* of a prison sentence



Opening Statements

- ▶ Not meant to be arguments of persuasion, but can set forth the defense's position in the case, so the jury understands what the defense's case is about.
- ▶ "Road map" of the case "the evidence will show....."
- ▶ Can be waived by either side

Burden of Proof

- ▶ In jury selection it was explained that the burden of proving the charge against the defendant is the **sole responsibility** of the prosecution. Since the state filed the charge, under the law, it is their responsibility to prove it.
- ▶ This burden **never** shifts to the defense and essentially the defense has no obligation to present any evidence whatsoever.
- ▶ Further, the burden of proving the case requires the prosecutor to establish “**Proof Beyond Every Reasonable Doubt**” that the defendant committed the charge he is accused of.

Burden of Proof

- ▶ Each and every element of the charge must be proven beyond and to the exclusion of every reasonable doubt in order for the state to meet its **burden** to obtain a conviction. If any juror has a reasonable doubt as to any of the ELEMENTS of the crime for which the defendant is accused then by law they will be instructed to return a verdict of Not Guilty.
- ▶ If the state fails to meet its burden successfully, the presumption of innocence remains and the defendant is Not Guilty.

Affirmative Defenses

- ▶ Some cases have issues that assist the defense in defending the accused and must be raised by the defense (though the burden to prove the charges never shifts away from the prosecution)
- ▶ These are called "**Affirmative Defenses**"
- ▶ Insanity
- ▶ Entrapment
- ▶ Self-defense
- ▶ **Insanity**: this relates to the mental state of the defendant **AT THE TIME** of the commission of the crime, and if established would compel a verdict of "**Not Guilty by Reason of Insanity**"

Insanity Defense

- ▶ The traditional standard is called "**The McNaughton Rule**" and requires: 1- disease of the mind 2- caused a defect of reason 3 - To the extent that the defendant, at the time of the offense, lacked the ability to know the wrongfulness of his actions: (couldn't distinguish **right from wrong**) or understand the nature and quality of his actions
- ▶ Many jurisdictions exclude from the insanity defense, the psycho or **sociopath**.

Example: a serial killer-- one who continues to commit crimes with no remorse

Insanity Defense

- ▶ The burden of proof of insanity varies from state to state:
- ▶ Some jurisdictions, once raised by the defense, requires the state to prove **beyond a reasonable doubt** that the defendant was sane
- ▶ In other jurisdictions the defendant must prove by the **weight** of the evidence that he was not sane
- ▶ Federal jurisdiction requires proof of insanity by **clear and convincing** evidence
- ▶ In Florida, if the defendant is found not guilty by reason of insanity he can be institutionalized in a forensic psychological hospital if dangerous or placed in a community-based facility, if not a danger to self or others.

- ▶ If institutionalized, a defendant found N.G.I. could actually spend more time in custody in a forensic hospital than would be the case if he were sane, found guilty, and sent to prison, if the defendant remains a danger to himself or others

Mental Competency

- ▶ Mental incompetency is not a defense to a criminal charge, but relates to a defendant's mental state and can affect his ability to be tried for the alleged offense, or if convicted his ability to proceed to sentencing.
- ▶ There is a completely different criteria in the law for a legal determination of competency.
- ▶ Under The Due Process Clause of the U.S. Constitution:
A defendant can't be tried, convicted or sentenced if, as a result of a mental disease or defect:
He is unable to understand the nature of the proceedings against him
He is unable to assist his lawyer in the preparation of his defense

Mental Competency

- ▶ In Florida the determination of competency is subject to a **psychological evaluation** by two doctors appointed by the court – in the event of a tie, a third doctor is appointed.
- ▶ The state or the defense is entitled to a hearing on this issue if requested.
- ▶ Note that in the State of Florida incompetence does not automatically require commitment to an institution-- it must first be established by clear and convincing evidence that the defendant meets the criteria for **involuntary hospitalization** meaning, essentially that he is a danger to himself or the community or at risk of self-neglect.
- ▶ If the defendant doesn't meet the standard he can be placed for **competency restoration** in a community-based facility or under some circumstances allowed to live with his family.
- ▶ In Florida if incompetency due to mental illness lasts for five years, the court will entertain a motion to dismiss the charges without prejudice.
- ▶ Incompetency can be due to mental illness or mental retardation

Entrapment

- ▶ This is an issue that is argued extensively in drug trafficking cases as well as prostitution cases.
- ▶ The defense of entrapment argues that the intent to commit a crime did not originate with defendant but rather through the actions and effort of law enforcement.
- ▶ Essentially, the crime was **MANUFACTURED** by law enforcement where one would not have otherwise existed.
- ▶ The concept is that police are supposed to **DETECT** ongoing crime not create it.
- ▶ Where law enforcement simply create an opportunity for crime to occur where one already has the **PREDISPOSITION** to commit the crime-- not considered entrapment.

Entrapment Examples

Example 1

- ▶ undercover narcotics detective poses as a street dealer
- ▶ addict approaches and says "I needed a "20, hard"–
- ▶ detective sells a \$20 piece of crack cocaine
- ▶ This is not considered entrapment as the addict was ready and willing to purchase illegal drugs

Example 2

- ▶ detective uses a confidential informant to relentlessly persuade his best friend (who has no prior criminal history) to go out to buy drugs for him because he is too ill.
- ▶ The best friend only agrees after incessant begging, pleading and pressure and the confidential informant exploiting his friendship to get him to do what he had no intention or interest in doing.
- ▶ This would be considered entrapment because the criminal act would not have occurred except for the agent of the police forcing this to happen.

Subjective Entrapment

- ▶ Florida Statute
- ▶ **Subjective Entrapment** is a jury question the defense raises to show the defendant was coerced or induced to commit a crime he would have otherwise not committed.
- ▶ The defense must show by the greater *weight of the evidence* that he was induced or encouraged by law enforcement (an undercover officer or a confidential informant) to commit the crime charged.
- ▶ If the defendant does so the state must, in order to obtain a conviction, *prove beyond a reasonable doubt*, that the defendant was predisposed to commit the crime before, and independent, of the police inducement or encouragement.

Objective Entrapment

- ▶ Due Process
- ▶ Objective entrapment is raised by the defense pretrial by a "**motion to dismiss based on entrapment as a matter of law**".
- ▶ This motion is argued before the judge who, under Florida law, if defense's argument is successful, has the power to dismiss the case without trial.
- ▶ The basis of this motion ignores **predisposition** of the defendant which is irrelevant and attacks the actions of law enforcement.
- ▶ If the conduct of law enforcement in the case is considered **EGREGIOUS**, then the defendant's right to due process (fairness) is considered violated.

Objective Entrapment

- ▶ **Egregious Behavior**, is police activity that is :
- ▶ Reasonably likely to cause an innocent person to commit a crime.

Example: where police have as an undercover agent, an alluring woman who uses promises of sexual favors to induce the defendant to get drugs for her.

- ▶ This would be considered outrageous police conduct and the case would be dismissed based on entrapment is a matter of law.
- ▶ This would be an example of where the police manufactured the crime, rather than detecting ongoing criminal activity.
- ▶ If the court refuses to grant the motion to dismiss the defense can argue this same issue in trial before the jury. This is known as "**two bites at the apple**".

Entrapment

- ▶ Entrapment as a practical matter is a difficult and risky defense.
- ▶ Defendant has to admit he did the deed of which he is accused
- ▶ You are essentially asking a jury to forgive your illegal activity
- ▶ You are trusting that they will understand the law of entrapment and follow it.
- ▶ Entrapment can only exist **IF** the unlawful inducement comes from law enforcement or someone acting on their behalf such as a confidential informant; it cannot evolve from a private citizen.

Self-defense or Justifiable Use of Force:

NON-D

- ▶ Generally, an individual who is threatened may use force as **reasonably appears necessary** to protect himself from the imminent use of unlawful force against himself.

DEADLY FORCE

- ▶ One is without fault
- ▶ One is confronted with unlawful force
- ▶ One is threatened with or reasonably believes they are threatened with **imminent death or great bodily harm**
- ▶ Florida law now does not require one to **retreat** in this situation.
- ▶ Defense of one's home against an intruder using deadly force is considered as justifiable.

Example Case: Trying the Case

- ▶ In our case at the conclusion of the trial, the jury will be instructed by the judge that– in considering the defense of **Self-Defense** if there is a **reasonable doubt** the defendant was justified in the use of force he should be found not guilty; conversely, if the jury has no doubt the defendant was not justified in the use of force than he should be found guilty
- ▶ It is with this instruction in mind that Ivan's attorney will focus on developing facts to persuade the jury that Ivan was **justified** in the use of force.
- ▶ After jury selection and the swearing in of the jury, the trial will begin giving both the state and the defense an opportunity to make an “**Opening Statement.**”

An opening statement is not argument or persuasive language with regard to the facts of the case but rather an opportunity for the defense and the state to outline for the jury “**what they expect the evidence will show**” and to frame the issues that the jury may be asked to consider.

Example Case: Trying the Case

- ▶ Ivan's attorney will introduce to the jury the concept that Ivan did nothing more than protect himself from an imminent attack by an intoxicated bully with a history of violence, he'll outline the facts, by explaining to the jury what he anticipates the evidence introduced in the trial will show.
- ▶ Arguments and conclusions as to what the evidence established is reserved to the end of the case in what is called "closing argument".
- ▶ Because it is the state's burden to prosecute the case, the state proceeds with its first witness in presenting the evidence to support the charges

Evidence

- ▶ Evidence can come from **witnesses** in the form of testimony
- ▶ Evidence can also consist of physical documents or tangible items admitted into the trial record.



Direct Evidence versus Circumstantial Evidence

- ▶ Direct Evidence is recorded into the record from **testimony** or **physical evidence** to describe the events and actions surrounding the alleged crime.
- ▶ Circumstantial Evidence ; a series of **circumstances** that can lead to reasonable **conclusions** as to what occurred regarding the alleged crime.

Circumstantial Evidence

Example I :

- ▶ There exists a room with one door and no windows, you are outside, hear a scream, and immediately see a person running out of the door with a knife and blood dripping from it.. You run into the room immediately and see a body bleeding on the floor face down, with obvious cuts and stabbings on their back. There is no one else around and there are no other entrances or exits from the room.
- ▶ This set of circumstances or "**circumstantial evidence**" could lead to **proof beyond a reasonable doubt** since the only **logical conclusion** is that the individual seen fleeing, committed a stabbing, ,

Circumstantial Evidence

Example II :

- ▶ The defendant is pulled over by the police while driving . The police search the vehicle and locate a bag of cocaine within a duffel bag in the trunk of the car. The car is determined to be owned by someone other than the defendant although he is alone in the vehicle.
- ▶ A duffel bag is dusted for fingerprints and the defendant's fingerprints are identified on the outside of the duffel bag
- ▶ The defendant is charged with possession of cocaine
- ▶ Is this proof beyond a reasonable doubt or is there a possible **reasonable** interpretation of what occurred that it would be inconsistent with defendant's guilt.

Example Case: Trying the Case

- ▶ The state proceeds with the **first witness** –Big Pete – the victim.
- ▶ Big Pete testifies upon **direct questioning** by the prosecutor that he was "all talk", and never intended to become physical with Ivan.
- ▶ **Direct Questions** can't suggest the answer

Example

- ▶ What occurred that night Sir?
- ▶ Were you drinking alcohol?
- ▶ How long were you in the bar?
- ▶ Did you speak with anybody and if so with whom?
- ▶ Are you accompanied by anyone?

- ▶ **Leading Questions** can be used on **cross examination**

Example

- ▶ Isn't it true sir that you drank five vodka tonics that night?

Example Case: Trying the Case

- ▶ Big Pete testifies on direct examination by the prosecutor that he had never been involved in any violence or fights in his life.
- ▶ He further states that he had only been at the lounge that night for about an hour and drank only one light beer
- ▶ The prosecutor has Big Pete answer questions as to the facts surrounding the incident that night.
- ▶ The prosecutor concludes his questioning and turns over his witness to Ivan's attorney for "**Cross Examination**":

Example Case:

Trying the Case – Cross Examination

- ▶ Ivan's counsel is not limited to direct questioning and fires off his line of challenges to Big Pete's direct testimony
- ▶ Counsel: Mr. Pete you just testified under oath that you've never been involved in any acts of violence or fights in your life
- ▶ Big Pete: yes sir
- ▶ Counsel: isn't it a fact sir that on May 25 of 2008 you were actually involved in a fistfight and sent Igor Brown to the hospital as a result of injuries that you inflicted
- ▶ Big Pete: yes, but I was never charged for that
- ▶ Counsel: isn't it a fact that you were never charged for that because your father is a Broward Sheriff Detective who managed to quash the arrest and prosecution
- ▶ Big Pete: I don't know
- ▶ Counsel: you don't know ?? you never discussed that with your father ???!
- ▶ Big Pete: No, the subject never came up

Example Case: Trying the Case

- ▶ If the defense attorneys cross examination is effective it will bring out issues to create **doubt** in the witnesses believability or it will raise questions as to the state's interpretation of the facts of the case.
- ▶ Since the state has the burden of proof to establish each element of the crime beyond every reasonable doubt, if the defense attorney creates doubts in the minds of the jury as to any significant part of the state's presentation of the case, the state may not obtain a conviction]
- ▶ **Note: defense counsel can continue to cross-examine Big Pete and challenge every detail of his testimony. An experienced defense attorney will not nitpick and challenge insignificant details, such as what color was the chandelier in the lounge or what kind of clothes was Ivan wearing, but will raise conflicts of significant issues or challenge major aspects of the witness's credibility.**

Trying the Case

- ▶ After cross examination the state can renew the questioning of its witness to clarify points made on the cross examination; this is called **REDIRECT**
- ▶ The defense can **RECROSS** any new issues raised in REDIRECT
- ▶ After each witness testifies, and all the physical evidence is introduced into the record, the state **RESTS** its case
- ▶ The jury is then removed from the courtroom

Trying the Case

- ▶ The defense must now make a **MOTION for DIRECTED VERDICT for JUDGMENT of ACQUITTAL**
- ▶ This is essentially an argument to the judge outside the presence of the jury that if one were to take all of the facts in the **light most favorable to the state** there is not even the basic elements from the facts that could support a conviction.
- ▶ It is unusual for a judge to grant this motion, but on occasion the state fails to establish even the basic elements that would allow the case to go to a jury for a determination on the facts.
- ▶ If the judge denies the motion the defense has opportunity to proceed, if they wish to present any evidence.
- ▶ Does the defendant have to present any evidence?
- ▶ Does the defendant have to testify?

Trying the Case: Defendant's Testimony

- ▶ CONSIDERATIONS: DEFENDANT TO TESTIFY OR NOT ?
- ▶ Does the jury need to hear from the defendant?
- ▶ Is the defendant a convicted felon that you do not wish the jury to know about because it may affect his credibility?
- ▶ Evaluation of defendant's demeanor (will he be able to effectively express himself and deal with cross examination without losing his temper)

Trying the Case: Defendant's Testimony

- ▶ Are there specific questions that will raise areas you do not want him to have to answer or explain that he may become exposed to on cross examination?
- ▶ Will his testimony **open doors** to raise issues for the state that you do not wish the jury to know about?
- ▶ Is the defendant's testimony essential to present facts you want the jury to be able to consider?
- ▶ In our case the defense of **Self-Defense** cannot be explained without Ivan testifying to the jury as to what his perception was and what was happening at the moment he struck Big Pete. Ivan's testimony is therefore **essential** to argue this defense in this case.

Trying the Case:

Objections

- ▶ If there is need for lengthy explanation or argument regarding an objection the jury may be excused and taken outside of the During trial.
- ▶ **OBJECTIONS** can be made as to the admissibility of **testimonial** or **physical evidence**
- ▶ During trial if either state or defense ask any **improper questions** of a witness or attempts to introduce **improper evidence**, it is the responsibility of the opposing side to announce to the court **"OBJECTION!"** and without lengthy dialogue, the **legal basis** for the objection
- ▶ In the State of Florida as in many other states as well as in the federal system, there is an **EVIDENCE CODE** that describes what evidence is admissible and what evidence should be considered inadmissible.

Trying the Case: Objections

- ▶ Studying and discussing the EVIDENCE CODE is the topic for a completely separate course as there are many issues to be learned and discussed. Any competent trial attorney must become well versed and familiar with the evidence code in order to properly represent his client whether it be a defendant or the state, in trial.
- ▶ If there is need for **explanation** of an objection, the parties can go "**SIDE BAR**" out of the hearing of the jury.

Trying the Case: Objections

- ▶ Name a major objection to the admissibility of physical evidence or the defendant's statement already discussed.....
- ▶ The **motion to suppress illegally seized evidence** or an **illegally obtained confession** is usually done PRETRIAL so as not to delay the trial.
- ▶ **Exception: the defendant's statement must be determined by the court to be voluntarily made before it can be introduced to the jury. If this has not been done pretrial, the court must make inquiry during the trial.**
- ▶ Other objections to the admissibility of the illegally seized evidence might be **waived** if they are not timely made **prior** to trial.
- ▶ Once made, the judge will rule on the objection and declare it be "**SUSTAINED**" or "**OVERRULED**"

COMMONLY MADE OBJECTIONS

- ▶ Immaterial-- not relevant at all
- ▶ Question too vague or general or calls for **speculation**
- ▶ Calls for an **opinion** (exception: **EXPERT WITNESS**)
- ▶ Leading --meaning the question is suggesting the answer (this is not permissible on direct examination)
- ▶ Argumentative
- ▶ Asked and answered
- ▶ Calls for **privileged testimony** : husband-and-wife, Doctor-patient, Attorney-client

COMMONLY MADE OBJECTIONS

- ▶ The prejudicial effect outweighs the probative value (graphic photos common)
- ▶ **Hearsay** = " and out-of-court statement presented for the **truth** of it's assertion"
- ▶ A large body of law on this in the evidence code, because there are many exceptions. The theory of this objection is that evidence submitted cannot be established to be **reliable**.
- ▶ **Example: Big Pete in his direct testimony may try to state "while I was at the bar Svetlana told me that..... OBJECTION HEARSAY!**
- ▶ Reliability is the issue because there is no way to cross examine Svetlana or reliably determine what she said.

Conclusion of the defense's case

DIRECTED VERDICT OF JUDGMENT OF ACQUITTÁL

- ▶ The standard now changes slightly: the argument presented to the judge on this motion is that in consideration of all of the facts now presented that **reasonable people could not differ** in finding that the facts established in trial could not possibly sustain a conviction.
- ▶ As with the first motion, this motion is also usually denied and the case will be submitted to the jury for a decision as to guilt
- ▶ As a practical matter most judges do not like to take the decision of guilt away from the jury once the case has been completely presented.

CLOSING ARGUMENTS

- ▶ Most trials are the last part of the trial for it is an opportunity for each party to **sum up** their case and argue to the jury what they believe the evidence proved or didn't prove.
- ▶ The State will argue it proved beyond a reasonable doubt all the elements of the crime charged, and will examine all the testimony and evidence to support its position
- ▶ The defense will then have an opportunity to **rebut** the State's argument and attempt to persuade the jury it should have legitimate doubts as to the State's interpretation of the case based on careful analysis of the testimony and physical evidence, and the logical conclusions that can be drawn from such analysis.
- ▶ The State has an opportunity to readdress the jury to comment on the defense's closing argument.

JURY INSTRUCTIONS

- ▶ Once closed, the jury must retire to the jury room to deliberate on the facts and determine the defendant's guilt or innocence. It's simply that as to the facts.
- ▶ They must first be instructed by the judge. He is to advise them as to the law applicable in the case. Remember the jury are the judges of the **FACTS** while the judge is the giver of the **LAW**. Essentially jury instructions are the "**ground rules**" for the jury's deliberations in addition to the applicable law of the case.
- ▶ The court will define the **elements** of the crime of aggravated battery consistent with the Florida law.
- ▶ The court will *not* advise the jury of the possible punishment for a conviction of aggravated battery. The jury is told it has **no interest** in the sentence if there is a conviction.

JURY INSTRUCTIONS

- ▶ The court will define "**PROOF BEYOND REASONABLE DOUBT**"
- ▶ And highlight with an additional instruction, that it is the State's **sole burden** to establish this proof
- ▶ The court will define and ensure that the jury knows that the defendant has a **PRESUMPTION OF INNOCENCE** with regard to the crime charged
- ▶ The court will explain criteria to **evaluate a witness** and their testimony with regard to **credibility**--did the witness have an interest in the outcome of the case?--Did the witness make inconsistent statements?--Did the witness answer the questions directly?
- ▶ The court will emphasize the defendant's **RIGHT TO REMAIN SILENT** and not testify in his own behalf. That the law commands a jury to **draw no inference of guilt** on behalf of the defendant if he does not testify in his own behalf
- ▶ That the arguments and statements of the attorneys are not evidence

JURY INSTRUCTIONS

- ▶ There may be **SPECIAL INSTRUCTION** regarding the law of a particular case (discussed earlier)
- ▶ In our case, self-defense known as "**Justifiable Force**" requires the reading of the applicable Florida law on the use of force to defend yourself.
- ▶ The court will explain **LESSER INCLUDED OFFENSES** that may be requested by the defense or the state
- ▶ There will be host of other instructions to assist and guide the jurors in their deliberations
- ▶ Once jurors begin deliberating **no one** but the court deputy has any communication with them.

JURY INSTRUCTIONS

- ▶ If there is a **QUESTION**, it is written down and the court deputy receives the paper delivers it to the judge where he will then read it to the defense and the state to discuss it.
- ▶ The jury as a whole may be called back into the courtroom in response to their question
- ▶ By the end of the day, usually around five or six o'clock in the evening, if no verdict is reached (unless "**sequestered**" usually only CAPITAL CRIMES) jurors are allowed to go home to return the next morning to court with firm instruction to discuss the case with no one
- ▶ Jurors are told not to read or watch any media coverage and to avoid all outside influences regarding the case
- ▶ Jurors are told that if they meet one of the lawyers in the hall on the way to court that they should not be offended if the attorneys did not say hello and completely ignored them. This is their ethical responsibility and the jurors should not be offended by this.
- ▶ Jurors can not take anything back with them in to the jury room (cell phones, books, newspapers)

JURY INSTRUCTIONS

- ▶ Any **UNDUE INFLUENCE** or attempt to contact a juror is to be reported to the court immediately
- ▶ **Example: a juror having dinner at a restaurant overhears a police officer who testified in the case earlier that day discussing the case at the next table and learns facts about the case that were not brought out in the trial.**
- ▶ In the event of a significant breach like this, the court may be compelled to grant a **MISTRIAL** (this means the case has to be tried all over again)
- ▶ The same result can happen if the jury is **DEADLOCKED** or **HUNG**, meaning that they cannot reach a unanimous decision.
- ▶ In this event the court might read the **ALLEN CHARGE**
- ▶ This is an instruction that essentially encourages the jurors to try one last time to reach a unanimous verdict to determine the case before the court is compelled to grant a mistrial.
- ▶ There is no time limit to a jury's deliberations as long as they are still discussing the case and attempting to reach a verdict.

JURY INSTRUCTIONS

- ▶ Once a decision is reached the court is informed.
- ▶ All assemble in the courtroom. The defense and the state stand as the **foreperson** of the jury hands the signed **VERDICT FORM** to the court deputy who then hands it to the judge. The judge will review the verdict form, and hand it to the CLERK to read out loud. This is known as **PUBLISHING THE VERDICT**. (A heart stopping moment!)
- ▶ If **acquitted**, meaning the defendant is found not guilty, he is discharged and free to leave the courtroom.
- ▶ If the defendant is **convicted**, meaning that he is found guilty as accused or of a **lesser included crime**, most courts will **REMAND** the defendant. This means that the defendant is taken into custody if he has been out on bond and there will be a court date set for **SENTENCING**.

SENTENCING

- ▶ **Sentencing** is an important part of the criminal process.
- ▶ It is the judge's responsibility to impose a **legal and fair** sentence, but before this can happen numerous factors that need to be considered.
- ▶ A few decades ago a judge had no specific sentencing guidelines and had almost complete discretion as to what sentence to impose in a particular case
- ▶ Legislatures passed sentencing laws known as a **CRIMINAL PUNISHMENT CODE** or **SENTENCING GUIDELINES** in an effort to infuse uniformity from one judge to the next with regard to sentencing.
- ▶ The theory was that defendants **similarly** convicted should receive **similar** punishments. Too often there was great disparity in sentences in similar cases, from one court to the next, simply because of the difference in philosophies of the particular judges.

SENTENCING GUIDELINES

- ▶ A *score* of *points* is calculated based on various *factors* factors, to be calculated and used in determining a legal sentence for a particular crime.
- ▶ **Factors:**
- ▶ Level of crime (assigned a number value by statute)
- ▶ Level of victim injury if any
- ▶ Defendant's prior criminal history
- ▶ Was defendant on probation
- ▶ Number of counts upon conviction

SENTENCING GUIDELINES

- ▶ After a series of calculations, the points add up to a number that represents a **range of months of prison** for the particular case for the particular defendant
- ▶ The **higher** the point value the **greater** amount of prison.
- ▶ In Florida under our guidelines, under 42 points the court can use **discretion** and prison is **not** required. Over 42 points prison is required
- ▶ The judge must first know the applicable **GUIDELINE RANGE**, before he can take anything else into consideration in determining an appropriate sentence.

PRE-SENTENCE INVESTIGATION (PSI)

- ▶ If the defendant has **no** prior criminal convictions he is entitled to have the court order:
- ▶ a **Pre Sentence Investigation (PSI)**, a report prepared by a corrections probation officer that is designed to reflect the defendant's **background**, including:
 - The defendant's work history.
 - The defendant's medical history.
 - Family situation.
 - Criminal history.
 - Substance abuse issues.
 - Mental health issues.
- ▶ The **PSI** will also advise the court as to where the defendant falls in the guidelines and will make a **sentencing recommendation** (not binding on the court).

SENTENCING HEARING

- ▶ The PSI will have been made available to all parties **prior** to sentencing, where any **objections** to the findings of the PSI may be raised.
- ▶ The PSI recommendation and the guidelines score are not absolute.
- ▶ At the time of the **SENTENCING HEARING**, both the state and the defense may address the court, present witnesses, and argue as to what they feel is fair sentence.
- ▶ The victim of a crime has the **constitutional right** to testify at the sentencing hearing and to inform the court as to what they feel is an appropriate sentence.

SENTENCING HEARING

- ▶ Occasionally police officers as well will testify for the state at the sentencing hearing.
- ▶ The defense can present CHARACTER WITNESSES, family members, members of the church etc.
- ▶ Anyone the defense feels has something positive to present to the court in an attempt to secure a more reasonable or lenient sentence may be called
- ▶ Of course, the **defendant** always has the right to address the court, but is not required to do so.
- ▶ As a rule the court will sentence **within** the appropriate guideline range.
- ▶ Credit for time served

SENTENCING DEPARTURES

- ▶ Under certain special circumstances the court may legally depart, **DOWNWARD** or **UPWARD**, and deviate from the guidelines required by law
- ▶ An effective defense attorney will determine if there is any legal basis for a **DOWNWARD DEPARTURE**
- ▶ There are 12 enumerated reasons for a Downward Departure – **MITIGATION:**

SENTENCING DEPARTURES: MITIGATING CIRCUMSTANCES

- ▶ Legitimate, uncoerced **plea bargain**.
- ▶ Defendant was an accomplice to the offense and was a relatively **minor** participant in the criminal conduct.
- ▶ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially **impaired**.
- ▶ Defendant requires **specialized treatment** for a **mental disorder** that is unrelated to substance abuse or addiction, or for a physical disability and the defendant is amenable to treatment.
- ▶ The need for payment of **restitution** to the victim outweighs the need for a prison sentence.

SENTENCING DEPARTURES: MITIGATING CIRCUMSTANCES

- ▶ The **victim** was an initiator, willing participant, aggressor, or provoker of the incident.
- ▶ The defendant acted under extreme **duress** or under the domination of another person.
- ▶ Before the identity of the defendant was determined, the victim was substantially compensated.
- ▶ Defendant **cooperated** with the State to resolve the current offense or any other offense.
- ▶ The offense was committed in an **unsophisticated** manner and was an **isolated incident** for which the defendant has shown **remorse**.
- ▶ At the time of the offense the defendant was **too young** to appreciate the consequences of the offense.
- ▶ Defendant to be sentenced as a **youthful offender**.

SENTENCING DEPARTURES: MITIGATING CIRCUMSTANCES

- ▶ Each is an important consideration as there are few other ways to persuade the court to deviate from a guidelines sentence
- ▶ The defense pursuant to a "**MOTION FOR DOWNWARD DEPARTURE**" can present evidence and expert testimony in support of the motion
- ▶ Obviously, a MOTION FOR DOWNWARD DEPARTURE can be an **important** element at sentencing for defense counsel to properly represent his client.

SENTENCING DEPARTURES

- ▶ There are about 23 reasons cited in the Florida rules of criminal procedure where a judge may depart **UPWARD** from the statutory required sentence, and actually render a sentence in the **excess** of the guidelines. These are called "**AGGRAVATING CIRCUMSTANCES**"
- ▶ Of course this motion for an **UPWARD DEPARTURE** can be argued by the state, or the judge on his own can make such a determination
- ▶ In the event the court departs upward in a sentence he must state on the record **specific reasons** for such a departure from the guidelines
- ▶ Florida has laws that create **special punishments** under certain circumstances in excess of the guidelines:

SENTENCING DEPARTURES: AGGRAVATING CIRCUMSTANCES

- ▶ Legitimate, uncoerced, **plea bargain**.
- ▶ Offense was one of **violence** and was committed in a manner that was especially heinous, atrocious or cruel.
- ▶ Offenses arose from **separate** episodes. Primary offense is at level 4 or higher and the defendant has committed 5 or more offenses within a 180 day period that have resulted in convictions.
- ▶ Primary offense is scored at level 3 and the defendant has committed 8 or more offenses within a 180 day period that have resulted in convictions.
- ▶ Offense was committed within **6 months** of defendant's discharge from a **release program or state prison**.
- ▶ Defendant occupied a **leadership** role in a criminal organization.

SENTENCING DEPARTURES: AGGRAVATING CIRCUMSTANCES

- ▶ Offense committed by a **public official** under color of office.
- ▶ Defendant knew victim to be a **law enforcement officer** at the time of the offense, the offense was a **violent offense**; and that status is not an element of the primary offense.
- ▶ Offense created substantial risk of death or great bodily harm to **many persons** or to one or more **small children**.
- ▶ **Victim especially vulnerable** due to age or physical or mental disability.
- ▶ Offense was motivated by **prejudice** based on race, color, ancestry, ethnicity, religion, sexual orientation or national origin of the victim.
- ▶ Victim suffered **extraordinary physical or emotional trauma or permanent physical injury**, or was treated with particular cruelty.

SENTENCING DEPARTURES: AGGRAVATING CIRCUMSTANCES

- ▶ Victim was physically attacked by the defendant in the **presence** of one or more members of the victim's family.
- ▶ Offense resulted in **substantial economic hardship** to a victim and consisted of an illegal act or acts committed by means of concealment, guile or fraud to obtain money or property, to avoid payment or loss of money or property or to obtain business or professional advantage
- ▶ Offense involved **multiple victims** or **multiple incidents** per victim.
- ▶ Offense involved a **high degree of sophistication** or planning or occurred over a lengthy period of time;
- ▶ The defendant used **position or status** to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationship; or

SENTENCING DEPARTURES: AGGRAVATING CIRCUMSTANCES

- ▶ The defendant was in the past involved in other conduct similar to that involved in the current offense.
- ▶ Offense committed in order to **prevent or avoid arrest**, to impede or prevent prosecution for the conduct underlying the arrest, or to effect an escape from custody.
- ▶ Defendant is **not amenable to rehabilitation** or supervision, as evidenced by an escalating pattern of criminal conduct as described in s. 921.001(8).
- ▶ Defendant **induced a minor** to participate in any of the offenses pending before the court for disposition.
- ▶ Primary offense is scored at level 7 or higher and the defendant has been convicted of one or more offense that scored, or would have scored, at an offense level 8 or higher.
- ▶ Defendant has an **extensive unscorable** juvenile record.

HABITUAL OFFENDER

- ▶ If you commit more than two of the qualifying crimes you may have double the exposure on sentencing
- ▶ Five-year felony = 10 years Florida State prison
- ▶ 15 year felony = 30 years Florida State prison

PRISON RELEASE RE-OFFENDER

"PRR"



years of being released from prison you will do 100% of your sentence with no time off for good behavior

MANDATORY MINIMUMS

- ▶ Certain classes of crimes have MANDATORY MINIMUM prison sentences that must be imposed upon conviction regardless of the guidelines score
- ▶ The court cannot without specific agreement by the state prosecutor, deviate downward or sidestep the minimum mandatory under any circumstances
- ▶ **Examples: drug trafficking cases**
- ▶ **In the commission of a crime if you CARRY a FIREARM there is a mandatory minimum prison sentence of 10 years**
- ▶ **If you FIRE the weapon there is a minimum mandatory of 20 years of a prison sentence**
- ▶ **If you INJURE someone with a firearm you are facing life imprisonment**
- ▶ **This is known as the "10 -- 20 -- life" law**

RESTITUTION

- ▶ If a victim suffers a direct monetary loss (not consequential)
- ▶ **Example: damage or loss of property, medical bills for injury sustained; not lost wages, pain and suffering etc.**
- ▶ The court can impose **RESTITUTION** as part of the sentence
- ▶ As a practical matter if the defendant is sent to prison for a lengthy period of time, he'll be less likely to be able to pay restitution.
- ▶ Although rarely done, the Court may impose a separate monetary fine in addition to imprisonment and restitution

DISCRETIONARY RANGE

- ▶ If the calculation of the sentencing guidelines score falls below 42 points the court can impose what is called a **DISCRETIONARY SENTENCE**, meaning that prison time is not compelled. This makes available to the court **several options** aside from incarceration in state prison.

WITHHOLD ADJUDICATION OF GUILT

- ▶ Not considered a conviction on one's record.
Defendant does not lose certain **civil rights**
- ▶ County jail -- -- maximum 364 days
- ▶ Probation -- -- up to the maximum time of possible in prison
- ▶ **House arrest** [community control] -- -- can't exceed two years
- ▶ Or any **combination** of the three where the supervision following County jail does not exceed the maximum sentence
- ▶ The court can also impose an electronic monitoring device **ELMO** or a **GPS** tracking system to limit the defendant's movement while on house arrest or probation

PROBATION

- ▶ PROBATION: monthly reporting to probation officer
- ▶ Random drug testing
- ▶ Must be gainfully employed or in school
- ▶ Travel often restricted to local jurisdiction
- ▶ No new arrests
- ▶ Probation officer can visit one's home or work unannounced and search with **NO WARRANT**
- ▶ Costs for supervision

PROBATION

- ▶ Any additional **special conditions** the court deems is appropriate. **Example:** psychological evaluation and any required follow-up treatment, family counseling, special substance abuse rehabilitation, anger management, batterers intervention program
- ▶ Upon **violation** of any of these conditions the probation officer will file an **AFFIDAVIT of VIOLATION OF PROBATION**, to alert the judge who will then issue a warrant for arrest.
- ▶ An arrest for a violation of probation is accompanied with an order of **NO BOND**
- ▶ The defendant will remain in custody pending a special hearing before the judge that actually placed him on probation.

HOUSE ARREST a.k.a. "COMMUNITY CONTROL" or "HOME CONFINEMENT"

presented weekly in a written schedule request

- ▶ If the activity is not approved in advance on a **weekly schedule** it can't be done
- ▶ All other times the defendant is expected to remain in his house, is not permitted in his backyard nor on his patio; his house is considered his **Jail**
- ▶ The **COMMUNITY CONTROL OFFICER** can check on the defendant at any time, day or night. If the defendant is **not** where he is scheduled to be, **no excuses** will be accepted. It will be deemed a violation of community control.
- ▶ As with a violation of probation, if the defendant violates any of the conditions of his community control, the community control officer will prepare an **affidavit of violation of community control** for the judge to sign. The defendant will be arrested with no bond and remain in custody pending a hearing before the judge

VIOLATION OF PROBATION or VIOLATION OF COMMUNITY CONTROL

as an individual who is accused of committing a crime

- ▶ The defendant is entitled to a **FIRST APPEARANCE HEARING** within 10 days of his arrest
- ▶ The defendant has the option upon his initial appearance, to **admit** the violation without a formal hearing.
- ▶ He can negotiate a plea with the prosecutor to present to the judge for his approval
- ▶ He can throw himself on the "mercy" of the court
- ▶ If the defendant wishes to **deny** the violation of probation or violation of community control he can request the court set a **FINAL HEARING** where he will have the opportunity to defend the accusation.
- ▶ The defendant will remain in jail until that FINAL HEARING which is usually set in several weeks or possibly longer from the time of the FIRST APPEARANCE.

FINAL HEARING

- ▶ Not the same as a trial
- ▶ **Judge** determines if you've violated the terms of your supervision rather than a jury
- ▶ **Reduced burden** on behalf of the state to prove the allegation: burden of proof = satisfy the "**conscience of the court**"
- ▶ This burden significantly **less** than proof beyond a reasonable doubt
- ▶ If the judge finds you guilty of violation of your supervision he can impose a prison sentence up to the **maximum** allowable by law , or he can **reinstate** your supervision with additional conditions or modify some, with a term of County jail rather than imprisonment.

FINAL HEARING

- ▶ Note: even if you were successful up until the **last day** of your supervision and then violated, the court still has jurisdiction to punish you.
- ▶ **Example: defendant is placed on a period of three years of probation. After two years and 364 days he commits a crime, the court can sentence him up to the maximum for the crime for which he was placed on probation. He gets no credit for the almost 3 years of successful probation.**
- ▶ Violation of probation hearings **rarely** go to final hearing
- ▶ Too **easy** for the state to prove
- ▶ Punishment is almost always **more severe** after a final hearing rather than as a result of plea negotiations
- ▶ Difficult concept to explain to defendants as to how they can be punished for a violation of probation **in addition** to a separate punishment if they have committed a new crime while on probation

JUVENILE COURT

- ▶ These are courts that deal with individuals who have committed crimes that are **under 18 years of age**
- ▶ The state still has the burden of charging and proving the crime, and instead of seeking a **CONVICTION** they seek an **ADJUDICATION OF DELINQUENCY**
- ▶ This adjudication does not go against a **permanent** adult record
- ▶ A juvenile judge has many **options** as to how to resolve a juvenile case -- -- there are many levels of punishment before child is actually committed to a facility where his freedom is taken
- ▶ Many rehabilitation programs available
- ▶ Accused child is entitled to:
- ▶ Written notice of the charges and time to prepare a defense

JUVENILE COURT

- ▶ Assistance of counsel (court appointed counsel if he is indigent)
- ▶ Opportunity to **confront** witnesses
- ▶ Right **not** to testify against himself
- ▶ Right to have guilt proven beyond a reasonable doubt
- ▶ There is **no right to a trial by jury**
- ▶ If a child is considered a **SERIOUS RISK** to society he can be **DETAINED** pretrial for a strictly limited period of time (28 days in Florida)
- ▶ If a child has a bad or violent record or is accused of a violent or serious crime, and he is over 14 years of age, the state can transfer him to **adult court** where he will be tried as an adult and subject to **adult punishment**

THE CRIMINAL DEFENSE ATTORNEY

- ▶ Most frequently asked "cocktail party" question:
- ▶ How can you defend someone you know is guilty?

- ▶ "Legal guilt" versus "moral guilt"

- ▶ Our founding fathers made a judgment call in forming our criminal justice system
- ▶ They made it purposefully **difficult** to convict –
– -- society is better served in letting a guilty person go free rather than having a system that makes it too easy to punish an innocent person for something he did not do

THE CRIMINAL DEFENSE ATTORNEY

- ▶ This criminal justice system does **not** work if either side fails to do its job
- ▶ If the system cannot establish your guilt pursuant to our laws with all of its protections then as far as society is concerned unless you plead guilty you are **not guilty**.
- ▶ The ethical responsibility of a defense attorney is to ensure that his client receives **DUE PROCESS** (treated fairly) and gets all of the protection he is afforded under our law

THE CRIMINAL DEFENSE ATTORNEY

- ▶ As a practical matter most cases aren't an issue of simply "getting someone off" but more of "**damage control**" -- -- taking a bad situation and trying to make it better
- ▶ Essentially attempting to keep the defendant out of jail or lessen his jail time and prevent a conviction from going against their record
- ▶ Most defendants are not "**heinous villains**", but rather decent people that do stupid things, or get caught up in drugs, or have relationship problems
- ▶ There are certainly an abundance of genuine criminals -- organized crime members -- thieves and con-men -- drug dealers -- violent people -- pedophiles -- people that prey on the weak.
- ▶ Advantage of **private practice** = attorney can **reject** the case or client- regardless of how much they're willing to pay if he doesn't wish to represent them

THE CRIMINAL DEFENSE ATTORNEY

- ▶ 2nd most popular "cocktail party" question: Is being a criminal lawyer dangerous?
- ▶ Remember a defense attorney doesn't have to represent the worst of the worst- but usually if your client knows you are fighting for them (they know what they've done) they are usually grateful for your effort
- ▶ **CAVEAT!!**
- ▶ **Be Fair** = give people the hard work and attention they are paying you for and COMMUNICATE with them about their cases. A major complaint about attorneys is that once they take a fee their clients can never reach them to talk about their case.
- ▶ Clients want to know, and they are entitled to know, about their cases. Even if the news is **bad**. It is important to be direct and honest about their situation rather than for them to be in the dark and **shocked** when they get to court.
- ▶ **NEVER, EVER** make promises about anything in the case unless you are 100% sure you can deliver on the promise.

THE CRIMINAL DEFENSE ATTORNEY

- ▶ It is a **wrong** for an attorney to promise great results in order to get retained and then greatly disappoint his client with results that fall short of promised expectations.
- ▶ The easiest way to antagonize a client or his family is to make false promises and create **unreasonable expectations** in your ability to handle their case.
- ▶ **Example** ; some attorneys learned this the hard way in the 1980s representing Colombian drug cartels in Miami, Florida
- ▶ Encourage clients if they have questions, worries or complaints to **communicate** them to you so you can ensure they are satisfied you are working in their best interest and they fully understand their case, and what you are attempting to do about it.
- ▶ Occasionally you will have a client that you simply cannot communicate with, or completely fails to meet his **fee obligation**

THE CRIMINAL DEFENSE ATTORNEY

- ▶ A private attorney can petition the court for **PERMISSION TO WITHDRAW FROM REPRESENTATION**
- ▶ This request under most circumstances is usually granted
- ▶ The court does **not** want to have a claim later on that the defendant's attorney did not properly or **effectively** represent him as a basis to **set aside** a sentence.
- ▶ Never take a case where you have a **CONFLICT OF INTERESTS** with **multiple** defendants
- ▶ **Example: mother and son are charged with sale of cocaine. Mother wants you to represent her and her son. Their defenses are not the same.**

THE CRIMINAL DEFENSE ATTORNEY

- ▶ In order to represent **both** of them you would have to **compromise** your effort for one to help the other. That is an unacceptable position for an attorney to place himself in .
- ▶ If you are fair and honest and work diligently for the people that hire you, risks of someone becoming violent are significantly **minimized**
- ▶ **Family law attorneys** (divorce lawyers) usually deal with far more dangerous clients. Passions and emotions run out of control when it comes to jealousy and money issues and child custody



ATTORNEYS FEES



- ▶ Depends on the complexity of the case
- ▶ Always discuss and come to an agreement with the client in the **BEGINNING** of your representation with regard to fees. Clients do not like to be surprised with the bill for unexpected attorneys fees
- ▶ Criminal attorneys don't usually bill on an hourly rate, but a **flat fee** or a range of fees on a **case-by-case** basis
- ▶ Private Criminal Defense attorneys usually get paid their fees before they file a court appearance on behalf of the defendant
- ▶ Example:
 - ▶ DUI – \$3500–\$10,000 for trial
 - ▶ Aggravated battery – \$5000–\$15,000 for trial
 - ▶ Drug trafficking – \$10,000–\$25,000 for trial
 - ▶ Homicide – \$25,000–\$75,000 for trial

ATTORNEYS FEES: INDIGENT CLIENTS

- ▶ If someone cannot afford to hire a private attorney, they are guaranteed representation. After an inquiry by the court, if it is determined that you have insufficient funds to hire a private attorney the court will appoint the **PUBLIC DEFENDER** to represent you
- ▶ As a rule (with exception) most PUBLIC DEFENDER representation is **not** considered by most as good as private counsel
- ▶ Public defenders are often **not as experienced** (great place to start after law school if you want to learn trial practice)
- ▶ **Agenda** for case outcome of a public defender is not the same as a private attorney. A public defender does not necessarily care if the clients he represents are **pleased with the outcome of the case** . **Their agenda is to resolve cases** because they have to many cases in their caseload
- ▶ A private lawyer has an interest in doing his best for his client to ensure they are satisfied, and to enhance or maintain his reputation for providing **quality representation**.

ATTORNEYS AND THE ACTUAL PRACTICE OF LAW

- ▶ Edt
- ▶ 12 years grade school
- ▶ Four years college
- ▶ Three years of law school -- -- law school does not really **prepare** you to practice law but simply gives you the **basic tools** to begin to learn about being a successful practicing lawyer
- ▶ A law school graduate usually applies to take a **BAR EXAM**
- ▶ The bar exam often lasts for a three days and has a **multistate** multiple choice section as well as an **essay section**
- ▶ In preparation for a bar exam there are many bar exam preparation courses that can be taken, these are called **BAR REVIEW COURSES**.
- ▶ These can be quite helpful in ensuring that you only have to take the bar exam one time. If you fail the bar exam there is usually a **waiting period** before you can take a **re-examination**