## Steps In The Federal Criminal Process

In this section, you will learn mostly about how the criminal process works in the federal system. Each state has its own court system and set of rules for handling criminal cases. Here are a few examples of differences between the state and federal criminal processes:

### Titles of people involved

State cases are brought by prosecutors or district attorneys; federal cases are brought by United States Attorneys. State court trial judges have a range of titles, but federal judges are called district court judges.

Federal magistrate judges are used in federal cases to hear initial matters (such as pre-trial motions), but they do not usually decide cases.

The use of grand juries to charge defendants is not required by all states, but it is a requirement in federal felony cases unless the defendant waives the grand jury indictment.

States and the federal government have laws making certain acts illegal, and each jurisdiction is responsible for setting punishments for committing those crimes. A state may punish a certain crime more harshly than the federal government (or vice versa), but a defendant can be charged and convicted under both systems.

The federal rules for criminal cases can be found in the Federal Rules of Criminal Procedure, which govern all aspects of criminal trials. Each state has its own similar rules.

The steps you will find here are not exhaustive. Some cases will be much simpler, and others will include many more steps. Please be sure to consult an attorney to better understand how (or if) the information presented here applies to your case.

### Important steps in the federal criminal process:

1. Investigation
2. Charging
3. Initial Hearing/Arraignment
4. Discovery
5. Plea Bargaining

6. Preliminary Hearing
7. Pre-Trial Motions
8. Trial
9. Post-Trial Motions
10. Sentencing
11. Appeal

**Investigation**

The investigators investigate the crime and obtain evidence, and help prosecutors understand the details of the case. The prosecutor may work with just one agency but, many times, several investigating agencies are involved.

Part of the investigation may involve a search warrant. The Fourth Amendment of the Constitution usually requires that police officers have probable cause before they search a person's home, their clothing, car, or other property. Searches usually require a search warrant, issued by a "neutral and detached" judge. Arrests also require probable cause and often occur after police have gotten an arrest warrant from a judge.

Depending on the specific facts of the case, the first step may actually be an arrest. If police have probable cause to arrest a suspect (as is the case if they actually witnessed the suspect commit a crime), they will go ahead and make an arrest.

### Direct Evidence

A prosecutor evaluates a case, and uses all the statements and information they have to determine if the government should present the case to the Federal Grand Jury — one in which all the facts lead to a specific person or persons who committed the crime. However, before the prosecutor made that conclusion, they have to look at both direct and circumstantial evidence. Direct evidence is evidence that supports a fact without an inference. Testimony of an eyewitness to a crime would be considered direct evidence because the person actually saw the crime. Testimony related to something that happened before or after the crime would be considered circumstantial.

### Circumstantial Evidence

The second type of evidence is circumstantial evidence — statement(s) or information obtained indirectly or not based on first-hand experience by a

person. Circumstantial evidence includes people's impressions about an event that happened which they didn't see. For example, if you went to bed at night and there was no snow on the ground but you awoke to snow, while you didn't actually see it snowing, you assume that it snowed while you slept.

**Charging**

After the prosecutor studies the information from investigators and the information they gather from talking with the individuals involved, the prosecutor decides whether to present the case to the grand jury. When a person is indicted, they are given formal notice that it is believed that they committed a crime. The indictment contains the basic information that informs the person of the charges against them.

For potential felony charges, a prosecutor will present the evidence to an impartial group of citizens called a grand jury. Witnesses may be called to testify, evidence is shown to the grand jury, and an outline of the case is presented to the grand jury members. The grand jury listens to the prosecutor and witnesses, and then votes in secret on whether they believe that enough evidence exists to charge the person with a crime. A grand jury may decide not to charge an individual based upon the evidence, no indictment would come from the grand jury. All proceedings and statements made before a grand jury are sealed, meaning that only the people in the room have knowledge about who said what about whom. The grand jury is a constitutional requirement for certain types of crimes (meaning it is written in the United States Constitution) so that a group of citizens who do not know the defendant can make an unbiased decision about the evidence before voting to charge an individual with a crime.

Grand juries are made up of approximately 16-23 members. Their proceedings can only be attended by specific persons. For example, witnesses who are compelled to testify before the grand jury are not allowed to have an attorney present. At least twelve jurors must concur in order to issue an indictment.

States are not required to charge by use of a grand jury. Many do, but the Supreme Court has interpreted the Constitution to only require the federal government to use grand juries for all felony crimes (federal misdemeanor charges do not have to come from the federal grand jury).

After the defendant is charged, they can either hire an attorney or if they are indigent they may choose to be represented by an attorney provided by the Government — a public defender — at no or minimal charge. The defendant's attorney is referred to as the defense attorney. The defendant's attorney assists the defendant in understanding the law and the facts of the case, and represents the defendant just as the prosecutor will represent the Government.

## Venue

The location where the trial is held is called the venue, and federal cases are tried in a United States District Court. There are 94 district courts in the United States including the District of Columbia and territories. Many states have more than one district court so the venue will depend on where you live in the state. Within each district, there may be several courthouse locations

### Initial Hearing / Arraignment

Either the same day or the day after a defendant is arrested and charged, they are brought before a magistrate judge for an initial hearing on the case. At that time, the defendant learns more about his rights and the charges against him, arrangements are made for him to have an attorney, and the judge decides if the defendant will be held in prison or released until the trial.

In many cases, the law allows the defendant to be released from prison before a trial if they meet the requirements for bail. Before the judge makes the decision on whether to grant bail, they must hold a hearing to learn facts about the defendant including how long the defendant has lived in the area, if they have family nearby, prior criminal record, and if they have threatened any witnesses in the case. The judge also considers the defendant's potential danger to the community.

If the defendant cannot "post bail" (pay the money), the judge may order the defendant to be remanded into the custody of the U.S. Marshals pending trial.

The defendant will also be asked to plead guilty or not guilty to the charges.

### Bail Hearing

After a person's arrest, a judge or other court officer will set the amount of bail, along with any other conditions for his or her release from jail. Factors to consider that could weigh against bail include flight risk and risk to the public

of further criminal activity. Factors that might be favorable to granting bail include a lack of prior criminal history and ties to the community. Possible rulings in a bail hearing include:

**Release on Own Recognizance:** The defendant is released from jail in exchange for signing an agreement promising to return to court and abide by other conditions.

**Personal Bond:** The defendant is released upon signing a bond, which states that he or she will be liable for criminal, and in some cases civil, penalties if he or she fails to appear in court.

**Bail Set with Terms of Release:** The defendant may go free by posting bail in the amount set by the court, either by paying it directly or obtaining a surety bond through a bail bond company.

**Discovery** is the general process of a defendant obtaining information possessed by a prosecutor regarding the defendant's case. In addition, prosecutors may be allowed to obtain all information a defendant holds regarding a case as well. This inter-exchange of information is commonly known as the "discovery period", which typically occurs prior to trial, but as evidences surfaces, may extend well into a given trial period. Typically, discovery periods involve the exchange of any information or evidence a prosecutor intends to use against a defendant during trial, which may include:

- Crime scene evidence such as photographs and other forensic evidence
- Witness, law enforcement, and even defendant testimony, as well as the names, addresses of all intended witnesses at a given trial
- Police reports, written or oral testimony from witnesses, booking reports, toxicology results from defendants, and DNA evidence offered by defendants
- Any intended expert witness testimony intended to be used during trial
- Virtually any other form of "raw" evidence obtained by the prosecutor's office

The distinguishing characteristic between "raw evidence" and other information potentially coming out from a prosecutor's office is that the evidence is presented as is. In essence, a defendant will receive all potential evidence, but they are not required to receive any information regarding the prosecution's intention to admit this evidence, or how this evidence may play into their overall legal strategy.

The intention of the discovery period is a two-pronged attempt by the courts to better the criminal justice process. First, as most would assume, discovery allows a defendant a better chance, or fairer chance, during trial. Contrary to popular crime dramas, surprise evidence at the last minute vindicating or convicting a defendant is rare. Additionally, by providing all evidence against a defendant, the defendant may prove more likely to agree to a plea agreement, sparing both the prosecutor's office and the courts the burden of going to trial. Included in most reciprocal discovery periods include pieces of evidence and reports, such as arrest warrants, search warrants, grand jury indictment testimony, police reports, and previous arrest records.

**Exculpatory Evidence in Criminal Cases**

In order to facilitate fairness, the laws provide that prosecutors provide the defense with any evidence that may potentially benefit defendants as well during the discovery period. This exculpatory evidence may help establish a defendant's innocence, and if not turned over, can result in the overturning of any conviction upon appeal. Typically, any information that may present any doubt concerning the guilt of a defendant, according to a reasonable juror, is deemed exculpatory evidence in most cases. To force the turnover of this information, defense attorneys usually make their requests from the onset, as well as interviewing other parties that might be aware of the existence of exculpatory evidence, such as directly interviewing police officers, other attorneys, and witnesses in the case both before and after a trial.

**A plea bargain is an agreement between a defendant and a prosecutor, in which the defendant agrees to plead guilty or "no contest" (*nolo contendere*) in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend to the judge a specific sentence acceptable to the defense.**

**What Is A Preliminary Hearing?**

For the defense, the preliminary hearing is just another opportunity to have charges dismissed, reduced, and analyzed before going to trial. For prosecutors, the preliminary hearing before a judge assures malicious, illegal, or otherwise inadmissible charges are not brought against a defendant without

sufficient cause. Some of the common attributes of a preliminary hearing include:

- Preliminary hearings are held in open court in front of one judge, no jury members, and typically last no more than two hours
- Prosecutors have the burden of proof, but must only show probable cause that a defendant committed an alleged charge before proceeding to trial
- Prosecutors begin the preliminary hearing by presenting sufficient evidence, including interviewing witnesses on the stand and presenting expert testimony, which will give the presiding judge enough reason to believe the defendant should stand trial
- Defense attorneys have the right, and often do, cross-examine witnesses, and in addition, the defense may present their own evidence, arguments, and motions to the presiding judge
- At the conclusion of a preliminary hearing, the charges will either be dismissed by a judge, reduced by the judge, or the defendant will be "bounded over" and forced to stand trial for the original charges

Sometimes, if the defense and prosecutor agree, a preliminary hearing may be "submitted on the record", which essentially substitutes the preliminary hearing for an actual trial, which is decided by the presiding judge.

**What Are My Legal Rights During A Preliminary Hearing?**

There are state-specific laws governing the process of preliminary hearings, but federal laws guarantee defendants certain rights during the process. Additionally, your state laws may afford other provisions and protections for defendants during the preliminary hearing phase, which are not mentioned here. Some of the rights afforded defendants during a preliminary hearing include:

- Defendants possess the right to be represented by legal counsel during their preliminary hearing
- Defendants can actively stage a defense during the preliminary hearing and refute the prosecutor's evidence, but typically, charges are still bound over and now the prosecutors know your defense strategy
- Defendants are entitled to a copy of the transcript of the preliminary hearing, which can be used as evidence during the future, especially regarding statements made by the prosecutor, prosecutors witnesses, and the defendant themselves

- Defendants can successfully have their charges dismissed if they prove a prosecutor's case lack sufficient evidence to prove that a crime occurred. Additionally, the failure of key witnesses to appear, the inability of the prosecutors to prove at a minimal level that all elements of a given crime occurred, or a key witnesses' statement falls apart under cross examination
- If charges are dismissed, prosecutors may elect to file charges against a defendant again in the future

**What Strategies Will My Attorney Use during A Preliminary Hearing?**

In theory, the preliminary hearing protects defendants from being subjected to erroneous or ill-conceived charges by a prosecutor. In reality, almost all charges are bound over during the preliminary hearing, and in essence, the preliminary hearing has become another arena for legal strategy by both parties. Both prosecutors and defense attorneys are exposed to at least some of the other party's strategy, which may include testing the overall strength of a given case, including evidence, witnesses, and other aspects. All of this information and research during the preliminary hearing may be vital in obtaining a favorable plea bargain prior to actually going to trial.

There are some downsides to having a preliminary hearing, which a defense strategy may seek to avoid by immediately going to trial. For example, if a defendant intends to plead guilty, avoid more expenses, and keep the charges out of public scrutiny, avoiding a preliminary hearing would prove beneficial. Additionally, if the defense feels a certain key witness may no longer be available in the future, avoiding allowing this key witness to offer testimony at the preliminary hearing, which can be used during a later trial, may require some stalling tactics, including avoiding a preliminary hearing.

**Pretrial Motions in a Criminal Case**

Before a trial, a slew of motions may be filed by the defense, which may greatly alter the charges being faced by a defendant, or in some cases, have them dismissed outright. Some of the commonly filed motions before a trial, include:

- **Motion to modify bail**, which requests a judge modify a defendant's bail status

- **Motion to dismiss complaint**, which request the judge to dismiss a case on the basis of a insufficient criminal complaint against a defendant
- **Motion for bill of particulars**, which if approved by a judge, will require the prosecutor to detail all charges, as well as the reason for filing these charges
- **Motion to reduce charges**, which requests a judge reduce charges to accurately charge a defendant for an alleged criminal incident
- **Motion for change of venue**, which defendants request their judicial proceedings be moved elsewhere to ensure a fair trial
- **Motion for to strike a prior conviction**, which if approved by the judge, will potentially prevent a defendant from facing the penalties and other sentencing guidelines associated with a repeat offender or person with a criminal record
- **Motion for discovery**, which is a formal request for the prosecution to turn over all evidence they possess regarding a defendant's case
- **Motion to preserve evidence**, which forces the prosecution to preserve all evidence until a defense investigator or expert can evaluate the evidence
- **Motion to disclose identity of an informant,** which if approved, will allow the defense to attack the credibility of an informant's motives and testimony
- **Motion to examine police personnel file,** which can be requested if a law enforcement officer's past conduct and history is relevant to the defense's existing criminal charges
- **Motion to suppress evidence,** which if approved, will allow the defense to exclude certain pieces of evidence that were obtained illegally, coerced, or tainted in some manner
- **Motion for speedy trial**, which can expedite the process of a trial to prevent government entities from refusing to release a defendant, but also, not brining the individual to trial for any actual crime

**Trial**

- **Judge or Jury Trial.** The defense often has the right to decide whether a case will be tried to a judge or jury, but in some jurisdictions both the prosecution and the defense have the right to demand a jury trial. (For more on the jury-trial right, including its limitations, see The Right to Trial by Jury.) Juries typically consist of 12 people, but some states allow for juries as small as six members.
- **Jury selection.** If the trial will be held before a jury, the defense and prosecution select the jury through a question-and-answer process

called "voir dire." In federal courts and many state courts, the judge carries out this process using questions suggested by the attorneys, as well as questions that the judge comes up with on his or her own.

- **Evidence issues.** The defense and prosecution request that the court, in advance of trial, admit or exclude certain evidence. These requests are called motions "in limine."
- **Opening statements.** The prosecution and then the defense make opening statements to the judge or jury. These statements provide an outline of the case that each side expects to prove. Because neither side wants to look foolish to the jury, the attorneys are careful to promise only what they think they can deliver. In some cases, the defense attorney reserves opening statement until the beginning of the defense case. The lawyer may even choose not to give an opening statement, perhaps to emphasize to the jury that it's the prosecution's burden to do the convincing.
- **Prosecution case-in-chief.** The prosecution presents its main case through direct examination of prosecution witnesses.
- **Cross-examination.** The defense may cross-examine the prosecution witnesses. (Also see What are 're-direct' and 're-cross' examination?)
- **Prosecution rests.** The prosecution finishes presenting its case.
- **Motion to dismiss (optional).** The defense may move to dismiss the charges if it thinks that the prosecution has failed to produce enough evidence—even if the jury believes the evidence—to support a guilty verdict. (For more information, see Acquittals by Judges in Jury Trials.)

A "**motion *in limine***" asks the court to decide that certain evidence may or may not be presented to the jury at the trial. A motion in limine generally addresses issues which would be prejudicial for the jury to hear in open court, even if the other side makes a timely objection which is sustained, and the judge instructs the jury to disregard the evidence. For example, the defendant may ask the court to rule that evidence of a prior conviction that occurred a long time ago should not be allowed into evidence at the trial because it would be more prejudicial than probative. If the motion is granted, then evidence regarding the conviction could not be mentioned in front of the jury, without first approaching the judge outside of the hearing of the jury and obtaining permission. The violation of a motion in limine can result in the court declaring a mistrial.

There are three types of motions *in limine*:

- Inclusionary - A motion asking the court to have something included in the trial.
- Exclusionary - A motion asking the court to have something excluded in the trial.
- Preclusionary - A motion asking the court to have something precluded in the trial

- 
- **Denial of motion to dismiss.** Almost always, the judge denies the defense motion to dismiss.
- **Defense case-in-chief.** The defense presents its main case through direct examination of defense witnesses.
- **Cross-examination.** The prosecutor cross-examines the defense witnesses.
- **Defense rests.** The defense finishes presenting its case.
- **Prosecution rebuttal.** The prosecutor offers evidence to refute the defense case.
- **Settling on jury instructions.** The prosecution and defense get together with the judge and determine a final set of instructions that the judge will give the jury.
- **Prosecution closing argument.** The prosecution makes its closing argument, summarizing the evidence as the prosecution sees it and explaining why the jury should render a guilty verdict.
- **Defense closing argument.** The defense's counterpart to the prosecutor's closing argument. The lawyer explains why the jury should render a "not guilty" verdict—or at least a guilty verdict on only a lesser charge.
- **Prosecution rebuttal.** The prosecution has the last word, if it chooses to take it, and again argues that the jury has credible evidence that supports a finding of guilty.
- **Jury instructions.** The judge instructs the jury about what law to apply to the case and how to carry out its duties. (Some judges "preinstruct" juries, reciting instructions before closing argument or even at the outset of trial.)
- **Jury deliberations.** The jury deliberates and tries to reach a verdict. Juries must typically be unanimous. (But see Do criminal jury verdicts have to be unanimous?) If less than the requisite number of jurors agrees on a verdict, the jury is "hung" and the case may be retried.

**Post Trial Motions**. **Post-trial motions** are filed **after the** judge or jury has decided on a verdict. If you do not agree with the verdict in your case because

you think it was impacted by errors or misconduct, you have the right to file one of these **motions**.

Common post-trial motions include:

- Motion for a New Trial – The court can vacate the judgment and allow for a new trial. This is rarely granted, but may be done “if the interest of justice so requires.”
- Motion for Judgment of Acquittal – Court may set aside the jury’s verdict and allow the defendant to go free.
- Motion to Vacate, Set Aside, or Correct a Sentence – Often successful for the purpose of correcting a clerical error in the sentence.

***For judgment* n.o.v.**

A "**motion for judgment *n.o.v.***" (*non obstante veredicto*, or notwithstanding the verdict) asks the court to reverse the jury's verdict on the grounds that the jury could not reasonably have reached such a verdict. This motion is made after the jury's verdict. If granted, the court enters a new verdict. This motion can be used in a criminal case only to reverse a guilty verdict; not guilty verdicts are immune to reversal by the court.

Under **Rule 50**, Federal Rules of Civil Procedure, the motion for directed verdict and JNOV have been replaced by the **motion for judgment as a matter of law (JMOL)**, which can be made at the close of the opposing party's evidence and "renewed" after return of the verdict (or after the dismissal of a hung jury).

Under **Rule 29**, Federal Rules of Criminal Procedure the "motion for a judgment of acquittal," or Rule 917, Rules for Courts-Martial the "motion for a finding of not guilty," if the evidence presented by the prosecution is insufficient to support a rational finding of guilty, there is no reason to submit the issue to a jury.

***For new trial***

A **motion for new trial** asks to overturn or set aside a court's decision or jury verdict. Such a motion is proposed by a party who is dissatisfied with the end result of a case. This motion must be based on some vital error in the court's handling of the trial, such as the admission or exclusion of key evidence, or an incorrect instruction to the jury. Generally the motion is filed within a short time after the trial (7–30 days) and is decided prior to the lodging of an appeal.

In some jurisdictions, a motion for new trial which is not ruled upon by a set period of time automatically is deemed to be denied.

### *To set aside judgment*

A "**motion to set aside judgment**" asks the court to vacate or nullify a judgment or verdict. Motions may be made at any time after entry of judgment, and in some circumstances years after the case has been closed by the courts. Generally the grounds for the motion cannot be ones which were previously considered when deciding a motion for new trial or on an appeal of the judgment.

### ***For* nolle prosequi**

A "**motion for *nolle prosequi***" ("not prosecuting") is a motion by a prosecutor or other plaintiff to drop legal charges. n. Latin for "we do not wish to prosecute," which is a declaration made to the judge by a prosecutor in a criminal case (or by a plaintiff in a civil lawsuit) either before or during trial, meaning the case against the defendant is being dropped. The statement is an admission that the charges cannot be proved, that evidence has demonstrated either innocence or a fatal flaw in the prosecution's claim, or the district attorney has become convinced the accused is innocent. It should be distinguished from the motion for judgment of *non prosequitur*, or judgment of *non pros*, which is a motion in some jurisdictions (e.g. Pennsylvania) by a defendant for a judgment in his favor for failure of the plaintiff to timely prosecute his claim.[4]

### *To compel*

A "**motion to compel**" asks the court to order either the opposing party or a third party to take some action. This sort of motion most commonly deals with discovery disputes, when a party who has propounded discovery to either the opposing party or a third party believes that the discovery responses are insufficient. The motion to compel is used to ask the court to order the non-complying party to produce the documentation or information requested or to sanction the non-complying party for their failure to comply with the discovery requests.

## Grounds for Appeal

Potential grounds for appeal in a criminal case include legal error, juror misconduct and ineffective assistance of counsel. Legal errors may result from improperly admitted evidence, incorrect jury instructions, or lack of sufficient evidence to support a guilty verdict. To grant the appeal, the appellate court must find that these errors affected the outcome of the case. If the errors would not have changed the verdict, they are considered harmless, and the conviction will stand.

A conviction may also be appealed if the defendant reasonably believes that the jury conducted itself improperly during deliberations or the trial itself. Jury misconduct includes the use of experiments, drug or alcohol abuse during deliberations or trial, and improper communications between jurors and witnesses or counsel.

Finally, criminal defendants often appeal their cases when they feel that they were not provided with adequate representation. To succeed in an ineffective assistance of counsel claim, a defendants must typically prove that but for their counsel's actions, the outcome of the case would have been different.

## Continuances Based on Inadequate Time

Perhaps the most common reason for a continuance is when one side did not have enough time to investigate the case and analyze the evidence. Many defense attorneys, especially public defenders, can move only so quickly because they are representing many clients. Presenting a case without being adequately prepared could violate the defendant's Sixth Amendment right to counsel. If the defense appears to be seeking a continuance simply as a delay tactic, and no unexpected event has occurred, the judge will deny the continuance.

The prosecution may have some limits on whether they can request a continuance based on inadequate time to prepare, since the defendant has a right to a speedy trial under the Sixth Amendment. (Read more here about the right to a speedy trial.)

**Continuances Based on Changing the Indictment or Attorney**

The indictment is the legal document that contains the information about the defendant's charge. If the prosecution makes meaningful changes to the facts contained in the indictment, the defense may be justified in seeking a continuance so that they can prepare for the changed facts. If the change is relatively minor and not relevant to the merits of the case, however, a continuance probably is not warranted.

Sometimes a defendant will seek a continuance when they are changing their attorney. They have a Sixth Amendment right to choose their own attorney, so a judge may grant a continuance if the defendant can show that changing their attorney is necessary. On the other hand, a defendant may not get a continuance if they delay in getting a new attorney, they have another attorney who is ready to represent them, or the new attorney would not be sufficiently prepared to present their case even with the continuance.

**Continuances Based on Surprises**

If the prosecution announces that it will introduce new evidence or new witnesses who were previously unknown to the defense, this will be a strong basis for a continuance. The defense also may seek a continuance if it is unable to locate a witness who was expected to testify on the defendant's behalf. A judge may be reluctant to grant a continuance if the defense still has sufficient time to prepare, or if the evidence is related to evidence that had been disclosed to the defense.

A judge even may grant a continuance during a trial if a witness for the prosecution provides unexpected testimony that the defendant could not have anticipated. If the defense can gather contradictory evidence within a reasonable time, the judge likely will provide an opportunity to do so. However, a defendant probably will not get a continuance if their own witness provided unexpected testimony.