CHAPTER 34

THE RIGHTS OF PRETRIAL DETAINEES*

Pretrial detention is the time period that you are incarcerated between being arrested and your trial. Detention is only supposed to be used to make sure that you will not flee before trial or pose a danger to other people. It is not supposed to be used to punish or rehabilitate you. This is because as a pretrial detainee, you have not been convicted of a crime and are not considered guilty since under the U.S. Constitution, a person accused of a crime is presumed innocent until proven guilty.

Because of this difference between pretrial detainees and convicted prisoners, you might think that detainees would retain greater rights and privileges than other incarcerated persons. Pretrial detainees, however, are rarely treated much differently than convicted prisoners. In many instances, the conditions at jails, where pretrial detainees are often held, are substantially worse than the conditions in state prisons.

This Chapter covers your rights under the Fifth and Sixth Amendments of the U.S. Constitution after the police have deemed you to be a suspect. Part A discusses interrogation law—which is the law about situations where the police question a suspect about a crime they believe he may have committed—and your Fifth Amendment right to counsel. Part B discusses your Sixth Amendment right to counsel. Part C discusses bail and Part D discusses your right to a speedy trial. Part E covers the conditions of your pretrial detention, including punishment, medical treatment, protection from violence, food and housing, excessive force, access to counsel, and voting rights.

This Chapter does not cover most "search and seizure" law under the Fourth Amendment, which determines when the police can legally arrest you or search you or your possessions. This area of law is complicated and beyond the scope of this Chapter.[1] Instead, this Chapter discusses your rights after the police have already detained you. It focuses specifically on interrogation law and your right to counsel under the Fifth and Sixth Amendments of the U.S. Constitution.

If you are not a U.S. citizen, you also have a treaty right to communicate with consular officers from your home government.[2] Consular access means that you have the right to contact your local consulate or embassy, as well as the right to have regular communications with consular officers from your native country. If you have citizenship with another country, Chapter II of the *JLM Immigration and Consular Access Supplement* (*ICA*) is of special interest to you. It explains your right to consular access as well as the reasons why you may want to contact your consulate and reasons why you may not want to do so. Consular officers may be able to help you in criminal cases. For example, they can gather mitigating evidence—which is evidence showing that there are reasons why you should receive a less severe sentence—in death penalty cases. Your consular officers may also help you if your rights have been violated, and they will often assist you in deportation proceedings. That Chapter will give you some practical advice on when and how to contact your consulate.

A. Your Rights During Investigation and Interrogation

The U.S. Constitution protects you against compelled self-incrimination during a police interrogation[3], regardless of whether you are charged with a federal or state offense.[4] In other words, you cannot be forced

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1. If you want to learn more about search and seizure law, a good overview is found in 1 Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure (5th ed. 2010). You should also read the cases regarding search and seizure law in your own state.

2. *See JLM ICA Supplement,* Chapter II "The Right to Consular Access"; Vienna Convention on Consular Relations, *adopted* Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America Dec. 14, 1967).

3. The term "police" here may include state agents such as jailhouse informants, i.e., fellow prisoners that are cooperating closely with and acting for the police.

4. U.S. Const. amend. V; *see also* Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (holding that the states cannot take away or limit your 5th Amendment right against self-incrimination because the 14th Amendment makes the 5th Amendment applicable to states); Missouri v. Seibert, 542 U.S. 600, 607, 124 S. Ct. 2601, 2607, 159 L. Ed. 2d 643, 652 (2004) (noting that the 5th and 14th Amendment voluntariness tests are identical (citing Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964)).

to confess to a crime or any part of a crime. Your state constitution may also protect you,[5] but regardless of what protections the state constitution provides, the police must, at the very least, do what is required according to the federal tests.[6] Therefore, before you are interrogated, the police must always give you your *"Miranda* warnings."[7] The exact nature of these warnings and when they apply is provided in the next three subsections. In brief, under *Miranda*, you are entitled to a lawyer both before and during police custodial interrogation, and you have the right to refuse to answer any and all questions asked of you by the police.[8] If a proper *Miranda* warning has not been given and you have not waived your rights, any incriminating statements made by you during an interrogation cannot be used against you at trial. However, a statement taken in violation of *Miranda* can be used during your trial to "impeach" you (to cast doubt on your credibility, which is the ability of someone to trust and believe what you say),[9] as can any physical evidence obtained as a result of the statements you made. [10]

1. Your *Miranda* Rights

Your *Miranda* rights are: (1) the right to remain silent, since anything you say may be used against you in court; (2) the right to counsel, both before and during interrogation; and (3) the right to a free lawyer, if you cannot afford one.[11] You may have heard these warnings on TV shows, and many people can recite them by heart. However, even though the police on television always read the warnings to a suspect at the time of arrest, *Miranda* applies to interrogation, not arrest. Importantly, the U.S. Supreme Court has ruled that there are no "special words" which the police must say in order to satisfy their constitutional obligations. As long as the police explain all of your rights to you, they have complied with *Miranda*.[12]

Furthermore, *Miranda* applies only during "custodial interrogations."[13] "Custodial" in this case means either: (1) after you have been taken into police custody;[14] or (2) when you have been deprived of your freedom of movement.[15] "Interrogation" can be either: (1) direct questioning by the police; or (2) the

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5. *See, e.g.,* Cal. Const. art. I, § 15, cl. 6; N.Y. Const. art. I, § 6; Tex. Const. art. I, §10.

6. State constitutional standards may give you more protection than the U.S. Constitution. Read the cases that interpret your state's constitution to find out what specific rights are guaranteed to you by the state. For an introduction to legal research, see Chapter 2 of the JLM.

7. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966) (holding that procedural safeguards are required to protect the 5th Amendment privilege against self-incrimination); *see also* Dickerson v. United States, 530 U.S. 428, 444, 120 S. Ct. 2326, 2336, 147 L. Ed. 2d 405, 420 (2000) (holding that *Miranda's* warning-based approach to determining admissibility of a statement made by the accused during custodial interrogation comes from the Constitution, and could not be overruled by a legislative act).

8. Miranda v. Arizona, 384 U.S. 436, 469–74, 86 S. Ct. 1602, 1625–28, 16 L. Ed. 2d 694, 720–24 (1966) (stating that an individual must be informed of his right to remain silent and that anything he says may be used against him, and must be allowed to ask for a lawyer.)

9. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (holding that the state may use previous statements for the purposes of impeachment even if the statements were obtained in violation of the detainee's *Miranda* rights). But in contrast, see State v. Santiago, 53 Haw. 254, 266, 492 P.2d 657, 664 (1971) (rejecting *Harris* and finding state use of a statement obtained in violation of *Miranda* for impeachment purposes violated Hawaii Constitution). Note that Hawaii is the only state that does not follow *Harris*.

10. United States v. Patane, 542 U.S. 630, 634, 124 S. Ct. 2620, 2624, 159 L. Ed. 2d 667, 673 (2004) (holding that physical evidence obtained as a result of "unwarned" statements—i.e. statements made without being told your Miranda rights—is still admissible in court as long as the statement was voluntary). The statements leading to the discovery of the evidence still must have been made voluntarily. *But see* Com. v. Martin, 827 N.E.2d 198, 444 Mass. 213 (2005) (holding that Massachusetts state constitution prohibits law enforcement from using evidence obtained from "unwarned" statements); State v. Knapp, 285 Wis.2d 86, 700 N.W.2d 899, 2005 WI 127 (2005) (holding that when physical evidence is obtained as the result of an intentional *Miranda* violation, the Wisconsin state constitution requires that the evidence be suppressed).

11. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706–07 (1966).

12. *See* California v. Prysock, 453 U.S. 355, 359–61, 101 S. Ct. 2806, 2809, 69 L. Ed. 2d 696, 701 (1981) (*per curiam*) (holding that *Miranda* warnings did not have to use the exact language of the *Miranda* opinion as long as the warnings reasonably explained to a suspect his rights).

13. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966) (stating that the holding of this case only applies to custodial interrogations, which means "questioning initiated by law enforcement officers after a person has been takin into custody or otherwise deprived of his freedom of action in any significant way).

14. Whether you are considered "in custody" depends on "how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984).

15. *See* Berkemer v. McCarty, 468 U.S. 420, 441–42, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 335–36 (1984)

"functional equivalent" of direct questioning.[16] It is considered interrogation whenever the police say or do something to you that they should know is likely to cause you to confess or say something incriminating.[17]

Some law enforcement departments have developed a two-step interrogation technique to get around the *Miranda* requirements. They start by questioning the suspect without giving him the *Miranda* warnings until he confesses to committing the crime (this statement cannot be admitted in court except for impeachment purposes, to challenge the defendant's credibility). He is then given his *Miranda* warnings and the officer asks similar questions to try to get the suspect to give up the same information.[18] The suspect often confesses again, believing that since he already confessed once, there is no harm in doing so again. However, any suspect being questioned in this situation should be careful, because in some cases the second confession can be used against you.

It is unclear whether the second, post-*Miranda* confession is admissible due to a recent Supreme Court decision, Missouri v. Seibert,[19] and an earlier decision, Oregon v. Elstad.[20] The Court suggested that the proper test was an evaluation of how effective the "*Miranda* warnings delivered midstream" (in the middle of the interrogation) actually were.[21] One concurring opinion instead thought the important question was whether the two-step interrogation was deliberately designed to get around the *Miranda* rule or instead resulted from decisions made in good faith by law enforcement officials.[22] Given this uncertainty, the most basic principle to remember is that sometimes it is not in your best interests to cooperate with questioning that occurs after you have received your *Miranda* warnings simply because you have already made potentially incriminating statements. The earlier statements may not be admissible and you have a right to ask for and receive counsel.

During any interrogation, your right to counsel is guaranteed under the Fifth Amendment. Your Fifth Amendment right to counsel is designed to protect you from self-incrimination.[23] Under *Miranda*, you are entitled to the advice of counsel both before the interrogation and while the interrogation is taking place. If you ask for a lawyer, any interrogation should stop.[24]

(holding that an ordinary traffic stop, where the officer had decided that the suspect would be taken into custody as soon as he exited his car but did not tell the defendant of that decision, did not constitute custody for *Miranda* purposes).

16. Rhode Island v. Innis, 446 U.S. 291, 300–01, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307–08 (1980) ("[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

17. *See* Rhode Island v. Innis, 446 U.S. 291, 303, 100 S. Ct. 1682, 1691, 64 L. Ed. 2d 297, 309 (1980) (holding that a short conversation between policemen in front of a suspect was not the "functional equivalent" of interrogation, as a reasonable police officer would not think that the conversation would lead to an incriminating statement from the suspect).

18. *See* Missouri v. Seibert, 542 U.S. 600, 604–06, 124 S. Ct. 2601, 2605–06, 159 L. Ed. 2d 643, 650–51 (2004) (plurality opinion) for a full discussion of the two-step interrogation and an example of this technique.

19. Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (plurality opinion) (holding that the second confession, made after *Miranda* warnings, was not admissible in the circumstances of the case, where the officer intentionally withheld the *Miranda* warnings at first and the two statements made were continuous).

20. Oregon v. Elstad, 470 U.S. 298, 309, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222, 232 (1985) (holding that a second confession was admissible where the two-step process resulted from a simple failure to administer *Miranda* warnings, where there was no actual coercion, and was later corrected by the giving of the *Miranda* warnings).

21. Missouri v. Seibert, 542 U.S. 600, 615–16, 124 S. Ct. 2601, 2612–13, 159 L. Ed. 2d 643, 657–58 (2004) (plurality opinion) (considering the most important factors to be "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, the degree to which the interrogator's questions treated the second round as continuous with the first," and any statements by the police officers to let the suspect know whether his statements made prior to the *Miranda* warnings would be admissible).

22. Missouri v. Seibert, 542 U.S. 600, 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643, 661 (2004) (Kennedy, J., concurring in the judgment).

23. This is different from the 6th Amendment right to counsel discussed in Part B of this Chapter. The 6th Amendment right ensures that you have good representation once formal criminal proceedings have been initiated against you.

24. *See* Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 387 (1981) ("[I]t is inconsistent with *Miranda* … for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.").

2. Voluntariness

The confession you make to the police must be voluntary in order to be used at your trial.[25] The word "voluntary" may be confusing, however, because in this context what it actually means is something like "not coerced."[26] To coerce someone means to pressure that person into doing something by the use of force or threats. Several things can make a court decide that your confession was not voluntary. The police cannot use[27] or threaten to use[28] physical violence in order to get you to confess. If the police threaten to administer a painful medical procedure in an attempt to get you to confess, even though they may be legally entitled to order this procedure, the court may consider the statements you make after this threat to be involuntary.[29] Your confession may not be considered voluntary if it occurs after the police have interrogated you for a long period of time.[30] If you have been deprived of food or sleep, your confession may be deemed involuntary. Likewise, if the interrogation room is in very bad condition,[31] courts may find your confession to be involuntary. In addition, the use of deception or promises of leniency in sentencing can sometimes make the confession involuntary.[32] If your confession is involuntary, that is, if it has been improperly compelled, it cannot be used at trial for any purpose.[33]

3. Waiving your *Miranda* Rights

If you waive (give up) your *Miranda* rights, the burden is on the prosecutor to show that you waived them "voluntarily, knowingly, and intelligently."[34] If you never read or never had your *Miranda* rights explained to you, then the prosecutor will have a hard time proving that you knowingly and intelligently waived your rights.

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25. *See* Miranda v. Arizona, 384 U.S. 436, 462, 86 S. Ct. 1602, 1621, 16 L. Ed. 2d 694, 716–17 (1966) (holding that a confession must be excluded where the accused was "involuntarily impelled to make a statement when but for the improper influences he would have remained silent."). In other words, if the police: (1) use incorrect methods, such as using force or threats; and 2) these methods cause a person to confess *when he would have otherwise remained silent*, then the confession is invalid.

26. *See* Colorado v. Connelly, 479 U.S. 157, 165, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473, 483 (1986) (holding that there must be "an essential link between coercive activity of the State … and a resulting confession by a defendant" if the evidence is to be excluded).

27. *See* Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936) (holding that the defendant could not be convicted on the basis of a confession obtained during a physical beating by a police officer); United States v. Abu Ali, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005), *aff'd*, 528 F.3d 210 (4th Cir. 2008) (holding that evidence obtained by extreme physical coercion "ha[s] no place in the American system of justice").

28. *See* Arizona v. Fulminante, 499 U.S. 279, 287, 111 S. Ct. 1246, 1252–53, 113 L. Ed. 2d 302, 316 (1991) (noting that "a finding of coercion need not depend upon actual violence by a government agent," and a "credible threat of physical violence" is enough to find coercion); Colorado v. Connelly, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473, 486 (1986) ("The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching).

29. *See, e.g.*, State v. Phelps, 456 N.W.2d 290,294, 235 Neb. 569, 575 (1990) (holding that a rape suspect's confession, made after police described a painful penile swab procedure that would be unnecessary if suspect confessed, was involuntary).

30. *See* Spano v. New York, 360 U.S. 315, 322, 79 S. Ct. 1202, 1207, 3 L. Ed. 2d 1265, 1271 (1959) (finding a confession involuntary, in part, because the suspect was subjected to prolonged interrogation of almost eight hours); Ashcraft v. Tennessee, 322 U.S. 143, 154, 64 S. Ct. 921, 926, 88 L. Ed. 1192, 1199 (1944) (finding a confession to be coerced where suspect was questioned for 36 hours without sleep or rest). *See also* Mincey v. Arizona, 437 U.S. 385, 398–410, 98 S. Ct. 2408, 2416–23, 57 L. Ed. 2d 290, 304–12 (1978) (holding that the statements of a suspect were involuntary where an interrogation lasted for four hours while the suspect was severely injured).

31. *See* Stidham v. Swenson, 506 F.2d 478, 481 (8th Cir. 1974) (holding a prisoner's confession to be coerced in part because the condition of his cell was "subhuman").

32. *See* Lynumn v. Illinois, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963) (finding confession to be involuntary where police told defendant that state financial aid to her child would be cut off and her children taken from her if she failed to cooperate); United States v. Tingle, 658 F.2d 1332, 1335–36 (9th Cir. 1981) (holding that intentionally causing the suspect to fear that she would not see her children for a "long time" was "patently coercive").

33. *See* Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290, 303 (1978) (noting that any use at trial of an involuntary statement violates the defendant's due process rights).

34. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 707 (1966). However, the prosecution does *not* need to prove this beyond a reasonable doubt. Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 485 (1986) ("[T]he State need prove waiver only by a preponderance of the evidence."). *See also*, People v. Seymour, 14 A.D.3d 799, 801, 788 N.Y.S.2d 260, 261–62 (3d Dept. 2005) (a valid waiver of *Miranda* rights is established if defendant understood the immediate meaning of the warnings).

If you assert your right to be silent after having your *Miranda* rights read to you, the interrogation must stop.[35] However, you must say that you are asserting your right to be silent. Simply remaining silent will not be considered enough to demonstrate that you have chosen to exercise your rights, and officers may continue interrogating you despite your silence until you make clear your choice to remain silent and stop cooperating with the interrogation.[36] If you ask for a lawyer during the interrogation, the interrogation must stop until you have had time to talk to a lawyer or until you restart the interrogation.[37] However, you must be clear that you are asking for an attorney to represent you in this circumstance.[38] In addition, you are entitled to an attorney whenever the interrogation begins again.[39]

B. Your Right to Counsel at Trial

Your right to counsel is protected by the Fifth and Sixth Amendments of the U.S. Constitution. It is important to realize that these two amendments differ in the kind of protections that they provide you. This chapter is about your right to the assistance of counsel under the Sixth Amendment. In short, you should know that statements made by you, outside the presence of your counsel and when you have not waived your right to counsel may not be used against you at your trial. It is important to realize, however, that the Sixth Amendment is "offense specific."[40] Offense specific means that, while you are detained, the state may continue investigating you for other crimes with which you have not yet been charged and may use your statements against you to prove those crimes.

1. Overview of the Sixth Amendment

The Sixth Amendment guarantees your right to the assistance of counsel,[41] among other things.[42] This right is different and independent from your Fifth Amendment right to counsel during interrogations.[43] The

35. Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966). Note that the police can continue to question you about unrelated crimes. *See* Michigan v. Mosley, 423 U.S. 96, 104–07, 96 S. Ct. 321, 326–28, 46 L. Ed. 2d 313, 322–323 (1975) (holding that although the suspect invoked the right to remain silent on robbery charges, several hours later another police officer could permissibly question the suspect about an unrelated homicide upon providing the *Miranda* warnings and securing a waiver from the suspect). *But see* People v. Boyer, 48 Cal. 3d 247, 273, 768 P.2d 610, 623, 256 Cal. Rptr. 96, 109 (1989) (finding that under California state law, police can no longer attempt to question a suspect in custody once the suspect has invoked both a right to remain silent and a right to an attorney), *overruled on other grounds by* People v. Stansbury 889 P.2d 588 (Cal. 1995).

36. *See* United States v. Ramirez, 79 F.3d 298, 305 (2d Cir. 1996) (holding that a suspect can selectively assert his right to remain silent, but simply failing to answer certain questions "does not constitute invocation of the right to remain silent.").

37. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 , 101 S. Ct. 1880, 1884–85, 68 L. Ed. 2d 378, 386 (1981) (holding that once the suspect asks for an attorney, interrogation cannot resume until counsel has been made available, or the accused himself initiates further conversations with the police). *But see* Berkemer v. McCarty, 468 U.S. 420, 437, 104 S. Ct. 3138, 3148–49, 82 L. Ed. 2d 317, 333 (1984) (holding that *Miranda* must be enforced strictly, but only in those situations where "the concerns that powered the decision are implicated."). This has been interpreted by lower courts as allowing police to ask clarifying questions to suspects who have volunteered information after asserting their rights to remain silent and to counsel. *See, e.g.*, United States v. Rommy, 506 F.3d 108, 133 (2d Cir. 2007), *cert, den'd*, 128 S. Ct. 1681, 170 L. Ed. 2d 358 (2008) (holding that "simple clarifying questions do not necessarily constitute interrogation.").

38. *See* Davis v. United States, 512 U.S. 452, 462, 114 S. Ct. 2350, 2356–57, 129 L. Ed. 2d 362, 373 (1994) (holding that a suspect must be clear in his desire for counsel; it is not enough for the suspect to state, "Maybe I should talk to a lawyer.").

39. Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 723 (1966) ("[T]he individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.").

40. *See* McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991) ("The Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commence . . . ."); Rothgery v. Gillespie County, 554 U.S. 191, 230, 128 S. Ct. 2578, 2602, 171 L. Ed. 2d 366, 395 (2008) (stating that the 6th Amendment right to counsel "attaches only to those offenses for which the defendant has been formally charged.").

41. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."). Note that the 6th Amendment does not apply to civil proceedings. For example, if you were to bring a 42 U.S.C. § 1983 civil rights claim against the state, you would not have 6th Amendment protections during that case.

42. The 6th Amendment also guarantees your right to a speedy trial. *See* Part D(1) of this Chapter for more information. Other rights under the 6th Amendment not covered in this Chapter include trial by jury and the right to cross-examine witnesses against you.

43. For information concerning your 5th Amendment right to counsel, see Part A(1) of this Chapter.

Sixth Amendment right to counsel has special significance for you as a pretrial detainee because it begins the moment formal criminal proceedings are started against you[44] and continues through trial preparation, the trial itself, the sentencing phase,[45] and beyond.[46] If you cannot afford a lawyer, the government must provide one for you if: (1) you are being prosecuted in a federal court; or (2) you are charged with a felony in state court.[47] The state is not required to appoint a lawyer to represent you if you are facing a misdemeanor or less.[48] However, if the state does not appoint a lawyer and you are convicted, even for a misdemeanor, you may not be imprisoned.[49]

Unlike your Fifth Amendment right to counsel, your Sixth Amendment right to counsel does not depend upon your request for a lawyer.[50] The state, including police investigators and prosecutors, has a duty to protect and to respect this right.[51] Officials may not deliberately cause you to make incriminating statements to use against you at your trial while you are unrepresented.[52] As explained in the next section, the Sixth Amendment has become especially important in cases where the police (or police informants) have "interrogated" or questioned defendants prior to trial.

This Sixth Amendment right applies in both federal and state court trials.[53] If you are facing state proceedings, that state may also have a similar provision in its state constitution, which may provide you with additional protection.

The state (which is defined to include the Department of Corrections and your prison) has an "affirmative obligation" to respect your right to counsel.[54] Some courts have held that this means the state may not take certain actions—such as transferring you to a distant prison, or restricting your telephone access—which might make it significantly more difficult for you to consult with your attorney.[55] Your right

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44. *See* Fellers v. United States, 540 U.S. 519, 523, 124 S. Ct. 1019, 1022, 157 L. Ed. 2d 1016, 1022 (2004) (holding that the right to counsel under the 6th Amendment "is triggered 'at or after the time that judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977))).

45. Mempa v. Rhay, 389 U.S. 128, 137, 88 S. Ct. 254, 258, 19 L. Ed. 2d 336, 342 (1967) (holding that the right to counsel extends to every stage of criminal proceedings where the defendant's substantive rights might be affected).

46. See *JLM*, Chapter 9 for information on the appeals process.

47. *See* Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that the 6th Amendment should be interpreted to mean that defendants must be provided with counsel in federal courts, unless the right is waived, and that this right is extended to state court matters through the 14th Amendment).

48. Argersinger v. Hamlin, 407 U.S. 25, 40, 92 S. Ct. 2006, 2014, 32 L. Ed. 2d 530, 540 (1972) (stating that imprisonment cannot be imposed without representation by counsel, even if the charge is a misdemeanor which results in a conviction). *See also* Alabama v. Shelton, 535 U.S. 654, 679, 122 S. Ct. 1764, 1779, 152 L. Ed. 2d 888, 909 (2002) (holding that defendant may not receive a suspended prison sentence which could be triggered by a subsequent violation of probation unless counsel is provided).

49. Scott v. Illinois, 440 U.S. 367, 374, 99 S. Ct. 1158, 1162, 59 L. Ed. 2d 383, 389 (1979) (holding that a defendant can be sentenced to imprisonment, but that he cannot actually be imprisoned unless he was represented by counsel).

50. *See* Carnley v. Cochran, 369 U.S. 506, 513, 82 S. Ct. 884, 889, 8 L. Ed. 2d 70, 76 (1962) (holding that "it is settled that where the assistance of counsel is a constitutional [requirement], the right to be [appointed] counsel does not depend on a request").

51. *See* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.").

52. *See* Fellers v. United States, 540 U.S. 519, 524, 124 S. Ct. 1019, 1023, 157 L. Ed. 2d 1016, 1023 (2004) (holding that evidence obtained from a discussion that took place after the defendant's indictment was inadmissible because it was obtained "outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights"); Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (holding that petitioner's 6th Amendment protections had been violated where evidence of his own incriminating words were used against him at his trial and agents had intentionally drawn out those words after he had been indicted without his counsel present).

53. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that the right to counsel applies in state proceedings).

54. *See* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.").

55. *See, e.g.,* Covino v. Vermont Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991) (noting that a prison transfer that makes it difficult for the detainee to talk to his lawyer—due to the distance the lawyer would have to travel—might violate right to counsel); Tucker v. Randall, 948 F.2d 388, 390 (7th Cir. 1991) (noting that denying a pretrial detainee telephone access for four days, if no other contact with the attorney was allowed, would possibly violate the 6th

to counsel, however, as with all constitutional rights, will be balanced against the state's legitimate interests, such as security or order.[56] See Part E(4) of this Chapter for more information on pretrial detainees' right of access to counsel.

2. The "Deliberately Elicited" Test

Under the Sixth Amendment, at trial, the state may not use incriminating remarks which were deliberately elicited (purposefully caused you to make statements against yourself) from you after you were charged with a crime if: (1) the statements are about the crime you are charged with;[57] and (2) you have not waived your right to counsel.[58] Exactly when the state has deliberately elicited incriminating statements can be confusing. The Sixth Amendment is not violated just because the state receives incriminating statements "by luck or happenstance."[59] Instead, the government has deliberately elicited statements whenever it purposely creates a situation where it is likely that the defendant will make incriminating statements without the assistance of counsel.[60] In addition, the government is also considered to have violated the test when it knowingly takes advantage of a situation to interrogate the accused without counsel present.[61] Proof that the state "must have known" its agent was likely to receive incriminating statements is enough to find a Sixth Amendment violation.[62]

You may be able to better understand the deliberately elicited test by learning about two of the Supreme Court's Sixth Amendment cases. In *Massiah v. United States*,[63] the defendant (Massiah) and his co-defendant (Colson) were charged with drug crimes and then released on bail. Without Massiah's knowledge, Colson agreed to cooperate with the police. Colson allowed the police to put a radio transmitter under the front seat of his car so the police could listen to conversations taking place there. Colson then had a conversation in his car with Massiah while the police listened. During this conversation, Massiah made incriminating statements, which were used in his trial and led to his conviction.

The Supreme Court reversed Massiah's conviction, finding that federal agents had deliberately elicited these incriminating statements from Massiah after his Sixth Amendment right to counsel had attached. Even though the "interrogation" was not conducted in police custody, and despite the fact that Massiah was not aware he was being interrogated, the Supreme Court held the Sixth Amendment protection still applied.

Amendment); Cobb v. Aytch, 643 F.2d 946, 951, 957 (3d Cir. 1981) (finding that transferring detainees from Philadelphia jails to Pennsylvania facilities hundreds of miles away, when most detainees were represented by city public defenders, violated the detainees' right to counsel). *See also* Benjamin v. Fraser, 264 F.3d 175, 184 (2d Cir. 2001) (noting that courts, when determining whether a burden on the prisoners' right of access to the courts is unjustifiable, will "weigh[ ] the financial and time costs imposed on attorneys by travel to remote prisons").

56. *See, e.g.*, Feeley v. Sampson, 570 F.2d 364, 373–74 (1st Cir. 1978) (finding that jail officials should be given discretion to balance detainee's legitimate need to communicate with attorneys against security concerns of unlimited phone calls).

57. *See* Part B(3) of this Chapter for more information on this limitation.

58. *See* Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (finding that the 6th Amendment was violated when prosecutors relied on defendant's words that were deliberately elicited from him after he had been indicted and in the absence of his counsel). *See also* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek" the assistance of counsel); Brewer v. Williams, 430 U.S. 387, 415, 97 S. Ct. 1232, 1248, 51 L. Ed. 2d 424, 447 (1977) ("[T]he lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the [suspect]. If … we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.") (Stevens, J., concurring).

59. Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985) (holding that defendant's right to counsel was violated when co-defendant, in cooperation with police, recorded incriminating statements made to him by defendant after indictment).

60. *See* United States v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 124 (1980) (stating that confinement puts a suspect under the potential psychological manipulation that may cause him to make incriminating statements).

61. *See* Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985) (stating that at the very least, the prosecutor and the police have a duty not to act in a manner aimed at getting around the protection created by the right to counsel).

62. *See* Maine v. Moulton, 474 U.S. 159, 176–77, 106 S. Ct. 477, 487–88, 88 L. Ed. 2d 481, 496–97 (1985) (finding a 6th Amendment violation when police knew that defendant would make statements to their agent that he had a constitutional right not to make before consulting counsel, even though police had told their informant not to interrogate the defendant).

63. Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

For the Sixth Amendment to have any force, the Supreme Court said, it must apply to "indirect and surreptitious [undercover] interrogations as well as those conducted in the jailhouse."[64]

United States v. Henry,[65] another Sixth Amendment case, shows how the state's use of paid informants to elicit incriminating statements can sometimes make those statements inadmissible. In *Henry*, the defendant was charged with armed robbery and placed in jail to await trial. An FBI agent contacted a paid informant, who was in the same cell block as Henry. The FBI agent told the informant to listen to what Henry said and report back any incriminating statements that Henry made. By telling the informant not to question Henry, the FBI agent was trying to comply with the Sixth Amendment restrictions on eliciting incriminating statements. The paid informant talked to Henry in prison about the charged crimes.

The Supreme Court found that this arrangement violated the Sixth Amendment by interfering with Henry's right to counsel. The Court cited three reasons for its decision. First, the paid informant got his orders from the FBI, and he was paid only if he produced useful information. Thus, despite the agent's instruction not to question Henry, the agent *must have known* that the arrangement would likely lead to the informant trying to secure incriminating statements from Henry without counsel present.[66] Second, the informant pretended to be nothing more than a fellow inmate. Conversation in such a situation may elicit information which would not be revealed to known government agents. Henry could not have "knowingly and voluntarily" waived his Sixth Amendment rights, since he did not know that the paid informant actually worked for the police.[67] Finally, the fact that Henry was in custody and indicted was important to the Court's decision.

Even if your confession is normally inadmissible under the Sixth Amendment because it was deliberately elicited, the state *can* admit that confession to impeach your testimony. In other words, if you give testimony at trial that differs from the informant's account of your conversations, the informant can testify *afterwards* that your testimony is unreliable.[68]

3. Offense Specific Limitation

The Sixth Amendment is "offense specific."[69] Offense specific means that the state may continue investigating you for other crimes with which you have not been charged and may use your statements against you. For example, imagine you are in jail waiting to be tried for a drug crime and the police suspect you of robbery (but you have not been charged with the robbery). The police could use any of the *Massiah* or *Henry* techniques to get information about the robbery, but not about the drug crime. Although the Sixth Amendment is offense specific, in some instances your Fifth Amendment *Miranda* rights could be implicated.[70] Keep this in mind when appealing your conviction.

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64. Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (quoting United States v. Massiah, 307 F.2d 62, 72–73 (2d Cir. 1962) (Hays, J., dissenting)).

65. United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

66. United States v. Henry, 447 U.S. 264, 270–71, 100 S. Ct. 2183, 2186–87, 65 L. Ed. 2d 115, 122 (1980) (stating that even if the agent did not intend the informant to take affirmative steps to get incriminating statements, he must have known it was likely).

67. United States v. Henry, 447 U.S. 264, 273, 100 S. Ct. 2183, 2188, 65 L. Ed. 2d 115, 124 (1980). For more information on waiver, see Section 4 of this Part.

68. Kansas v. Ventris, 556 U.S. 586, 594, 129 S. Ct. 1841, 1847, 173 L. Ed. 2d 801, 809 (2009) (holding that a violation of the 6th Amendment right did not mean the informant's statement was inadmissible as testimony for impeachment purposes, even when the informant was planted in the defendant's cell and was instructed to listen for any incriminating statements).

69. *See* Texas v. Cobb, 532 U.S. 162, 174, 121 S. Ct. 1335, 1344, 149 L. Ed. 2d 321, 332 (2001) (holding that where a pretrial detainee had been indicted for one crime but had not yet been charged with a closely related crime, his "Sixth Amendment right to counsel did not bar police from interrogating" him regarding the related crime); McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991) ("The Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced…"); Rothgery v. Gillespie County, 554 U.S. 191, 230, 128 S. Ct. 2578, 2602 171 L. Ed. 2d 366, 394 (2008) (stating that the 6th Amendment right to counsel "attaches only to those offenses for which the defendant has been formally charged"). Some states treat the question of crime relatedness slightly differently, and depending on where you have been charged, this may be to your advantage. *See, e.g.*, People v. Bing, 76 N.Y.2d 331, 349–50, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990) ("[P]ermitting questioning on unrelated crimes violates neither the State Constitution nor . . . our prior right to counsel cases.").

70. *Compare* Illinois v. Perkins, 496 U.S. 292, 299–300, 110 S. Ct. 2394, 2398–99, 110 L. Ed. 2d 243, 252–53 (1990) (holding that an undercover agent, while in jail posing as a fellow prisoner, may question a prisoner about a crime without giving a *Miranda* warning if the prisoner has not yet been charged with that crime), *with* Mathis v. United

4. Waiver of Your Right to Counsel

As with your Fifth Amendment right to counsel, your Sixth Amendment right to counsel can be waived. You must have waived your Sixth Amendment right knowingly and voluntarily.[71] The burden is on the prosecution to show that your waiver meets those conditions.[72] Neither a defendant's request for counsel at arraignment nor receiving court appointed counsel make it *presumptively invalid* for the police to initiate interrogation after such a request. Part of the reasoning for such a rule is that a defendant is free to waive his right to counsel after he requests counsel. However, importantly, once a defendant expresses "his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[73] For example, in *Montejo v. Louisiana*, the Supreme Court said that a police interrogation which took place after arraignment was not forbidden, because defendant Montejo had remained completely silent during his hearing when the Court appointed an attorney to represent him and had never actually requested an attorney or asserted his Sixth Amendment rights. Because of this, the police were allowed to question Montejo and Montejo's decision to speak to the police without his court appointed counsel present was not involuntary.[74] However, the Court sent the case back to the lower court to determine whether Montejo had actually made a **clear** assertion of his right to counsel when the officers approached him, in which case "no interrogation should have taken place unless Montejo initiated it."[75]

C. Bail

Bail is the release from custody of a charged suspect who must appear before the court at a later date. The suspect may be required to pay money or post bond in an amount set by the judge in order to make sure he appears in the future.[76] The judge is allowed to decide whether you will be released or held for trial. There is no constitutional right to bail. The only constitutional rights you have regarding bail are: (1) the court's discretion cannot be exercised arbitrarily (randomly) in making the determination whether to release you on bail or to detain you; and (2) excessive bail cannot be imposed because that is expressly prohibited by the Eighth Amendment.[77] However, despite the weak constitutional standards regarding bail, the federal government and many states have passed legislation protecting the rights of pretrial detainees to bail.

1. The Federal Bail Reform Act

The Federal Bail Reform Act describes the federal government's authority to detain or release prisoners before trial, appeals of a release or detention order, penalties for failure to appear and for offenses committed while on release, and pretrial services for detainees.[78] In *United States v. Salerno*, the Supreme Court considered a constitutional challenge to the Federal Bail Reform Act by a pretrial detainee.[79] The defendants in *Salerno* argued that the Fifth Amendment of the U.S. Constitution prohibited the detention of arrestees without bail. However, the court held that pretrial detention on the basis of future danger was not

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States, 391 U.S. 1, 4–5, 88 S. Ct. 1503, 1505, 20 L. Ed. 2d 381, 385 (1968) (holding that questioning of a prisoner by a person known to be an Internal Revenue Service (IRS) official about tax violations, without the giving of a *Miranda* warning, violated the prisoner's 5th Amendment rights, when the prisoner was in prison for an entirely different offense). See Part A of this Chapter for more information on your 5th Amendment rights.

71. Faretta v. California, 422 U.S. 806, 835–36, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581–82 (1974) (holding that waiver of the right to counsel must be made knowingly, voluntarily, and intelligently). Note that while the waiver must also be made competently and intelligently, those criteria are generally satisfied if you are competent to stand trial. *Compare* Godinez v. Moran, 509 U.S. 389, 396–97, 113 S. Ct. 2680, 2685, 125 L. Ed. 2d 321, 330–31 (1993) (holding that if a person is competent to stand trial, he is also competent to waive the right to counsel or to plead guilty), *with* Indiana v. Edwards, 128 S. Ct. 2379, 2387–88, 171 L. Ed. 2d 345, 357 (2008) (holding that "the Constitution permits States to insist upon representation by counsel" for defendants who are competent enough to stand trial but "who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves").

72. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424, 439 (1977) (noting that "it [is] incumbent upon the State" to prove the validity of a waiver).

73. Edwards v. Arizona, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981).

74. Montejo v. Louisiana, 556 U.S. 778, 789, 129 S. Ct. 2079, 2086–88 (2009).

75. Montejo v. Louisiana, 556 U.S. 778, 797, 129 S. Ct. 2079, 2091 (2009).

76. Black's Law Dictionary 160 (9th ed. 2009).

77. "Excessive bail shall not be required . . . ." U.S. Const. amend. VIII.

78. Bail Reform Act, 18 U.S.C. §§ 3141–3156 (2006).

79. United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

a violation of due process. It was also not impermissible punishment before trial.[80] The Court found that as long as the provisions of the Act were not intended to punish dangerous individuals, preventing danger to the community was an adequate reason to justify detention before trial.[81] The rest of this Part deals with your rights under the Bail Reform Act.

(a) Timing of Bail Hearing

If you are a federal pretrial detainee, you are entitled to a detention hearing at your first appearance before a judge to determine whether you are entitled to receive bail. In setting your bail, the judge focuses on two factors: first, whether there is enough assurance that you will appear for trial; and second, whether you will pose a significant threat to the safety of the community.[82] The default rule is that you will be released either on your own recognizance or upon your payment of an amount of bail set by the judge.[83] A defendant is released on his "personal recognizance" when he is released after promising to appear for trial at a later date without being required to pay bail. [84] If the judge does not believe that releasing you on those terms will satisfy the two factors, she may impose a number of conditions on your release.[85] If the judge finds that no condition or combination of conditions will satisfy the two factors, the judge must order detention before trial.[86]

It is important to note that the detention hearing can be postponed for five weekdays at your request, or for three days at the request of the government.[87] At this hearing, you have a right to be represented by counsel or to have counsel appointed if you cannot afford to pay for counsel. You have the right to testify, to present witnesses, and to cross-examine witnesses that appear at the hearing.[88] Any ruling by the court that you are not entitled to be released prior to trial must be supported by "clear and convincing evidence" that no combination of conditions on your release will reasonably assure the safety of others and your appearance at trial.

A delay in the hearing will not defeat the government's power to seek your detention. The Supreme Court held that the government's failure to comply with the prompt hearing provision of the Act did not require the release of a person otherwise considered likely to flee or cause danger to others.[89] So, improper timing or delay of your detention hearing will not automatically guarantee your release under the statute if you are considered likely to flee or cause dangers to other persons in the community.

(b) Denial of Bail

The text of Section 3142(f) indicates that, if you are a flight risk or threaten the safety of the community, you must be detained before trial. Most courts of appeal hold that only one of the two conditions needs to be satisfied in order to justify detainment before trial.[90] On the other hand, other courts of appeal have held

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80. United States v. Salerno, 481 U.S. 739, 748–54, 107 S. Ct. 2095, 2102–05, 95 L. Ed. 2d 697, 709–13 (1987).

81. United States v. Salerno, 481 U.S. 739, 746–47, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697, 708–09 (1987).

82. 18 U.S.C. § 3142(f) (2006) (2008 amendment struck out the word "violence" in § 3142(f)(1)(A) and replaced it with "violence, a violation of section 1591").

83. 18 U.S.C. § 3142(b) (2006).

84. Black's Law Dictionary 1386 (9th ed. 2009).

85. 18 U.S.C. § 3142(c)(1) (2006). Some examples of conditions of release that a court may impose include: where you may live or travel; with whom you may associate; that you comply with a specified curfew; that you return to custody for specified hours following release for limited purposes such as employment or schooling; that you remain in the custody of a designated person who agrees to assume your supervision; that you maintain employment, or if unemployed, seek employment; that you maintain or start an educational program; that you avoid the alleged victim or any potential witnesses; that you regularly report to a designated law enforcement agency or other agency; that you not possess a firearm or other dangerous weapon; that you refrain from excessive use of alcohol or use of any non-prescription drug; that you undergo medical, psychological, or psychiatric treatment (including drug and alcohol treatment); or any other condition necessary to assure your appearance and the safety of any other person or the community. 18 U.S.C. § 3142(c)(1)(B) (2006).

86. 18 U.S.C. § 3142(e) (2006) (2008 amendment renumbered the subsections under § 3142(e)).

87. 18 U.S.C. § 3142(f)(2)(B) (2006).

88. 18 U.S.C. § 3142(f)(2)(B) (2006).

89. United States v. Montalvo-Murillo, 495 U.S. 711, 717, 110 S. Ct. 2072, 2077, 109 L. Ed. 2d 720, 729–30 (1990) (finding the government's failure to comply with the prompt hearing provision under the Bail Reform Act did not require release of a person otherwise considered to be a flight risk or a danger to others.).

90. *See* United States v. King, 849 F.2d 485, 488 (11th Cir. 1988) (finding pretrial detention appropriate if defendant is a flight risk *or* a danger to the community); United States v. Ramirez, 843 F.2d 256, 257 (7th Cir. 1988) (*per curiam*) (same); United States v. Sazenski, 806 F.2d 846, 848 (8th Cir. 1986) (*per curiam*) (same); United States v.

that a showing of dangerousness to the community, without more, is not enough for a judge to order pretrial detention.[91] Regardless of which courts of appeals you appear before, if the court finds that you are likely to flee and wants to keep you detained, it must also find that there are no conditions that could reasonably assure your presence at trial.[92] In coming to the conclusion on whether there are conditions to reasonably assure presence at trial, the court must look to different factors, including, the nature and circumstances of the offense charged, the weight of evidence against the defendant, the history and characteristics of the defendant, and the danger posed to the community by the defendant's release.[93]

If you are denied bail, the hearing may be reopened at any time before the trial if the judge finds there is information that was unknown at the time of the hearing and which is relevant to whether the two factors above (appearance at trial and safety of the community) can be met.[94] If a judge grants you bail and you cannot afford to pay it, you will be held in a detention facility until your trial date arrives. If you are found guilty, any time that you have already served will be deducted from your sentence.

The judge is prohibited from imposing a bail so high that you are unable to pay and are ultimately detained prior to trial.[95] However, this provision does not automatically require the release of a person who is unable to meet the bail requirement. If you move to reduce the amount of the initial bail, the judge will hold a detention hearing. However, the judge may still determine that without bail there are no conditions that will reasonably assure your presence for trial. In such a situation, the court may decide that the initial amount was necessary and reasonable.

(c) Review and Appeal of Bail Decision

Importantly, you can ask for a review of the hearing officer's decision regarding bail. You can also appeal the decision to a higher court. If the original decision on bail was made by somebody other than the judge who has jurisdiction over the criminal case (such as a magistrate judge), you or the government may appeal the officer's decision to the judge who has jurisdiction over the case.[96] For example, if you are granted release but you think the court imposed too many conditions on your release, you could ask for the judge to amend the conditions imposed by the judicial officer.

After the order has been reviewed, both you and the government have the right to appeal the decision to a circuit court.[97] If you do appeal, the appellate court will review both the lower court's finding of facts and its resulting decision to grant or deny bail under the "clearly erroneous" standard,[98] which means that the appellate court must have a "definite and firm conviction" that the lower court made a mistake.[99] This

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Coleman, 777 F.2d 888 (3d Cir. 1985) (holding that danger to the community is sufficient under the statute to justify detention).

91. United States v. Ploof, 851 F.2d 7, 11–12 (1st Cir. 1988) (holding that detention based on dangerousness is only proper if the case involves one of the circumstances in 18 U.S.C. § 3142(f)(1)); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (same). *See also* United States v. Sabhnani, 493 F.3d 63, 76 (2d Cir. 2007) (holding that factors which make the defendant more likely to flee such as relative ease and family living in other countries may, combined with dangerousness, support preventative detention).

92. *See* United States v. Berrios-Berrios, 791 F.2d 246, 250–51 (2d Cir. 1986).

93. 18 U.S.C. § 3142(g) (2006) (2008 amendment struck out the word "violence" in § 3142(g)(1) and replaced it with "violence, a violation of section 1591"); *see* United States v. Jackson, 823 F.2d 4, 6–7 (2d Cir. 1987) (affirming the pretrial detention of a defendant who faced the possibility of a severe sentence, where the crime charged involved narcotic drugs, and where the government had shown extensive criminal history, general lack of ties to the community, hidden assets, and use of false names).

94. 18 U.S.C. § 3142(f) (2006) (2008 amendment struck out the word "violence" in § 3142(f)(1)(A) and replaced it with "violence, a violation of section 1591").

95. 18 U.S.C. § 3142(c)(2) (2006).

96. 18 U.S.C. § 3145(a) (2006) (providing for review of a release order); 18 U.S.C. § 3145(b) (2006) (providing for review of a detention order).

97. 18 U.S.C. § 3145(c) (2006).

98. *See* United States v. Gotti, 794 F.2d 773, 778 (2d Cir. 1986) (appeals court will only overturn district court bail determination if the lower court's facts were clearly erroneous or the lower court committed an error of law); United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) ("In reviewing a district court's order granting or denying bail, we apply the clearly erroneous rule to the court's predicate factual findings.") (citing United States v. Matir, 782 F.2d 1141 (2d Cir. 1986)).

99. United States v. Berrios-Berrios, 791 F.2d 246, 250–51 (2d Cir. 1986) (explaining that in order to reverse a lower court's ruling when applying the clearly erroneous standard, the reviewing court must hold a "definite and firm conviction that a mistake had been committed") (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948)).

standard of review means that most bail decisions are not overturned on appeal. However, it is an option that you should consider if you feel that bail was unfairly denied and believe that you can show that you are not a danger to the community or a flight risk.

2. New York's Bail Statute

In New York, your eligibility to be released on your own recognizance or on bail is governed by Articles 510 and 530 of the New York Criminal Procedure Law. If you were charged in a state other than New York, you should check the relevant state statutes, some of which have been provided as an appendix to this Chapter.

Under Section 510.10, at your initial appearance the court issues a securing order that either releases you on your own recognizance, fixes bail, or commits you to the custody of the sheriff.[100] Section 510.20 allows you to apply for bail or recognizance, as opposed to commitment to the custody of the sheriff, and to present arguments and evidence in support of your application in court. According to the language of the statute, the application can be made at the time of the original securing order or any time afterward.[101] However, in practice, bail applications are confined to the post-arrest arraignment or the arraignment on your indictment unless there is a subsequent change in the circumstances of your detention.

The decision on your application is not left entirely up to the judge's discretion. If you were charged with a non-felony offense, the court must order recognizance or bail.[102] If the court releases you on your recognizance, you will be released from custody with the understanding that you will later appear in court.[103] If the court fixes bail, you will be released from custody on the condition that you post a sum of money that will make sure you appear at later hearings.[104] Even if you are not charged with a felony but the judge sets bail, you will still be committed to the custody of the sheriff if you are unable to post the bail.[105] If you are charged with a felony, the court may, in its discretion, order recognizance or bail (subject to some restrictions discussed below) or commit you to the custody of the sheriff.[106] Certain local criminal courts (city courts, town courts, and village courts) cannot release you on recognizance or bail if you are charged with certain types of felonies (class A felonies) or if you have been convicted of two prior felonies.[107] No local criminal court may order recognizance or bail if you are charged with a felony until it has received a fingerprint report concerning your prior criminal record, and the district attorney has had an opportunity to be heard on the matter.[108] If a report on your past criminal behavior is unavailable, the district attorney may consent to recognizance or bail without it.[109]

Section 530.30 provides you with an opportunity to apply to a higher court to grant recognizance or bail in felony cases where certain local criminal courts have no authority to do so.[110] This section also allows you to appeal to a higher court when the lower criminal court has denied your application for recognizance or bail or ordered excessive bail.[111] If you have been charged with a felony, the district attorney must have the opportunity to be heard and the higher court judge must be provided with a copy of your criminal record.[112] Note that under New York's Bail statute, you may appeal your bail to the higher court only once.[113] However, you may also petition the higher court for release through a writ of *habeas corpus*. A higher court will only overturn a lower court's bail decision if it was a "clear error," that is, it was a constitutional

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100. N.Y. Crim. Proc. Law § 510.10 (McKinney 2009).

101. N.Y. Crim. Proc. Law § 510.20 (McKinney 2009); *see, e.g.*, People *ex rel.* Rosenthal v. Wolfson, 48 N.Y.2d 230, 233, 397 N.E.2d 745, 746, 422 N.Y.S.2d 55, 56 (1979) (holding that when pertinent new evidence becomes available the trial court should reconsider their initial decision to grant or withhold bail).

102. N.Y. Crim. Proc. Law § 530.20(1) (McKinney 2009). *See also* N.Y. Crim. Proc. Law § 510.40(3) (McKinney 2009) ("If the bail fixed is not posted, or is not approved after being posted, the court must order that the principal be committed to the custody of the sheriff.").

103. N.Y. Crim. Proc. Law § 500.10(2) (McKinney 2009).

104. *See* N.Y. Crim. Proc. Law § 500.10(3) (McKinney 2009).

105. N.Y. Crim. Proc. Law § 510.40(3) (McKinney 2009).

106. *See* N.Y. Crim. Proc. Law § 530.20(2) (McKinney 2009).

107. N.Y. Crim. Proc. Law § 530.20(2)(a) (McKinney 2009).

108. N.Y. Crim. Proc. Law § 530.20(2)(b)(i)–(ii) (McKinney 2009).

109. N.Y. Crim. Proc. Law § 530.20(2)(b)(ii) (McKinney 2009).

110. N.Y. Crim. Proc. Law § 530.30(1)(a) (McKinney 2009).

111. N.Y. Crim. Proc. Law § 530.30(1) (McKinney 2009).

112. N.Y. Crim. Proc. Law § 530.30(2) (McKinney 2009).

113. N.Y. Crim. Proc. Law § 530.30(3) (McKinney 2009).

violation, a statutory violation, or an abuse of discretion.[114] You can use *habeas corpus* to be released on bail or recognizance if the state does not meet certain deadlines in bringing your case. If you have been committed to the custody of the sheriff, the state must release you on bail or recognizance if the state is not ready for trial within a specified time period.[115] The time period depends on the seriousness of the crime you have been charged with, and it ranges from 90 days for the most serious charges to 5 days for the most minor.[116] This time limit does not apply if you are charged with negligent homicide, manslaughter, or murder[117] or if the state is not ready for trial due to "some exceptional fact or circumstance."[118] If the court orders bail due to a violation of Subsection 30.30(2), it should be set at a level you will be able to post.[119]

If the denial of bail is not required by law, Section 510.30 gives the factors the court will consider when setting the amount of bail. Your application for recognizance or bail will be determined after the court has considered the following information:

(1) Your character, reputation, habits, and mental condition;
(2) Your employment and financial resources;
(3) Your family ties and length of residency in the community;
(4) Your criminal record;
(5) Your juvenile record;
(6) Your previous record with respect to court appearances and flight to avoid criminal prosecution;
(7) The weight of evidence against you in the pending criminal action; and
(8) The sentence that may be imposed upon conviction.[120]

You should note that under New York's statute, the courts are not allowed to consider your potential threat to the community based on future criminal conduct when considering your application for recognizance or bail. The court may only consider whether any bail, or the amount fixed as bail, is necessary to ensure your future court appearance.[121] However, some case law suggests that the goal of assuring the safety of the community can indirectly be taken into consideration.[122] Moreover, as a practical matter, the above factors provide enough room for courts to detain defendants whom they find to be potentially

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114. *See* People *ex rel.* Klein v. Krueger, 25 N.Y.2d 497, 499, 255 N.E.2d 552, 554, 307 N.Y.S.2d 207, 209–10 (1969) ("[I]n a habeas corpus proceeding the court may review the action of the denial of bail or the fixing of the amount of bail if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated.").

115. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2003 & Supp. 2012); People *ex rel.* Chakwin v. Warden, N.Y.C. Correctional Facility, Rikers Island, 63 N.Y.2d 120, 125, 470 N.E.2d 146, 148, 480 N.Y.S.2d 719, 721 (1984).

116. *See* N.Y. Crim Proc. Law § 30.30(2)(a)–(d) (McKinney 2003 & Supp. 2012).

117. N.Y. Crim. Proc. Law § 30.30(3)(a) (McKinney 2003 & Supp. 2012).

118. N.Y. Crim. Proc. Law § 30.30(3)(b) (McKinney 2003 & Supp. 2012) (exceptional circumstances include, but are not limited to, the sudden unavailability of evidence).

119. People *ex rel.* Chakwin v. Warden, N.Y.C. Correctional Facility, Rikers Island, 63 N.Y.2d 120, 125, 470 N.E.2d 146, 148, 480 N.Y.S.2d 719, 721 (1984) ("[A] defendant's showing of a violation of [§ 30.30(2)] will result in the defendant's release, either by a fixing of bail at an amount which the defendant can post or by a release of the defendant on his own recognizance. As the People concede, the words 'upon such conditions as may be just and reasonable' do not give the trial court the right to maintain bail at an amount which the defendant is unable to meet.").

120. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2009).

121. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2009); *see* Sardino v. State Comm'n on Judicial Conduct, 58 N.Y.2d 286, 289–90, 448 N.E.2d 83, 84, 461 N.Y.S.2d 229, 230 (1983) (finding judicial misconduct when judge arbitrarily set bail without any regard to the statutory factors); People *ex rel.* Schweizer v. Welch, 40 A.D.2d 621, 622, 336 N.Y.S.2d 556, 557–58 (4th Dept. 1972) (noting that, when the setting of bail is discretionary, the safety of the community may not be properly considered as it "is not one of the listed criteria"); People *ex rel.* Bauer v. McGreevy, 555 N.Y.S.2d 581, 583, 147 Misc. 2d 213, 215–16 (Sup. Ct. Rensselaer County 1990) (holding that county court cannot deny bail application solely to protect the community; ensuring defendant's appearance in court is the only matter of legitimate concern).

122. *See* People v. Torres, 446 N.Y.S.2d 969, 972, 112 Misc. 2d 145, 149 (Sup. Ct. N.Y. County 1981) (holding that the defendant's potential danger to the community cannot be considered in fixing the amount of bail, but may be relevant in court's threshold determination as to whether bail should or should not be set at all); People v. Melville, 308 N.Y.S.2d 671, 677, 62 Misc. 2d 366, 373 (N.Y. Crim. Ct. N.Y. County 1970) (stating that "if a court determines that a defendant will be a threat [to the community] if released prior to trial its duty is to remand him rather than set an extremely high bail"); *cf.* People *ex rel.* Klein v. Krueger, 25 N.Y. 2d 497, 502, 255 N.E.2d 552, 555–56, 307 N.Y.S.2d 207, 212 (1969) (threat to potential witnesses is a reason to deny bail); People v. Mohammed, 653 N.Y.S.2d 492, 497–98, 171 Misc. 2d 130, 136 (Sup. Ct. Kings County 1996) (noting that there are several statutes aimed at remedying the abuse caused by the idea that the only reason for "bail is to ensure the defendant's return to court").

dangerous.[123] Also, there is no statutory requirement for the court to take the defendant's financial resources into account, so a small amount of bail can sometimes be enough to ensure that you are detained until trial.

D. Your Right to a Speedy Trial

1. The Sixth Amendment: Constitutional Right to a Speedy Trial

Your right to a speedy trial is guaranteed by the Sixth Amendment of the U.S. Constitution and applies to trials in both federal and state courts.[124] You have a right to a speedy trial even if you are released on bail before trial.[125] Note, however, that this right does not apply until you have been formally charged or are arrested.[126] The remedy for the violation of the right to a speedy trial is the dismissal of the indictment.[127]

The courts have not defined a specific number of days after which your federal constitutional right to a speedy trial has been violated. Instead, the Supreme Court has created a balancing test for courts to use in speedy trial cases. The four factors to be considered in determining whether there has been a violation of your constitutional rights are: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[128] A court does not always have to consider each of these factors, however. Unless there is some delay that is presumptively prejudicial—that is, a delay that appears to have damaged your case—the three factors other than prejudice to your case do not need to be considered.[129] Furthermore, the length of delay that will trigger an application of all four factors will depend on the particular circumstances of the case.[130] As a general guideline, note that the Supreme Court observed that delays of about one year or longer usually trigger a full, four-part analysis.[131]

While the Supreme Court has ruled that "[a] showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause,"[132] the government's justification for the delay is also important. A deliberate attempt by the government to delay your trial may help establish your claim to a constitutional violation, but negligence or overcrowded courts will be weighed less heavily against the government. However, reasons other than a deliberate attempt to delay your trial will still be considered because the responsibility ultimately rests with the government.[133] In addition, failing to file a complaint to assert your right will make it difficult to prove that you were denied your constitutional right to a speedy trial.[134]

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123. *See, e.g.*, People *ex rel.* Hunt v. Warden, Riker's Island Corr. Facility, 161 A.D.2d 475, 476, 555 N.Y.S.2d 742, 743 (1st Dept. 1990) (finding that nature and extent of more than 100 counts of sexual abuse and exploitation of young children, taken together with the criteria spelled out in the statue and "the defendant's general reputation and character and lack of stable employment" supported denial of bail).

124. U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; *see* Klopfer v. North Carolina, 386 U.S. 213, 222–23, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7–8 (1967) (holding that the 6th Amendment is enforceable in state as well as federal actions).

125. United States v. MacDonald, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502, 71 L. Ed. 2d 696, 704 (1982) (stating that the speedy trial guarantee is designed in part to "reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail").

126. *See* United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 479 (1971) ("[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision…").

127. *See* Strunk v. United States, 412 U.S. 434, 440, 93 S. Ct. 2260, 2264, 37 L. Ed. 2d 56, 62 (1973) (holding that the only remedy available for such violations is reversing the conviction, vacating the sentence, and dismissing the indictment); United States v. Ray, 578 F.3d 184, 191, 198–99 (2d Cir. 2009) (remedy for sixth amendment violation is dismissal but holding that sixth amendment does not apply to sentencing proceedings).

128. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–17 (1972) (holding that courts must conduct a balancing test when considering speedy trial cases and listing some of the factors that courts should weigh).

129. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–17 (1972) ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.").

130. *See* Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972) ("To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

131. Doggett v. United States, 505 U.S. 647, 652, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520, 528 n.1 (1992).

132. Reed v. Farley, 512 U.S. 339, 353, 114 S. Ct. 2291, 2299, 129 L. Ed. 2d 277, 290 (1994).

133. *See* Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972).

134. *See* Barker v. Wingo, 407 U.S. 514, 531–32, 92 S. Ct. 2182, 2192–93, 33 L. Ed. 2d 101, 117–18 (1972).

The federal government[135] and most state governments have enacted speedy trial statutes to guarantee this right. We discuss the federal and New York statutes below. While most speedy trial statutes are similar, if you are accused of a state crime outside of New York, you should locate and read the speedy trial statute of your particular state. See Appendix A of this Chapter for a listing of state speedy trial statutes. For an introduction to legal research, see Chapter 2 of the *JLM*.

2. The Federal Speedy Trial Act[136]

Hoping to implement a quicker procedure for trying cases in the federal courts and to ensure that the right to a speedy trial is respected, Congress passed the Speedy Trial Act. If you are charged with a federal crime, you have a statutory right to have your case tried within the time limits specified in the Act. The Act provides (1) that the indictment charging you with an offense must be filed within thirty days from the date on which you were arrested or served with a summons for the charges;[137] (2) that your trial must start within seventy days of the filing of the indictment or from the date you first appeared in court, whichever date is later;[138] and (3) that your trial must not begin less than thirty days from when you first appear in court through counsel or expressly waive the right to have counsel.[139]

If the government fails to indict you within the thirty-day time limit explained above, the charges against you that are contained in the complaint will be dismissed.[140] If the prosecution fails to bring your case to trial within seventy days of filing an indictment,[141] the indictment will be dismissed on your motion.[142] If you fail to move for dismissal before trial or if you enter a plea of guilty or *nolo contendere* (no contest),[143] your right to have the charges dismissed under the statute will be waived.[144]

(a) Dismissal With or Without Prejudice

If there is a violation of the Speedy Trial Act's time limits, the court will dismiss the charges either with or without prejudice. If the dismissal is "with prejudice," the government cannot bring the case again. If the dismissal is "without prejudice," the government can file the same charges again. In deciding whether to dismiss with or without prejudice, the court will consider: (1) the seriousness of the offense; (2) the facts and circumstances that led to its dismissal; and (3) the effect of re-prosecution on the administration of the Speedy Trial Act and the administration of justice.[145]

In balancing the three considerations listed above, the court will often favor dismissal without prejudice. The Supreme Court has reversed the dismissal with prejudice of a criminal prosecution for violation of the Speedy Trial Act, and has characterized the dismissal as an abuse of discretion because the lower court

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135. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2006 & Supp. III 2009).

136. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2008). The most important sections are § 3161 which deals with time limits, and § 3162 which specifies the sanctions imposed when the time limits are violated.

137. 18 U.S.C. § 3161(b) (2008). However, the section also states that if you are charged with a felony in a district where no grand jury has been in session during this 30-day period, the period of time for filing of the indictment will be extended for an additional 30 days.

138. 18 U.S.C. § 3161(c)(1) (2008).

139. 18 U.S.C. § 3161(c)(2) (2008).

140. 18 U.S.C. § 3162(a)(1) (2008). *See* United States v. Cortinas, 785 F. Supp. 357, 360–62 (E.D.N.Y. 1992), *aff'd mem.*, 999 F.2d 537 (2d Cir. 1993) (holding that a violation of the Speedy Trial Act requires dismissal only of charges alleged in the complaint; prosecution for other conduct arising out of the same criminal incident, even though it was known or reasonably should have been known at the time of the complaint, is not barred).

141. 18 U.S.C. § 3161(c)(1) (2008).

142. 18 U.S.C. § 3162(a)(2) (2008).

143. Black's Law Dictionary 1146 (9th ed. 2009) (stating that a plea of no contest means that the defendant, "while not admitting guilt . . . will not dispute the charge. This plea is often preferable to a guilty plea, which can be used against the defendant in a later lawsuit.").

144. 18 U.S.C. § 3162(a)(2) (2008). *See also* United States v. Brown, 498 F.3d 523, 532 (6th Cir. 2007) (observing that the defendant had not asserted his right to a speedy trial before this appeal and stating that this fact "weighs heavily toward a conclusion that no Sixth Amendment violation occurred."), *cert. denied*, 128 S. Ct. 674, 169 L. Ed. 2d 528 (2007); United States v. Morgan, 384 F.3d 439, 442 (7th Cir. 2004) (dismissing defendant's appeal based on speedy trial grounds because he did not file a pretrial motion on the issue); United States v. Jackson, 30 F.3d 572, 575 (5th Cir. 1994) (holding that defendant waived right to dismissal by conditionally pleading guilty to one count before moving for dismissal).

145. 18 U.S.C. § 3162(a)(1) (2008). *See* United States v. Taylor, 487 U.S. 326, 336, 108 S. Ct. 2413, 2419, 101 L. Ed. 2d 297, 310 (1988) (holding that district courts must carefully consider the specified statutory factors as applied to the particular case and articulate clearly their effect in rendering its decision).

failed to state the reasons for its conclusion that the government's conduct was careless.[146] The Court also stated that the lower court erred in not considering the lack of prejudice to the defendant from the brief delay and the fact that defendant's behavior in failing to appear for trial contributed to the delay. The Supreme Court held that the lower court's desire to send a message to the government—that unexcused delays will not be tolerated—is not enough to bar the re-prosecution of the defendant by dismissing with prejudice.[147]

Courts also tend to rule for dismissal without prejudice in cases where the offense charged is serious.[148]

(b) "Stop the Clock" Provisions

Upon a motion to dismiss the case, the defendant must prove that the indictment or trial was delayed beyond the time period allowed under the statute.[149] Once the defendant has shown that the government has violated the statutory time limits, the government may attempt to prove that the indictment or trial was still timely. The government will do so under subsection 3161(h)(3) of the Act,[150] which allows the time-tallying to stop in certain circumstances. There are many provisions in the statute ("stop the clock" provisions) that exclude certain periods of time in determining whether the indictment was filed in a timely manner or the trial was commenced (begun) on time.[151] However, delay because of general congestion in court, lack of diligent preparation, or failure to obtain witnesses on the part of the prosecution will not be excluded.[152] However, the wide variety of provisions that "stop the clock" will generally allow a delay longer than the statutorily defined time period without violating your right to a speedy trial.

A recent Supreme Court case has held that the prosecutor, when scheduling the trial, may not rely on the defendant's promise not to raise a speedy trial claim.[153] In other words, even if you believe that you intentionally "opted out" of your speedy trial rights before the trial, you are not prevented from raising these rights during trial.[154] Importantly, the fact that there has been no violation of the federal Speedy Trial Act does not prevent the court from finding that you have been denied your Sixth Amendment right to a speedy trial.[155]

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146. United States v. Taylor, 487 U.S. 326, 343, 108 S. Ct. 2413, 2423, 101 L. Ed. 2d 297, 314 (1988) (holding that the district court abused its discretion because it failed to factor in the seriousness of the crime charged and relied heavily on an unexplained characterization of the government's actions as "lackadaisical").

147. United States v. Taylor, 487 U.S. 326, 338–43, 108 S. Ct. 2413, 2420–23, 101 L. Ed. 2d 297, 311–15 (1988). *See also* New York v. Hill, 528 U.S. 110, 118, 120 S. Ct. 659, 666, 145 L. Ed. 2d 560, 569 (2000) (declining to affirm dismissal with prejudice and holding "objection to a specified delay may be waived" if not raised at trial).

148. *See* United States v. Abdush-Shakur, 465 F.3d 458, 464, 470 (10th Cir. 2006) (holding that dismissal with prejudice is not called for when "the delay caused by the government is unintentional and the district court . . . share[s] in the blame for the delay"), *cert. denied*, 127 S. Ct. 1321, 167 L. Ed. 2d 130 (2007). The 8th Circuit has one of the most defendant-friendly precedents on this topic. *See, e.g.*, United States v. Duranseau, 26 F.3d 804, 809 (8th Cir. 1994) (dismissing of indictment without prejudice is not an abuse of discretion where delay resulted from inadvertent noncompliance with Act and not from desire to gain tactical advantage against defendant, and re-prosecution would not prejudice defendant despite his claim that alibi witness had died). *Compare* United States v. Wilson, 11 F.3d 346, 353 (2d Cir. 1993) (finding that lower court did not abuse its discretion in finding that unexcused delays in filing indictments did not justify dismissal of indictments with prejudice where narcotics charges were very serious and where defendants had consented to delays), *and* United States v. Wells, 893 F.2d 535, 538 (2d Cir. 1990) (finding that charge of impersonating federal officer was "serious offense" for purposes of determining whether dismissal should be without prejudice), *with* United States v. Clymer, 25 F.3d 824, 831–32 (9th Cir. 1994) (dismissing indictment with prejudice despite seriousness of drug charge where defendant was detained under cloud of pending indictment for 522 days, at least five months of which was not excludable).

149. 18 U.S.C. § 3162(a)(2) (2008).

150. 18 U.S.C. § 3162(a)(2) (2008).

151. 18 U.S.C. § 3161(h)(1)–(9) (2008). The following are some examples of the periods of delay that are included in this subsection: (1) delay resulting from other proceedings, from trial with respect to other charges against the defendant, from any pretrial motion, or from the removal of the case to another district; (2) any period of delay during which the prosecution is deferred pursuant to written agreement with the defendant, for the purpose of allowing the defendant to demonstrate his good conduct; (3) any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

152. 18 U.S.C. § 3161(h)(8)(C) (2008).

153. Zedner v. United States, 547 U.S. 489, 509, 126 S. Ct. 1976, 1990, 164 L. Ed. 2d 749, 769 (2008).

154. Zedner v. United States, 547 U.S. 489, 501, 126 S. Ct. 1976, 1985, 164 L. Ed. 2d 749, 764 (2008) (holding that the "public interest cannot be served … if defendants may opt out of the Act").

155. 18 U.S.C. § 3173 (2008) (stating that "[n]o provision of [the Speedy Trial Act] shall be interpreted as a bar to any claim of denial of speedy trial as required by" the 6th Amendment).

3. New York's Speedy Trial Statute

Your right to a speedy trial under New York law is governed by Sections 30.20 and 30.30 of the New York Criminal Procedure Law.[156] Although the New York Constitution does not expressly contain a speedy trial clause, you still have a state constitutional right to a speedy trial under the guarantee of due process.[157] When filing your speedy trial claim, you should raise the constitutional provisions as well as the statutory ones in order to preserve your right to a speedy trial.

As for the state constitutional right to a speedy trial, the New York courts have articulated the factors to be balanced in determining whether your state constitutional right to a speedy trial has been violated. The factors to be considered in the test are: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether there has been an extended period of pretrial incarceration; and (5) whether there is any indication that your defense has been impaired by the delay.[158]

Under the state speedy trial statute, the amount of time in which the state must bring you to trial depends on the offense with which you are charged. For each level of offense, there are two time periods. The type of remedy that is available to you depends on which of the two time limits the state has violated.

Type of Offense	Short Period[159]	Long Period[160]
Felony	Ninety days	Six months
Misdemeanor punishable for more than three months	Thirty days	Ninety days
Misdemeanor punishable for less than three months	Fifteen days	Sixty days
Violation	Five days	Thirty days

If the government has violated the short period for the offense for which you are charged, you must be released from detention,[161] unless you are being held for another offense or have previously violated the terms of your release.[162] The government violates the short period if it is not ready for trial *and* you have not been released on bail or on your own recognizance.[163] The short time period begins when you are committed to the custody of the sheriff.[164]

If the government is not ready to bring you to trial within the long period, the charges against you must be dismissed.[165] The long time period begins on the day following the commencement of the criminal action, which is the filing of the first accusation.[166].If new accusations have been filed to replace the original charges, the amount of time in which the state must bring you to trial will be determined by the new offense,

156. N.Y. Crim. Proc. Law §§ 30.20–30.30 (McKinney 2003 & Supp 2011).

157. N.Y. Const. art. I, § 6; People v. Singer, 44 N.Y.2d 241, 253, 376 N.E.2d 179, 186, 405 N.Y.S.2d 17, 25 (1978) (holding that unreasonable delay in prosecution violates the defendant's state constitutional right to due process of law and noting that "the State due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute (citation omitted) and the Sixth Amendment"). *But see* People v. Vernace, 96 N.Y.2d 886, 888, 756 N.E.2d 66, 68, 730 N.Y.S.2d 778, 780 (2001) (holding that good faith determinations to delay prosecution with cause, "will not deprive defendant of due process even though there may be some prejudice to defendant.").

158. People v. Taranovich, 37 N.Y.2d 442, 445, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 82–83 (1975); People v. Vernace, 96 N.Y.2d 886, 887–88, 756 N.E.2d 66, 67, 730 N.Y.S.2d 778, 779 (2001).

159. N.Y. Crim. Proc. Law § 30.30(2)(a)–(d) (McKinney 2003 & Supp 2011).

160. N.Y. Crim. Proc. Law § 30.30(1)(a)–(d) (McKinney 2003 & Supp 2011).

161. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2003 & Supp 2011). Note that even if release is required, the judge can require you to meet bail or impose other conditions on your release. The judge can also order your redetention if you violate those conditions. N.Y. Crim. Proc. Law § 30.30(3)(c)(iii) (McKinney 2003 & Supp 2011). In practice, this may be known as a 30.30 release. For more information about the conditions which can be imposed on your pretrial release, see Part C(2) of this Chapter.

162. N.Y. Crim. Proc. Law § 30.30(3)(c) (McKinney 2003 & Supp 2011).

163. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2003 & Supp 2011).

164. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 2003 & Supp 2011)

165. In practice, this may be known as a 30.30 dismissal.

166. N.Y. Crim. Proc. Law § 30.30(1) (McKinney 2003 & Supp 2011).

starting from the time the new charges were filed. However, there is an important exception to this time calculation rule. If the combined total of the period of time applicable to the new charge *plus* the period of time that has already passed since the filing of the old complaint—**subtracting the excludable time period—**is greater than *six months* for the long period or *ninety days* for the short period, the period applicable to the old, original charges will still apply as if the new charges had never been filed.[167]

Like the federal Speedy Trial Act, the New York statute also provides that certain periods of time before you are brought to trial are not included in determining whether your right to a speedy trial has been violated.[168] There are also statutory limitations on when the relief described above is available to you.[169] For example, no remedies are available if the state was ready for trial before the time period expired, but is now not ready due to an "exceptional fact or circumstance."[170] Additionally, the time limits do not apply if you are charged with criminally negligent homicide,[171] first[172] or second-degree[173] manslaughter, or first[174] or second-degree[175] murder.[176]

If you feel that you have been denied access to a speedy trial, you must raise this issue before the trial begins or before you plead guilty.[177] The claim will not be preserved for appeal if not properly raised in the trial court.[178] Unlike statutory speedy trial claims, however, properly asserted constitutional speedy trial claims are not waived by a guilty plea or by making a plea bargain agreement.[179] Most speedy trial claims are raised in pretrial motions (such as a motion to dismiss) or state habeas corpus petitions.[180] If you are represented by counsel, confer with your attorney as to which procedure best fits your case.

E. Conditions of Pretrial Detention

While you are held in a prison or other detention facility prior to or during trial, you are a pretrial detainee. As a pretrial detainee, you have, at minimum, the same rights as a convicted prisoner.[181] Unlike a

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167. N.Y. Crim. Proc. Law § 30.30(5) (McKinney 2003 & Supp 2011).

168. N.Y. Crim. Proc. Law § 30.30(4) (McKinney 2003 & Supp 2011). These exceptions function the same way as the similar federal provisions discussed in Part D(2) of this Chapter. Some examples of "excludable time" under this statute include: (a) certain pretrial procedures; (b) continuances granted at the defendant's request or on his consent; (c) when the defendant cannot be found or has escaped from custody; (d) when the defendant is without counsel through no fault of the court; (e) under exceptional circumstances when the government needs more time to prepare. *See, e.g.*, People v. Reed, 19 A.D.3d 312, 318, 798 N.Y.S.2d 47, 54 (1st Dept. 2005) (holding that the period of time caused by the prosecutor's adjournment could count toward the defendant's speedy trial claim where the defendant did not request or consent to that adjournment).

169. N.Y. Crim. Proc. Law § 30.30(3) (McKinney 2003 & Supp 2011).

170. N.Y. Crim. Proc. Law § 30.30(3)(b) (McKinney 2003 & Supp 2011). For example, a court may decide that the state encountered an "exceptional circumstance" if evidence material to the state's case suddenly became unavailable, despite the district attorney's efforts to obtain the evidence, if it is reasonable to believe that the evidence will become available in a reasonable time. Evidence is material when it has "some logical connection with the facts of consequence or the issues." Black's Law Dictionary 638 (9th ed. 2009).

171. N.Y. Penal Law § 125.10 (McKinney 2009).

172. N.Y. Penal Law § 125.20 (McKinney 2009).

173. N.Y. Penal Law § 125.15 (McKinney 2009).

174. N.Y. Penal Law § 125.27 (McKinney 2009).

175. N.Y. Penal Law § 125.25 (McKinney 2009).

176. N.Y. Crim. Proc. Law § 30.30(3)(a) (McKinney 2003 & Supp 2011).

177. N.Y. Crim. Proc. Law § 170.30(2) (McKinney 2007); N.Y. Crim. Proc. Law § 210.20(2) (McKinney 2007); People v. Cintron, 7 A.D.3d 827, 828, 776 N.Y.S.2d 919, 919 (3d Dept. 2004) (holding defendant's guilty plea waived appellate review of his statutory right to speedy trial).

178. *See* People v. Bancroft, 23 A.D.3d 850, 850–51, 803 N.Y.S.2d 824, 825–26 (3d Dept. 2005) (holding that the right to a speedy trial may be waived where a defendant fails to raise the claim in either a pretrial motion "or otherwise register an appropriate objection on this ground throughout the course of his prosecution").

179. *See* People v. Savage, 54 N.Y.2d 697, 698, 426 N.E.2d 468, 468, 442 N.Y.S.2d 974, 975 (1981) (noting that a guilty plea does not waive the constitutional speedy trial right); People v. Blakley, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 460–61 (1974) (dismissing defendant's indictment because plea bargain should not have been made in exchange for withdrawal of claim of speedy trial violation); People v. Thorpe, 160 Misc. 2d 558, 559, 613 N.Y.S.2d 795, 796 (2d Dept. 1994) (holding that "a constitutional speedy trial claim is not waived by a guilty plea").

180. For more information on state habeas corpus petitions, see *JLM*, Chapter 20, "New York Habeas Corpus- New York, Florida and Texas". Note that the New York Court of Appeals has held that habeas corpus petitions asserting a denial of the defendant's right to speedy trial cannot be brought during a pending criminal proceeding. People *ex rel.* McDonald v. Warden, 34 N.Y.2d 554, 555, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974).

181. *See* Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) ("[P]retrial

post trial prisoner, however, you have not been convicted of any crime—thus in some cases you may be entitled to a higher level of constitutional protection.

The leading case on the rights of pretrial detainees is *Bell v. Wolfish*.[182] *Wolfish* made clear that the most important difference between pretrial detainees and convicted prisoners is that pretrial detainees cannot be punished. Convicted prisoners often contest prison conditions on the basis that they violate the Eighth Amendment prohibition on "cruel and unusual punishment." Pretrial detainees cannot be punished at all because they have not been convicted. To punish a pretrial detainee who has been convicted of no crime would violate the Due Process Clauses of the U.S. Constitution.[183]

Generally, claims brought by prisoners or pretrial detainees about conditions of detention are brought under one of three constitutional amendments. Convicted prisoners are protected by the Eighth Amendment's ban on cruel and unusual punishment. Pretrial detainees in federal facilities are protected by the Due Process Clause of the Fifth Amendment. Pretrial detainees in state facilities are protected by the Due Process Clause of the Fourteenth Amendment. The protections of the Fifth and Fourteenth Amendments against poor detention conditions are otherwise equal. Pretrial detainees have at least the same rights under the Due Process Clause as convicted prisoners do under the Eighth Amendment; thus, as a pretrial detainee you may use cases which involve the Eighth Amendment, as long as you point out that your argument is based on one of the due process clauses.

The right not to be punished without due process of law is one of the constitutional rights that protect you while you are detained. Pretrial detainees are entitled to the same constitutional protections as convicted prisoners.[184] Even if a condition of pretrial confinement cannot be shown to constitute punishment in violation of due process, it may still violate one of your other constitutional rights. If the conditions of your detention would violate the constitutional rights of a convicted inmate, they violate your rights as a pretrial detainee.

To find out what these rights are, you should consult the other chapters of the *JLM*, which explain the rights of convicted inmates. These rights include, among others, freedom of religion and speech under the First and Fourteenth Amendments, the right to be free from unreasonable searches and seizures under the Fourth Amendment, and the right under the Equal Protection Clause not to be discriminated against on the basis of race. A chapter which may be helpful is Chapter 15, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law." Immigrant or foreign pretrial detainees should also consult Chapter II of the *JLM ICA Supplement*.

While the law is unclear whether the Fourteenth and Fifth Amendments give pretrial detainees a higher level of constitutional protection than convicted prisoners, the Supreme Court has repeated that pretrial detainees are entitled to at least the same rights as those enjoyed by convicted prisoners.[185] Some courts have found that pretrial detainees may enjoy greater rights than convicted prisoners. However, most courts have found that the same standards apply to convicted and pretrial detainees alike. These cases are discussed in more detail below.

The rest of Part E focuses only on areas of prison life where there may be a difference between the rights of pretrial detainees and those of convicted prisoners. Section 1 deals with your right not to be punished. Section 2 discusses medical care, protection from violence, and food and housing. Section 3 examines your right not to be subjected to excessive force. Your right of access to counsel is covered in Section 4, and Section 5 examines your right to vote.

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detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

182. Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

183. *See* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

184. Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

185. *See* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983) (holding that the due process rights of a pretrial detainee "are at least as great as the Eighth Amendment protections available to a convicted prisoner").

1. The Right Not to be Punished

(a) Punishment for Underlying Crime

The purpose of detaining you prior to or during trial is not to punish you, but to ensure your presence at trial.[186] Thus, under *Bell v. Wolfish*, you cannot be punished for the crime of which you are accused while you are a pretrial detainee.[187] Under *Wolfish*, therefore, the central question is whether the conditions to which you are subject constitute punishment.[188]

(i) Intent to Punish

The most direct way to show that the conditions are punitive is to show that they were intended to punish you. For example, in a case involving a pretrial detainee who was confined in a restraint chair for eight hours after fighting with prison guards, the United States Court of Appeals for the Third Circuit held that it was for the jury to determine whether the guards confined the prisoner in the chair for the purpose of maintaining prison order and security or for the purpose of punishment. If the guards' intent was to maintain order, then their actions were constitutional; if their intent was to punish, then their actions violated the Due Process Clause of the Fourteenth Amendment.[189]

(ii) Not Related to Non-Punitive Government Goals

It is often difficult to prove the intent behind a set of conditions imposed by a prison. Without proof of intent, the conditions will amount to punishment if you can show that they are not reasonably related to a legitimate, non-punitive government goal. This involves a two-part inquiry: (1) is the goal of the conditions legitimate and non-punitive; and (2) are the conditions an excessive way to achieve that goal.[190] It is difficult but not impossible to show that the conditions or restrictions of your pretrial detention amount to punishment under this two-part test.

In applying the first part of the test, the *Wolfish* court found that the maintenance of order and security in a detention facility is a legitimate non-punitive government goal.[191] Jail officials will generally claim that whatever they did to you was for legitimate purposes of maintaining order and security—not for punishment—but a court may find the conditions impermissible despite these claims.[192] For example, if one

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186. Bell v. Wolfish, 441 U.S. 520, 536, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447, 467 (1979).

187. Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). This means that you cannot be treated in a way that seems like it is punishment before you have been found guilty after a trial during which all of your due process rights have been satisfied. You also cannot be treated in a way that is intended to promote the traditional aims of criminal punishment, including pay back for the crime supposed to have already been committed or mistreatment in hopes of preventing more crimes from being committed in the future. Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447, 469 n.20 (1979) ("Retribution and deterrence are not legitimate non-punitive governmental objectives.").

188. *See* Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447, 466 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against the deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.").

189. Fuentes v. Wagner, 206 F.3d 335, 342, 346 (3d Cir. 2000) (holding that while the pretrial detainee may have shown that the prison officials overreacted in their use of a restraint chair, he still failed to show that their intentions were punitive, i.e., "maliciously and sadistically to cause harm").

190. Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873–74, 60 L. Ed. 2d 447, 468 (1979) (holding that without a showing of an expressed intent to punish, whether conditions or restrictions amount to punishment "generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.") (citations and internal quotation marks omitted).

191. Bell v. Wolfish, 441 U.S. 520, 540, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447, 469 (1979) ("The effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.").

192. Bell v. Wolfish, 441 U.S. 520, 538–39, 99 S. Ct. 1861, 1873–74, 60 L. Ed. 2d 447, 468–69 (1979) (the characterization by prison officials of a condition or restriction as "non-punitive" does not make it so); *see, e.g.*, Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001) (upholding the lower court's ruling that restraints that were characterized as non-punitive by the city's corrections department caused so much pain to detainees that they had the same effect as punishment).

prison official makes up a charge against you, and then other guards take measures that they legitimately believe to be non-punitive, you may be able to show that the officer who falsely accused you intended to punish you. If you can trace back the harmful treatment to any prison official who intended to punish you, you may be able to establish unconstitutional pretrial punishment.[193]

In examining whether the measures taken were excessive, the *Wolfish* court stated that courts should grant prison authorities "wide-ranging deference" in their judgments about what practices are needed to maintain order and security in a prison or detention facility.[194] This means that even if the prison's methods for maintaining order and security are unpleasant, the court is unlikely to substitute its judgment for that of the prison officials.[195] Overly harsh conditions and restrictions are nevertheless violations.[196] For example, where a detainee was kept in isolation lockup for nine months for no apparent reason, the court held that on its face such treatment "smacks of punishment."[197] The court remanded the case to determine whether there was a reason to justify the lockup in the isolation wing.[198]

In another case, prisoners were chained and handcuffed for over twelve hours and deprived of access to toilets after a failed escape attempt. The court held that such restraints would violate the Fourteenth Amendment if the jury found that the restraints were not a reasonable method of preventing prisoners from escaping again, or if "alternative and less harsh methods" could have been used.[199] Furthermore, "a severe curtailment" of pretrial detainees' out of cell time may be evidence of punitive intent and constitute punishment,[200] even when dealing with prisoners who "are determined to be prone to: escape; assault staff or other inmates . . . or likely to need protection from other inmates [sic]."[201]

The *Wolfish* case itself involved a wide range of prison practices, all of which the Court upheld as reasonably related to a legitimate need to maintain order and security in a detention facility. Double-bunking of pretrial detainees,[202] random shakedown searches of detainees' cells,[203] a "publishers-only" rule that prohibited detainees from receiving hardcover books unless they were mailed directly from the publisher,[204] and routine body cavity searches after contact visits[205] were all found to be reasonable

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193. Surprenant v. Rivas, 424 F.3d 5, 14 (1st Cir. 2005) (holding that fabricating a serious charge, knowing that the lie would have serious negative consequences for a pretrial detainee, is an illegal manipulation of legitimate prison regulations and "can constitute arbitrary punishment by a correctional officer, even if the response by other (unwitting) prison officials is legitimate and non-punitive").

194. Bell v. Wolfish, 441 U.S. 520, 540, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 469 n. 23 (1979) ("In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order . . . courts must heed our warning that such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence … that the officials have exaggerated their response . . . courts should ordinarily defer to their expert judgment in such matters.") (citations and internal quotation marks omitted).

195. Bell v. Wolfish, 441 U.S. 520, 542, 99 S. Ct. 1861, 1876, 60 L. Ed. 2d 447, 470 n.25 (1979) ("Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional.").

196. Bell v. Wolfish, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447, 469 n.20 (1979) ("[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, . . . that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.").

197. Covino v. Vt. Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991).

198. Covino v. Vt. Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991); s*ee also* United States v. Gotti, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) (placing detainee in administrative detention because of the crime for which he has been charged rather than his actions while incarcerated constitutes punishment).

199. Putman v. Gerloff, 639 F.2d 415, 420 (8th Cir. 1981).

200. Pierce v. County of Orange, 526 F.3d 1190, 1208 (9th Cir. 2008) (holding that pretrial detainees must be given adequate time out of their cells to exercise and observe their religions).

201. Pierce v. County of Orange, 526 F.3d 1190, 1197, n.3 (9th Cir. 2008); Cal. Code Regs. Tit. 15, § 1053.

202. Bell v. Wolfish, 441 U.S. 520, 542, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 470 (1979) (stating that there is no "'one man, one cell' principle lurking in the Due Process Clause").

203. Bell v. Wolfish, 441 U.S. 520, 556–57, 99 S. Ct. 1861, 1883–84, 60 L. Ed. 2d 447, 480 (1979) (finding that the searches did not violate the 4th Amendment and did not constitute punishment under the Due Process Clause).

204. Bell v. Wolfish, 441 U.S. 520, 550–52, 99 S. Ct. 1861, 1879–81, 60 L. Ed. 2d 447, 475–77 (1979) (finding no 1st Amendment violation, or punishment in violation of the Due Process Clause).

205. Bell v. Wolfish, 441 U.S. 520, 560–61, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979) (finding no 4th Amendment violation, or punishment in violation of the Due Process Clause). *But see* U.S. v. Calhoun, 2002 U.S. Dist. Lexis 23277 (D. Kan. Nov. 13, 2002) (stating that strip searches of people arrested on non-violent misdemeanors must be

security measures that did not violate the due process rights of pretrial detainees. This shows how difficult it may be to convince a court that the measures taken by the prison officials were meant to be punitive in violation of your constitutional rights.

(b) Disciplinary Measures for Infractions of Prison Rules

Courts have found that you can be disciplined if you break the prison rules while you are a pretrial detainee or if officials have reason to believe that you need to be restrained for the safety and order of the detention facility. In other words, you can be punished for breaking prison rules as long as you are not being punished for the underlying crime that led to your arrest in the first place.[206] Unfortunately, there is little clear guidance as to what distinguishes "discipline" from "punishment."[207] What is important to understand is that when you break prison rules, you can be subjected to additional restraints on your liberty, including being placed in administrative detention or isolation,[208] having privileges removed,[209] and being held in handcuffs or other restraining devices.[210]

Pretrial detainees, unlike convicted prisoners, are usually entitled to procedural protections when punishments or additional restraints are imposed upon them.[211] Therefore, when officials subject you to additional restraints ("punishment") for your violation of prison rules, they must follow certain procedures consistent with due process of law. Some courts have required that pretrial detainees be given due process before the additional restrictions are imposed,[212] while others have allowed the restrictions first, so long as they are followed up in a manner that satisfies due process.[213] The due process to which you are entitled

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justified by a reasonable suspicion outside the confinement context).

206. *See* Rapier v. Harris, 172 F.3d 999, 1003 (7th Cir. 1999) (noting that though a pretrial detainee cannot be punished for the underlying crime of which he stands accused, he "can be punished for misconduct that occurs while he is awaiting trial"); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) ("[P]retrial detainees are [not] free to violate jail rules with impunity."); Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (holding that reasonable punishment may be imposed to enforce prison requirements, but not to punish the unproven criminal allegations).

207. *See* Fuentes v. Wagner, 206 F.3d 335, 343 (3d Cir. 2000) (holding that eight hours in restraint chair after disruptive behavior would be unconstitutional if it were found to have been imposed as punishment, although defendant in this case was put in the restraint chair "to stop his disruptive behavior and maintain prison order and security."); McFadden v. Solfaro, 1998 U.S. Dist. LEXIS 5765, at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (finding the disciplinary segregation of pretrial detainee for breaking prison regulations acceptable because it was not punitive and instead was "tied to the legitimate objective of maintaining order and impressing the need for discipline").

208. *See* Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (ruling that disciplinary segregation of pretrial detainee for breaking prison rules does not violate the Constitution, as long as a due process hearing is provided); McFadden v. Solfaro, 1998 U.S. Dist. Lexis 5765 at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding constitutionality of pretrial detainee's administrative segregation for acting against prison regulations by "committing . . . unhygienic acts" and threatening guards).

209. *See* McFadden v. Solfaro, 1998 U.S. Dist. LEXIS 5765, at *32 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding loss of privileges including "commissary, walkman, phone").

210. *See* Fuentes v. Wagner, 206 F.3d 335, 343 (3rd Cir. 2000) (upholding prison authorities' right to restrain prisoner in chair for eight hours after prisoner's disruptive behavior since restraint was not used as a punishment). On the other hand, prison officials are not permitted to go too far with their disciplinary actions and when they do, you may have a valid constitutional claim under the 14th Amendment. *See* Danley v. Allen, 540 F.3d 1298, 1309 (11th Cir. 2008) (holding that when jailers continue using "substantial force against a prisoner who has clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force is excessive").

211. *See* Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001) (holding that imposition of non-punitive restrictions which nonetheless were significant restraints on detainees' liberty required subsequent due process protections); Rapier v. Harris, 172 F.3d 999, 1004–05 (7th Cir. 1999) (holding that pretrial detainees, unlike convicted prisoners, are entitled to procedural protection before the imposition of punishment for misconduct); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (holding that a due process hearing is required before imposing disciplinary segregation on a pretrial detainee). *But see* Wilson v. Blankenship, 163 F.3d 1284, 1295 (11th Cir. 1998) (finding temporary placement of pretrial detainee in isolation, without bedding, for causing a disturbance was permissible without a hearing). The rule that punishments must be "atypical and significant" to require due process protections applies only to convicted prisoners, not to pre-trial detainees. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995). If you are a convicted prisoner and want a more complete explanation on this topic, see *JLM*, Chapter 17.

212. *See* Rapier v. Harris, 172 F.3d 999, 1005 (7th Cir. 1999) (finding that "punishment can be imposed only after affording the detainee some sort of procedural protection"); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (finding that "a pretrial detainee may not be punished without a due process hearing").

213. *See* Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001).

when restrained or punished for breaking prison rules is equivalent to that described in *Wolff v. McDonnell*,[214] which defines the due process rights of convicted prisoners at a prison disciplinary hearing.[215] You are entitled, for example, to be given written notice of the charges against you, to be given a hearing on the matter before an impartial officer, and to call witnesses and present evidence at that hearing.[216] State laws may give you even greater due process rights than those laid out in *Wolff*. For a more detailed discussion of what due process in prison disciplinary hearings entails, see *JLM*, Chapter 17, "Your Rights at Disciplinary Proceedings."

2. The Rights of Pretrial Detainees vs. The Rights of Convicted Prisoners: Medical Care, Protection from Violence, and Food and Housing

This Section discusses the state's affirmative obligation to provide for your basic needs while you are detained. It covers your rights to the following: (1) food and housing; (2) medical care; and (3) protection from assault. Some courts have referred to these rights as "conditions of confinement."[217] Others have described them as "basic necessities"[218] or "basic human needs."[219] It remains unclear whether pretrial detainees have the right to higher standards than those provided by law to convicted prisoners.[220]

(a) Introduction: Rights of Convicted Prisoners

Since pretrial detainees are entitled to at least the same standards of food and housing, medical care, and protection from assault as convicted prisoners, you should consult the relevant chapters of the *JLM* to find out more about the law in each of these areas. To learn more about your rights to medical care, see *JLM*, Chapter 22. See *JLM*, Chapter 23 for information on your right to be free from assault. This Section will not repeat the material laid out in those chapters, but will focus instead on the similarities and differences between the rights that pretrial detainees and convicted prisoners have to these basic necessities.

(b) Greater Protection for Pretrial Detainees?

As noted, the Eighth Amendment does not apply to unconvicted pretrial detainees since pretrial detainees cannot be punished for their alleged offenses. That suggests that pretrial detainees might be entitled to better treatment than convicted prisoners. For instance, in a detainee medical care case, the Supreme Court stated that the "due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner."[221] In City of Revere v. Mass. Gen. Hosp., the Supreme Court left open the possibility that even where a prison official's level of intent in treating the prisoner does not reach "deliberate indifference," the rights of a pretrial detainee may nevertheless be violated.[222]

However, *Revere*, like most of the cases that suggested the possibility of a higher standard for pretrial detainees than for convicted prisoners, did not explain what the difference in standards would be, and did not make a ruling on that basis. Instead it found that on the facts of the case, the state had fulfilled its obligation by taking the injured detainee to the hospital promptly after he was apprehended by the police.[223]

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214. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

215. Benjamin v. Fraser, 264 F.3d 175, 190 n.12 (2d Cir. 2001) (noting that although *Wolff* involved a convicted prisoner, the same standard applied to pretrial detainees); s*ee also* Wolff v. McDonnell, 418 U.S. 539, 564–66, 570–71, 94 S. Ct. 2963, 2979, 2982, 41 L. Ed. 2d 935, 956, 959 (1974).

216. Benjamin v. Fraser, 264 F.3d 175, 190 (2d Cir. 2001); s*ee also* Wolff v. McDonnell, 418 U.S. 539, 564–66, 570–71, 94 S. Ct. 2963, 2979, 2982, 41 L. Ed. 2d 935, 956, 959 (1974).

217. *See, e.g.*, Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996).

218. *See, e.g.*, Boswell v. Sherburne County, 849 F.2d 1117, 1121 n.4 (8th Cir. 1988) (describing circuit split on issue of whether pretrial detainees are entitled to greater rights than convicted prisoners with respect to "such basic necessities as food, living space, and medical care").

219. *See, e.g.*, Hare v. City of Corinth, 135 F.3d 320, 324 (5th Cir. 1998).

220. *See* section 2(c) of this Chapter.

221. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983).

222. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243–44, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 610–11 (1983).

223. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983). *See also* Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (noting without deciding that "it is quite possible . . . that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment"); Davidson v. Cannon, 474 U.S. 344, 348, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677, 683 (1986) ("The guarantee of due process has never been understood to mean that the State must

In general, when making a claim that your constitutional rights have been violated as a pretrial detainee, you will argue (1) that the same treatment would also violate the rights of a convicted prisoner and (2) that you may have even greater rights, according to the cases cited in the footnotes of this paragraph.

(c) Retreat from Greater Protection

The Supreme Court has not ruled on whether pretrial detainees are entitled to a higher standard of care than convicted prisoners with respect to food and housing, medical treatment, and protection from assault.[224] Some lower courts have considered the possibility that there is a higher standard for pretrial detainees than for convicted prisoners.[225] However, most of the federal circuits have abandoned trying to describe this difference[226] and have found instead that the same standards for conditions of confinement, medical care, and protection from violence apply to convicted prisoners and pretrial detainees alike.[227]

3. The Right Not to be Subjected to Excessive Force

An official who uses excessive physical force against you while you are a pretrial detainee violates your due process rights under the Fifth or Fourteenth Amendment. Convicted prisoners also have a right to be free from excessive physical force. That right, however, stems from the Eighth Amendment prohibition on cruel and unusual punishment.

There are two components to a claim that an official acted with excessive physical force: (1) a subjective component, which looks at the official's state of mind and (2) an objective component, which looks at the

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guarantee due care on the part of its officials."); Daniels v. Williams, 474 U.S. 327, 333, 106 S. Ct. 662, 666, 88 L. Ed. 2d 662 (1986) (holding that police officer's alleged negligence in leaving pillow on stairs and causing detainee to trip and injure himself does not constitute a deprivation of due process, and noting that even if the Court established that a state official's actions might constitute a claim of action under tort law, there is not necessarily a deprivation of due process). The question remaining after *Davidson* is whether there is some standard of care for pretrial detainees that falls between the negligence standard (which is not sufficient to establish a due process violation) and the deliberate indifference standard applicable to convicted prisoners (the minimum standard of care to which pretrial detainees are entitled).

224. *See* Daniels v. Williams, 474 U.S. 327, 335, 106 S. Ct. 662, 667, 88 L. Ed. 2d 672, 670 n.3 (1986) (declining to decide whether a standard between negligence and intentional conduct violates the due process clause); *see also* City of Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412, 427 (1989) (declining again to decide whether something less than deliberate indifference may suffice to establish a deprivation in violation of due process of a pretrial detainee's right to medical care).

225. For a description of a split in the circuit courts on the issue of whether the 14th Amendment standard applicable to pretrial detainees differs from the 8th Amendment standard applicable to convicted prisoners, see Boswell v. Sherburne County, 849 F.2d 1117, 1121 n.4 (8th Cir. 1988) (declining to resolve which standard applies to medical care claims brought by pretrial detainees in the 8th Circuit). *See also* Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (noting without deciding that "it is quite possible … that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided to convicted prisoners by the Eighth Amendment"). The general consensus among courts on this point currently appears to be that pretrial detainees have no greater rights to medical care than convicted prisoners.

226. *See, e.g.*, Davis v. Hall, 992 F.2d 151, 152–53 (8th Cir. 1993) (holding that, due to the lack of a different, established standard for reviewing pretrial detainees' claims, the court will "apply the deliberate indifference standard").

227. *See* Caiozzo v. Koreman, 581 F.3d 63 , 69–72 (2d Cir. 2009), Ford v. County of Grand Traverse, 535 F.3d 483, 494–95 (6th Cir. 2008) (holding that pretrial detainees are guaranteed the "right to adequate medical treatment by the Due Process Clause of the Fourteenth Amendment, and are subject to the same deliberate-indifference standard of care" as are convicted prisoners); Liscio v. Warren, 901 F.2d 274 (2d Cir. 1990) (finding deliberate indifference standard applicable to pretrial detainee's claim of failure to provide medical care for drug and alcohol withdrawal). Often courts retain the language that pretrial detainees are *at least* afforded the 8th Amendment protections granted to convicted prisoners but other courts, in coming to this conclusion, have stated that when it comes to "basic necessities" or "basic human needs," the same standard applies to both convicted prisoners and pretrial detainees. *See, e.g.*, Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding that with regard to providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard required by the due process clause is the same as that required by the Eighth Amendment for convicted prisoners); s*ee also* Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996) (applying the deliberate indifference standard to a section 1983 claim involving the failure of state officials to prevent a suicide by a pretrial detainee, and holding that when a state official's acts or omissions are at issue, the deliberate indifference standard applies to claims involving the basic human needs of pretrial detainees); Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994) (applying the Eighth Amendment standard to unsanitary prison conditions, and citing *Hamm* for the proposition that when it comes to providing pretrial detainees with "such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that allowed by the Eight Amendment for convicted persons.").

amount of harm caused. See *JLM*, Chapters 24 and 25, "Your Right to be Free from Assault," and "Your Right to be Free from Illegal Searches," for a more detailed discussion of excessive force claims.

The different circuits of the federal courts disagree about how, if at all, the excessive force standard differs for pretrial detainees and convicted prisoners. Most but not all courts have held that when it comes to excessive force claims, pretrial detainees do have greater rights than convicted prisoners.[228]

Three separate constitutional provisions govern claims of excessive force. The Supreme Court discussed these provisions in *Graham v. Connor*[229] and held that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from excessive force.[230] The Court held that the Fourteenth Amendment, at a minimum, prohibits "force that amounts to punishment"[231] but left open the possibility that the Fourth Amendment protections of arrestees may extend additional protection to pretrial detainees.[232]

Once you have decided to bring an excessive force claim under the Fourteenth Amendment, it is still unclear exactly what standard of review the court will use. In the absence of a ruling by the Supreme Court, some lower courts have created an intermediate standard of review for excessive force claims of pretrial detainees. Under this intermediate standard, pretrial detainees who claim excessive force in violation of the Fourteenth Amendment Due Process Clause need to show that the person who exerted the force either had "actual intent" to use excessive force or was at least "reckless" in doing so.[233] This standard is therefore more difficult to meet than the "unreasonableness" standard of the Fourth Amendment.[234]

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228. *See, e.g.*, Lanman v. Hinson, 529 F.3d 673, 680 (6th Cir. 2008) (noting that the circuit has held that different standards apply, depending on if the plaintiff is a free citizen, a convicted prisoner, or something in between); Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996) ("[P]retrial detainees must arguably be afforded a higher standard than that provided by the Eighth Amendment. . . . [T]his is so at least for claims that deal with things other than conditions of confinement."). *But see* Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (holding that in excessive force claims, "it makes no difference whether [the plaintiff] was a pretrial detainee or a convicted prisoner because the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving . . . pretrial detainees") (internal quotation marks and citation omitted).

229. The 4th Amendment protects against excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen." Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 454 (1989) (noting that some factors for determining whether excessive force under the 4th Amendment include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight") (citing Tennessee v. Garner, 471 U.S. 1, 8–9, 105 S. Ct. 1694, 1700, 85 L. Ed. 2d 1, 8 (1985)). The 8th Amendment protects convicted prisoners from excessive force that amounts to "cruel and unusual punishment." U.S. Const. amend. VIII; Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 454 (1989). *See also* Whitley v. Albers, 475 U.S. 312, 320–21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986) (noting that the circumstances in which the force is used must be taken into account and holding that force will only be found excessive if it was inflicted "maliciously and sadistically").

230. Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 n.10 (1989).

231. Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 n.10 (1989).

232. Graham v. Connor, 490 U.S. 386, 395 n.10, 109 S. Ct. 1865, 1871 n. 10, 104 L. Ed. 2d 443, 455 n.10 (1989) (noting that the 4th Amendment standard might continue to apply beyond "the point at which arrest ends and pretrial detention begins."). The lower federal courts are not all in agreement on this issue. *Compare* Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (holding that an arrestee is still entitled to 4th Amendment protection while in the custody of the arresting officers after the act of arrest), *with* Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (*en banc*) (holding that the 4th amendment "does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody").

233. *See* Wilson v. Williams, 83 F.3d 870, 875–76 (7th Cir. 1996) (holding that officials exert excessive force on a pretrial detainee if they act with "actual intent" to violate the detainee's rights or with "reckless disregard" of those rights; the court explained that the standard to be applied to excessive force claims of pretrial detainees is neither wholly subjective nor wholly objective). *See also* Telfair v. Gilberg, 868 F. Supp. 1396, 1410–12 (S.D. Ga. 1994) (holding unique intermediate standard applies to excessive force claims of pretrial detainees, requiring a lesser showing of intent than the 8th Amendment standard applied to convicted prisoners), *aff'd*, 87 F.3d 1330 (11th Cir. 1996). Under *Telfair*, a pretrial detainee does not need to establish malicious intent to make out a claim of excessive force, but rather only needs to establish either that the official acted with an intent to punish the detainee (which would be impermissible under the 14th Amendment) or, in the absence of such intent, that the official's actions were not reasonably related to a legitimate government objective. *C.f.* Gibson v. County of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (stating that the court has not decided "whether there are instances in which pretrial detainees, as opposed to convicted prisoners, may establish a constitutional violation without meeting the [8th Amendment] deliberate indifference standard").

234. Darrah v. City of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001) ("A substantially higher hurdle must be surpassed to make a showing of excessive force under the 14th Amendment than under the "objective reasonableness" test of *Graham*, in which excessive force can be found if the officer's actions, in light of the totality of the circumstances, were not objectively reasonable.").

Other courts have held that the excessive force standard for pretrial detainees is the same as that for convicted prisoners under the Eighth Amendment, so that pretrial detainees must show that a person acted not only with intent, but "inflicted unnecessary and wanton pain and suffering."[235] As a general rule, if you are a pretrial detainee and you can show that you were treated with excessive force for the purpose of punishment, then you can establish that your due process rights have been violated under the *Graham* standard. For example, where a pretrial detainee in the process of trying to escape was assaulted by an officer who caught him in the act, the court held that if the officer's purpose was to punish, injure, or discipline the inmate, then it constituted impermissible punishment.[236]

4. Right of Access to Counsel

Under the Sixth Amendment of the U.S. Constitution, you have a right to counsel in the preparation of your defense. (See Part B of this Chapter for a broader discussion of your right to counsel.) This right includes the right to meet with and communicate with your attorney while you are detained awaiting trial. If the conditions of your detention interfere with your ability to meet with your attorney or to communicate in private to discuss your case, then they may violate your Sixth Amendment right to counsel. [237]

Pretrial detainees may have a greater right of access to counsel than convicted prisoners. The Supreme Court recognized in *Maine v. Moulton* that the right to counsel is especially important during the period before trial.[238] *Moulton* did not involve a pretrial detainee,[239] but it has been cited by some lower courts as support for the proposition that courts should be especially protective of your right to counsel while you are a pretrial detainee.[240] As one court stated, when pretrial detainees are kept from effectively communicating with their attorneys, "the ultimate fairness of their eventual trial can be compromised."[241]

Prison regulations that make it difficult for your attorney to meet and communicate with you may violate with your Sixth Amendment right to counsel. Regulations and conditions found to interfere with this right include limits on detainees' telephone conversations with attorneys,[242] inadequate privacy during such telephone discussions,[243] inadequate or inadequately private space in which to meet with your attorneys,[244]

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235. *See, e.g.*, Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (holding that in excessive force claims, "it makes no difference whether [the plaintiff] was a pretrial detainee or a convicted prisoner") (citation omitted); Taylor v. McDuffie, 155 F.3d 479, 483–84 (4th Cir. 1998) (applying the 8th Amendment subjective test to excessive force claim brought by detainee due to officers' alleged actions shortly after arrest). Remember that under the 8th Amendment test, in some circumstances (such as when maintaining order in a detention facility) courts will require that the state official have acted "maliciously and sadistically" for there to be a violation of your rights. Wilkins v. Gaddy, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (holding that when prison officials maliciously and sadistically use force to cause harm contemporary standards of decency are violated regardless of whether injury is evident). *See also* Whitley v. Albers, 475 U.S. 312, 320–21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251, 261 (1986) (noting that the circumstances in which the force is used must be taken into account and holding that force will only be found excessive if it was inflicted "maliciously and sadistically").

236. Putman v. Gerloff, 639 F.2d 415, 420–21 (8th Cir. 1981) (holding that there was a duty to stop a sheriff from inflicting force on an escaping pretrial detainee if the force used amounted to summary punishment). *See also* Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (noting that an otherwise legitimate restriction or condition may be viewed as punitive and therefore be in violation of the detainees constitutional rights if the condition is "excessive in light of the seriousness of the violation").

237. You should also look at the chapters of the *JLM* describing the rights of access to counsel of convicted prisoners, because these rights certainly apply to pretrial detainees as well. See *JLM*, Chapter 3, "Your Right to Learn the Law and Go to Court," on your right of access to a law library, and Chapter 18, "Your Right to Communicate with the Outside World," on your right to correspond with and visit with your attorney.

238. Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.").

239. Maine v. Moulton involved a defendant who was released on bail pending trial, during which time the police arranged for his co-defendant to wiretap a conversation between the two. During that conversation, the defendant made incriminating statements. The Court deemed these statements inadmissible, on the basis that the police used the wiretap to evade the defendant's right not to be interrogated without an attorney present. Maine v. Moulton, 474 U.S. 159, 180, 106 S. Ct. 477, 489, 88 L. Ed. 2d 481, 498–99 (1985).

240. *See, e.g.,* Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001) (citing *Moulton* in a pretrial detainee case for the importance of the right to counsel).

241. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989).

242. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–52 (8th Cir. 1989) (noting that, if proven, restrictions on access to counsel were "inadequately justified" where detainees were effectively permitted one attempt at a 20-minute phone call with attorneys during office hours every other week).

243. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–53 (8th Cir. 1989) (finding inadequate privacy where phones

and prison regulations that create substantial and unpredictable delays when your attorneys come to meet with you.[245] A transfer from one detention facility to another may also violate your right to counsel, if the transfer is to a place so distant that your access to counsel is impaired.[246]

The Sixth Amendment right to counsel guarantees you the right to have access to your attorney. It may also provide you with a right to access a law library.[247] In particular, prisoners who wish to proceed *pro se* (advocating for yourself before the court) under *Faretta v. California*[248] may have a right to a law library. However, not every circuit recognizes that right.[249] At least one court has held that inadequate access to a law library during pretrial detention can worsen the infringement on your Sixth Amendment right to counsel where the rules already make it hard for you to communicate with your lawyer.[250] For a more detailed discussion of this right, see Chapter 3 of the *JLM,* "Your Right to Learn the Law and Go To Court."

As explained in *JLM*, Chapter 3, under *Lewis v. Casey*, if you claim that your right of access to the courts has been interfered with, you must show that the denial of this right has caused "actual injury" to your case. But, in *Benjamin v. Fraser,* the Second Circuit distinguished the right of access to the courts from the right to counsel for pre-trial detainees. If you assert that there were barriers to accessing your counsel, in violation of the Sixth Amendment, then you do not need to show actual injury.[251]

5. Voting Rights

Even though you are a pretrial detainee, you still have the right to vote.[252] Disenfranchisement, or denial of the right to vote, violates your rights under the Equal Protection Clause of the Fourteenth Amendment. However, the case law is confusing about *how* you can actually vote.

In *McDonald v. Board of Election Commissioners*, the Supreme Court affirmed a district court's ruling that a law excluding un-sentenced prisoners who could not get out on bail from obtaining absentee ballots did not violate the Equal Protection Clause of the Constitution.[253] The Court reasoned that, although the

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were brought to a noisy public space and conversations could be overheard by guards and other prisoners).

244. *See, e.g.*, Benjamin v. Fraser, 264 F.3d 175, 187–88 (2d Cir. 2001) (holding that detention facility must provide attorneys with an adequate number of visitation rooms in which to meet with their clients prior to and during trial, and these rooms must provide adequate privacy).

245. Benjamin v. Fraser, 264 F.3d 175, 179 (finding a 6th Amendment violation where attorneys "routinely face[d] unpredictable, substantial delays in meeting with clients" from 45 minutes to two hours, that were caused by a combination of factors, including a limited number of counsel rooms, a rule requiring that prisoners not be moved to counsel rooms without escorts, and a rule prohibiting prisoners from being brought to counsel rooms during prisoner counts).

246. *See* Covino v. Vt. Dept. of Corr., 933 F.2d 128 (2d Cir. 1991) (*per curiam*) (remanded to determine whether detainee's transfer to a more distant jail impaired his 6th Amendment right to counsel); s*ee also* Cobb v. Aytch, 643 F.2d 946, 960 (3d Cir. 1981) (affirming injunctive relief limiting transfers of detainees to distant facilities on the basis that these substantially interfere with detainees' right to counsel).

247. Walton v. Toney, 44 Fed. App'x. 49, 51 (8th Cir. 2002) (*per curiam*) ("To prevail on an access-to-courts claim, an inmate must ... demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.") (internal quotation and citation omitted). *But see* United States v. Wilson, 690 F.2d 1267, 1271–72 (9th Cir. 1982) (asserting that where a defendant chooses not to represent himself and where adequate legal assistance is provided, no constitutional right to access a law library exists).

248. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1974) (upholding the right to self-representation and implying other defense tools may be guaranteed by the 6th Amendment).

249. *Compare* Taylor v. List, 880 F.2d 1040, 1047 (9th Cir. 1989) ("[T]he Sixth Amendment right to self-representation … includes a right of access to law books, witnesses, and other tools necessary to prepare a defense.") (citing Milton v. Morris, 767 F.2d 1443, 1446 (9th Cir. 1985)), *with* United States v. Cooper, 375 F.3d 1041, 1051–52 (10th Cir. 2004) ("[P]retrial detainees are not entitled to law library usage if other available means of access to court exist .... When a prisoner voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding, he is not entitled to access to a law library.") (citations omitted).

250. Johnson-El v. Schoemehl, 878 F.2d 1043, 1053 (8th Cir. 1989) (finding that in a case where jail rules already violated detainee's right to counsel by making it hard for detainees to communicate with their lawyers, the fact that detainees were only allowed to use law library for two hours a week and library was inadequate for most legal research made violation of detainees' rights worse).

251. Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001) (finding that there is no need to state actual injury when access to counsel is impaired).

252. *See, e.g.*, Murphree v. Winter, 589 F. Supp. 374, 380 (S.D. Miss. 1984) (holding that, under the equal protection clause of the Constitution, a state statute that denies pretrial detainees the right to vote must be interpreted to allow pretrial detainees to vote, or it becomes unconstitutional).

253. McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969).

pretrial detainees were denied the right to vote by absentee ballot, there had been no showing that the state had failed to provide other access to the polls for pretrial detainees.[254]

It appears that a better case can be made when a detainee argues that a number of possible alternatives were also unavailable. In *Goosby v. Osser*[255] the Supreme Court noted that when (1) a state statute prohibited pretrial detainees from voting by absentee ballot and there were allegations that (2) election officials had denied pretrial detainees' requests to vote in person or by proxy at public polling places, at special prison polling places, or by any other means, the case was different from *McDonald v. Board of Election Comm'rs*.

Finally, in *O'Brien v. Skinner*, a similar fact pattern came before the Court. State officials refused to allow pretrial detainees who were being detained in their home counties to vote by absentee ballot. The New York Court of Appeals (the highest court in the State) had held that no alternative way of voting had to be provided to the plaintiffs.[256] Since the state law allowed non-incarcerated persons who were unable to be physically present on election day to vote, the U.S. Supreme Court ruled that the statute discriminated against pretrial detainees in an arbitrary manner in violation of the Fourteenth Amendment's Equal Protection Clause.[257]

Thus, as a pretrial detainee you have the right to vote. You do not have an absolute right to vote by absentee ballot. However, if state officials deny you the opportunity to vote by absentee ballot, they must provide you an alternative way to cast your ballot.

F. Conclusion

As a pretrial detainee, you have constitutional and statutory rights that are protected under national and state laws. It is important to remember that you have not been convicted of a crime, and you are innocent until proven guilty. You have rights concerning body searches, visitation, medical treatment, voting, speedy trial, bail, protection from assault, and self-incrimination. Most importantly, you have the right to an attorney and should request one as soon as you are detained or taken into custody. If you are a state prisoner, read the cases and laws of your state to learn about your specific rights.

254. McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408–09, 22 L. Ed. 2d 739, 745–46, n.6 (1969) ("[T]he record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own."). Therefore, the Court said, "it is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." McDonald v. Board of Elections Comm'rs, 394 U.S. 802, 807, 89 S. Ct. 1404, 1408, 22 L. Ed. 2d 739, 745 (1969).

255. Goosby v. Osser, 409 U.S. 512, 521–22, 93 S. Ct. 854, 860–61, 35 L. Ed. 2d 36, 44 (1973).

256. O'Brien v. Skinner, 414 U.S. 524, 532, 94 S. Ct. 740, 744, 38 L. Ed. 2d 702, 709 n.1 (1974) (Marshall, J., concurring) ("The [New York] Court of Appeals stated: 'We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions [or] would threaten like hazards embraced by such schema.'") (internal citations omitted).

257. O'Brien v. Skinner, 414 U.S. 524, 530, 94 S. Ct. 740, 743, 38 L. Ed. 2d 702, 707 (1974).

APPENDIX A: STATE SPEEDY TRIAL STATUTES

This list covers state speedy trial provisions, either in statutes or court rules. If no statute is listed for a state that state likely has a constitutional speedy trial guarantee.

Alabama
None

Alaska
Alaska R. Crim. Proc. 45 (Lexis 2006-2007).

Arizona
Ariz. Rev. Stat. §§ 13–114 (West 2010).

Arkansas
Ark. R. Crim. Proc. §§ 27–30 (Lexis 2011).

California
Cal. Penal Code §§ 1381--82 (West 2000 & Supp. 2009).

Colorado
Colo. Rev. Stat. Ann. § 18—1--405 (West 2004 & Supp. 2011).

Connecticut
Conn. Gen. Stat. Ann. § 54-82m (West 2009).

Delaware
None

District of Columbia
D.C. Code Ann. § 23-1322 (West 2001 & Supp. 2011).

Florida
Fla. Stat. Ann.: R. Crim. P. 3.191 (West 2007 & Supp. 2011).

Georgia
Ga. Code Ann. § 17-7-170 (Lexis 2008 & Supp. 2011).

Hawaii
Haw. Rev. Stat. Ann.: R. Crim. P. 48(b) (Michie 2012).

Idaho
Idaho Code § 19-3501 (Michie 2004 & 2011).

Illinois
725 Ill. Comp. Stat. 5/103-5 (West 2006 & Supp. 2011).

Indiana
Ind. R. Crim. P. 4 (Lexis 2012).

Iowa
Iowa R. Crim. P. 2.33 (West 2002 & Supp. 2011).

Kansas
Kan. Stat. Ann. § 22-3402 (2007 & Supp. 2010).

Kentucky
Ky. Rev. Stat. Ann. § 500.110 (Michie 2008 & Supp. 2011).

Louisiana
La. Code Crim. Proc. Ann. Art. 701 (West 2004 & Supp. 2011).

Maine
Maine R. Crim. P. 48(b) (West 2011).

Maryland
Ann. Code of Md.: Crim. Proc. § 6-103 (Michie 2001 & Supp. 2011).

Massachusetts
Ann. Laws of Mass.: Crim. P. 36 (Lexis 2011--2012).

Michigan
Mich. Comp. Laws Ann. § 768.1 (West 2000 & Supp. 2011--2012).

Minnesota
Minn. Stat. Ann. § 644A.033 (West 2009 & 2011)

Mississippi
Miss. Code Ann. § 99-17-1 (Lexis 2007 & Supp. 2011).

Missouri
Ann. Mo. Stat.. § 545.780 (Vernon 2002 & 2011).

Montana
Mont. Code Ann. § 46-1-506 (West 2011)

Nebraska
Rev. Stat. of Neb. § 29-1207 (2008 & Supp. 2011).

Nevada
Nev. Rev. Stat. Ann. § 178.556 (Michie 2011).

New Hampshire
N.H. Super. Ct. R. App. 1 (Lexis 2011--2012).

New Jersey
None

New Mexico
District Courts: Ann. R. of N.M.: R. Crim. Proc. for Dist. Ct. 5-604 (2004).
Magistrate Courts: Ann. R. of N.M.: R.Cr.P. for Magistrate Ct. 6-506 (2004).
Metropolitan Courts: Ann. R. of N.M.: R.Cr.P for Metro Ct. 7-506 (2004).

New York[258]
N.Y. Crim. Proc. Law §§ 30.10--30 (McKinney 2003 & Supp. 2012).

North Carolina
Gen. Stat. N.C. Ann. § 15-10 (Lexis 2011).

North Dakota

258. See Part D(3) of this Chapter for in-depth information about New York's statute.

N.D. Cent. Code Ann. § 29-19-02 (Lexis 2006 & Supp. 2011).

Ohio
Ohio Rev. Code Ann. § 2945.71 (Baldwin 2006 & Supp. 2011).

Oklahoma
Okla. Stat. Ann. Tit. 22, § 812.1 (West 2003 & Supp. 2011).

Oregon
Or. Rev. Stat. § 135.747 (2011).

Pennsylvania
Pa. R. Crim. Proc. (State) 600 (West 2012).

Rhode Island
R.I. Gen. Laws § 12-13-7 (2002 & Supp. 2010).

South Carolina
None

South Dakota
S.D. Codified Laws § 23A-44-5.1 (West 2004 & Supp. 2011).

Tennessee
Tenn. Code Ann. § 40-14-101 (Lexis 2006 & Supp. 2011).

Texas
Tex. Stat. Ann.: Code of Crim. Proc. Art. 32A (Vernon 2006 & Supp. 2011).

Utah
Utah Code Ann. § 77-1-6 (Lexis 2008 & Supp. 2011).

Vermont
Vt. Stat. Ann. Tit. 13, § 7553b (2009 & Supp. 2011).

Virginia
Code of Va. Ann. § 19.2-243 (Lexis 2008 & Supp. 2011).

Washington
Ct. R. Ann. 3.3 (West 2011--2012).

West Virginia
W. Va. Code Ann. § 62-3-21 (Michie 2010 & Supp. 2011).

Wisconsin
Wis. Stat. Ann. § 971.10 (West 2007 & Supp. 2011).

Wyoming
Wyo. Ct. R. Ann.: Crim. Proc. 48 (Lexis 2011).