

CHAPTER 34

THE RIGHTS OF PRETRIAL DETAINEES*

A. Introduction

“Pretrial detention” refers to the time period during which you are incarcerated after being arrested but before your trial. Pretrial 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, under the U.S. Constitution, a person accused of a crime is presumed innocent until proven guilty. So, as a pretrial detainee, you have not been convicted of a crime and are not considered guilty.

Because of this difference between pretrial detainees (“detainees”) and convicted prisoners, you might think that detainees would have greater rights and privileges than convicted prisoners. 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 and detained you. Part B discusses interrogation law—which is the law covering situations in which the police question a suspect about a crime they believe he may have committed—and your Fifth Amendment right to counsel. Part C discusses your Sixth Amendment right to counsel. Part D discusses bail and Part E discusses your right to a speedy trial. Part F 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” (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. Chapter II of the *JLM Immigration and Consular Access Supplement* (ICA) will give you some practical advice on when and how to contact your consulate.

* This Chapter was revised by Julian Perez, based in part on previous versions by Jared Pittman, Sarah Abramowicz, Kai-lin Hsu, Christian Parker, Elif Uras, Erica Bazzell, and Julie Caskey. Special thanks to John Boston and Steven Wasserman of the Legal Aid Society for their valuable comments.

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 art. 36, Apr. 24, 1963, 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).

B. 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 to confess to a crime or any part of a crime. Your state constitution may also protect you.⁵ However, regardless of what protections the state constitution provides, the police must, at the very least, do what is required by the U.S. Constitution.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, 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 (a warning that you have these rights) 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 to show that you did or did not do something. 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, by showing that you have said inconsistent things),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

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))).

5. *See, e.g.*, Cal. Const. art. I, § 15; 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).

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 In this context, “Custodial” refers to 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 “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). The suspect 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 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 thought the important

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 taken 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, 440, 441–42, 104 S. Ct. 3138, 3150, 3151, 82 L. Ed. 2d 317, 334, 335–36 (1984) (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

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

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 it actually means is something like “not coerced” in this context.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 use²⁷ or threaten to use²⁸ 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 is not likely to be considered involuntary simply because it occurred after the police interrogated you for a long period of time, but if you were subject to a long interrogation and were deprived of food or sleep, your confession may be deemed

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). Factors different courts have used to determine whether this is admissible include but are not limited to: whether the suspect was in custody for the first interrogation (*Smith v. Clark*, 612 F. App'x 418 (9th Cir. 2015)), the length of time elapsed between the first and second interrogation (*United States v. Chaidez-Reyes*, 996 F. Supp. 2d 1321 (N.D. Ga. 2014)), and whether the officer took “specific curative steps” to ensure the *Miranda* warning served its purpose (*United States v. St.*, 472 F.3d 1298, 1314 (11th Cir. 2006)).

23. This is different from the 6th Amendment right to counsel discussed in Part C 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.”).

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).

involuntary.³⁰ Likewise, if you were held in very bad conditions for your interrogation,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.

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 clearly communicate 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

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”).

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, unless the suspect initiates further communication), *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

you in this circumstance.³⁸ In addition, you are entitled to an attorney whenever the interrogation begins again.³⁹

C. Your Right to Counsel at Trial

Your right to counsel is protected by the Fifth and Sixth Amendments of the U.S. Constitution. As explained below, 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, if you have not waived your right to counsel, any statement you make outside the presence of your lawyer cannot be used against you at your trial. However, It is important to realize that the Sixth Amendment is “offense-specific,” meaning that it only applies to the offense for which you are detained.⁴⁰ So, while you are detained, the state may continue to investigate you for other crimes you have not yet been charged with and use your statements against you to prove those crimes. In other words, they may question you without a lawyer about other crimes you are not yet charged with and they can use those statements against you if they later prosecute you for 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 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 you⁴⁴ 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

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.”). *But see* Downey v. State, 144 So. 3d 146, 151 (Miss. 2014) (holding Mississippi exceeds this minimum standard by its state constitution).

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 commenced. . . .”); *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 E(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 B(1) of this Chapter.

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, 339-340, 83 S. Ct. 792, 794, 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

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—that might make it significantly more difficult for you to consult with your attorney.⁵⁵ Your right 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 F(4) of this Chapter for more information on pretrial detainees’ right of access to counsel.

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 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

2. The “Deliberately Elicited” Test

Under the Sixth Amendment, at trial, the state may not use incriminating remarks that were “deliberately elicited” from you *after* you were charged with a crime under certain circumstances. A remark is “deliberately elicited” if the government purposefully caused you to make statements against yourself. These incriminating remarks may not be used at trial if: (1) the statements are about the crime you are charged with,⁵⁷ and (2) you have not waived your right to counsel.⁵⁸ Determining exactly when the state 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 defendant 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 been triggered. 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. For the Sixth Amendment to have any force, the Supreme Court

unlimited phone calls).

57. See Part C(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 a 6th Amendment violation where prosecutors relied on remarks deliberately elicited from defendant after he was 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).

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 elicit 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 that 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.⁶⁸

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* to show that you said something different before, and, as a result, your testimony should be viewed as unreliable.⁶⁹

3. Offense-Specific Limitation

The Sixth Amendment is “offense-specific.”⁷⁰ As explained above, this means that the state may continue investigating you for other crimes with which you have not been charged and may use your

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. *United States v. Henry*, 447 U.S. 264, 272, 100 S. Ct. 2183, 2188, 65 L. Ed. 2d 115, 123 (1980) (citing these factors when distinguishing cases where Fourth and Fifth Amendment protections were held not to apply before charges were filed).

69. *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).

70. *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.”).

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.⁷¹ Keep this in mind when appealing your conviction.

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.⁷² The burden is on the prosecution to show that your waiver meets those conditions.⁷³ 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, meaning that the court will not necessarily assume that the police violated your rights if you were interrogated without counsel even though you requested counsel. 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 should not be] 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."⁷⁴ 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.⁷⁵ 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."⁷⁶

D. Bail

A suspect who has been charged with a crime and who must appear before the court at a later date may be released from jail if they post "bail." To be released, you may be required to pay money or post bond (a debt you promise to the court) in an amount set by the judge. Bail's purpose is to make sure the charged party appears before the court at the assigned time.⁷⁷ That said, there is no constitutional

71. *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 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 B of this Chapter for more information on your 5th Amendment rights.

72. *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). 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, 554 U.S. 164, 178, 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 still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves").

73. *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).

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

75. *Montejo v. Louisiana*, 556 U.S. 778, 789, 129 S. Ct. 2079, 2086–88, 173 L. Ed. 2d 955, 965–67 (2009).

76. *Montejo v. Louisiana*, 556 U.S. 778, 797, 129 S. Ct. 2079, 2091, 173 L. Ed. 2d 955, 970 (2009).

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

right to bail. The judge is allowed to decide whether you will be released or held for trial. The only constitutional rights you have regarding bail are: (1) the court's cannot act arbitrarily (randomly) in deciding whether to release you on bail or to detain you; and (2) excessive bail cannot be imposed.⁷⁸ However, the federal government and many states have passed legislation protecting the rights of pretrial detainees to bail. Below is a description of the federal government's stance on 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, rules for appeals of a release or detention order, penalties for failure to appear and for offenses committed while on release, and pretrial services for detainees.⁷⁹ In *United States v. Salerno*, the Supreme Court considered a constitutional challenge to the Federal Bail Reform Act.⁸⁰ The defendants in *Salerno* argued that the Fifth Amendment of the U.S. Constitution demanded that pretrial detainees have the right to bail. However, the court held that pretrial detention was okay because *future* danger was not a violation of due process.⁸¹ The Court found that a the Act was supposed to prevent danger to the community, rather than to punish people, and that this was a good enough reason to justify denying bail.⁸² 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" when you first appear before a judge, in which the court will determine whether you will receive bail. In deciding whether to provide you access to bail, the judge focuses on two things: 1) the likelihood that you will appear for trial, and 2) whether you will pose a significant threat to the safety of the community if you are released.⁸³ 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.⁸⁴ If the judge releases the defendant on his own "recognizance" the defendant must promise to appear for trial at a later date. A defendant released on his own recognizance will not be required to pay bail.⁸⁵ If the judge does not believe that releasing you on your own recognizance will satisfy the two factor test laid out above, she may impose a number of conditions on your release.⁸⁶ If the judge finds that no condition or combination of conditions will satisfy the two factors, the judge must order detention before trial.⁸⁷

The detention hearing can be postponed for five weekdays at your request, or for three days at the request of the government.⁸⁸ At this hearing, you have a right to be represented by a lawyer or to have a lawyer appointed to represent you if you cannot afford to pay for one. You have the right to testify,

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

79. Bail Reform Act, 18 U.S.C. §§ 3141–3156 (2012).

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

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

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

83. 18 U.S.C. § 3142(f) (2012).

84. 18 U.S.C. § 3142(b) (2012).

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

86. 18 U.S.C. § 3142(c)(1) (2012). 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) (2012).

87. 18 U.S.C. § 3142(e) (2012).

88. 18 U.S.C. § 3142(f)(2)(B) (2012).

to present witnesses, and to cross-examine witnesses that appear at the hearing.⁸⁹ If a court rules that you are not entitled to be released prior to trial, it must support its stance by “clear and convincing evidence” that no combination of conditions on your release will reasonably assure the safety of others and also ensure your appearance at trial.

A delay in the hearing will not automatically free you from 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.⁹⁰ 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 likely to improperly leave the jurisdiction or threaten the safety of the community, you must be detained before trial. The majority of courts of appeal have said that only one of the two conditions needs to be satisfied in order to justify detaining you before trial.⁹¹ On the other hand, some courts of appeal have said that a showing of dangerousness to the community, without more, is not enough for a judge to order pretrial detention.⁹² 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.⁹³ In deciding whether there are conditions that could reasonably assure presence at trial, the court must look to different factors. These include: 1) the nature and circumstances of the offense charged, 2) the weight of evidence against the defendant, 3) the history and characteristics of the defendant, and 4) the danger posed to the community by the defendant’s release.⁹⁴

If you are denied bail, you may ask the court to reconsider so long as you have 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) are met.⁹⁵ 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 in the detention facility during trial will be subtracted from your sentence.

The judge cannot impose a bail so high that you are unable to pay.⁹⁶ However, this does not automatically require your release if you cannot pay bail. You may ask the court to reduce the amount of the bail, and if you do 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

89. 18 U.S.C. § 3142(f)(2)(B) (2012).

90. *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).

91. *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. Coleman*, 777 F.2d 888, 893 (3d Cir. 1985) (holding that danger to the community is sufficient under the statute to justify detention).

92. *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).

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

94. 18 U.S.C. § 3142(g) (2012) (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).

95. 18 U.S.C. § 3142(f) (2012) (2008 amendment struck out the word “violence” in § 3142(f)(1)(A) and replaced it with “violence, a violation of section 1591”).

96. 18 U.S.C. § 3142(c)(2) (2012).

trial. In such a situation, the court may decide that the initial amount was necessary and reasonable even if you cannot pay it.

(c) Review and Appeal of Bail Decision

You have two options if you wish to challenge your bail amount. First, if a judicial officer set your bail and this judicial officer is someone *other than the judge who has jurisdiction over your criminal case*, you can ask a judge in your district to review the judicial officer's decision. Second, you can appeal the decision to a higher court.⁹⁷ For example, if you are granted release but you think the judicial officer imposed too many conditions on your release, you could ask for the judge to relax the conditions.

After the proper judge has reviewed the order allowing or denying bail, which was granted by the judicial officer, both you and the government have the right to appeal the judge's decision to a circuit court.⁹⁸ 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,⁹⁹ which means that the appellate court must have a "definite and firm conviction" that the lower court made a mistake in order to overturn the decision.¹⁰⁰ This 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 (after promising to appear for trial at a later date without being required to pay bail) 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.¹⁰¹ 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.¹⁰² 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 (such as a misdemeanor), the court must order recognizance or bail.¹⁰³ If the

97. 18 U.S.C. § 3145(a) (2012) (providing for review of a release order); 18 U.S.C. § 3145(b) (2006) (providing for review of a detention order).

98. 18 U.S.C. § 3145(c) (2012).

99. *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)).

100. 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)).

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

102. 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 (N.Y. 1979) (holding that when pertinent new evidence becomes available the trial court should reconsider their initial decision to grant or withhold bail).

103. 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.").

court releases you on your own recognizance, you will be released from custody with the understanding that you will later appear in court.¹⁰⁴ If the court sets 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. 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 (hold you in jail).¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ If a report on your past criminal behavior is unavailable, the district attorney may consent to recognizance or bail without it.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ Note that under New York's Bail statute, you may appeal your bail to the higher court only once.¹¹² A higher court will only overturn a lower court's bail decision if it was a "clear error," that is, it was a constitutional violation, a statutory violation, or an abuse of discretion.¹¹³ However, you may also petition the higher court for release through a "writ of *habeas corpus*" (a court order demanding an institution holding someone in custody to bring that person to court). You can petition for a writ of *habeas corpus* to be released on bail or recognizance if the state does not meet certain deadlines in bringing your case.¹¹⁴ 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 murder¹¹⁷ 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

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

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

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

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

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

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

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

110. N.Y. Crim. Proc. Law § 530.30(1)(b)–(c) (McKinney 2009).

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

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

113. 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 (N.Y. 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.”).

114. N.Y. Civ. Practice Law and Rules § 7002 (McKinney 2016).

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

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) If you have been charged with certain domestic violence crimes, your violation of any order of protection and your history of use or possession of a firearm;
- (8) The weight of evidence against you in the pending criminal action; and
- (9) 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 dangerous.¹²³

E. 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

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 and that 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, 678, 62 Misc. 2d 366, 373–74 (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").

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 statute 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

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 However, a court does not always have to consider each of these factors. Unless there is some delay that is “presumptively prejudicial”—that is, a delay that can be assumed 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 (that will be presumptively prejudicial) will depend on the particular circumstances of your 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

The federal government¹³⁵ 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 find 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*.

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 6th 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 (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).

135. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012).

2. The Federal Speedy Trial Act¹³⁶

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. As a result, 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 This means that, if you fail to file a motion for dismissal before trial or if you enter a plea of guilty or *nolo contendere* (no contest),¹⁴³ you will lose the right to have the charges dismissed under the statute.¹⁴⁴

It is important to note that, while similar, your rights under the Federal Speedy Trial Act are not the exact same thing as your rights to a speedy under the Sixth Amendment. So, 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.¹⁴⁵

(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

136. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012). 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) (2012). 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 the indictment will be extended by an additional 30 days.

138. 18 U.S.C. § 3161(c)(1) (2012).

139. 18 U.S.C. § 3161(c)(2) (2012).

140. 18 U.S.C. § 3162(a)(1) (2012). *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) (2012).

142. 18 U.S.C. § 3162(a)(2) (2012).

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) (2012). *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, 442–43 (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. § 3173 (2012) (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).

the offense; (2) the facts and circumstances that led to the dismissal, and (3) the effect of re-prosecution on the administration of the Speedy Trial Act and the administration of justice.¹⁴⁶

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” (meaning that the lower court failed to exercise basic, reasonable judgment) because the lower court did not state the reasons for its conclusion that the government’s conduct was careless.¹⁴⁷ The Court also stated that the lower court made an error when it failed to consider the fact that the brief delay did not result in harm to the defendant’s case and the fact that defendant’s own behavior (specifically, that he failed 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 state from prosecuting the defendant again.¹⁴⁸

Courts also tend to rule for dismissal without prejudice in cases where the offense charged is serious.¹⁴⁹

(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.¹⁵⁰ 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,¹⁵¹ which allows the clock to stop in certain circumstances. There are many of these “stop clock” provisions in the statute that exclude certain periods of time from the calculation of whether the indictment was filed in a timely manner and whether the trial was commenced (begun) on time.¹⁵² However, delay because of general business of the court, lack of diligent preparation, or failure to

146. 18 U.S.C. § 3162(a)(1) (2012). *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).

147. *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”).

148. *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).

149. *See* *United States v. Abdush-Shakur*, 465 F.3d 458, 464–70 (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).

150. 18 U.S.C. § 3162(a)(2) (2012).

151. 18 U.S.C. § 3162(a)(2) (2012).

152. 18 U.S.C. § 3161(h)(1)–(8) (2012). 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.

obtain witnesses on the part of the prosecution will not be excluded.¹⁵³ 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.

The Supreme Court has held that, when scheduling the trial, the prosecutor may not rely on the defendant’s promise not to raise a speedy trial claim.¹⁵⁴ 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.¹⁵⁵

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 clause in Article 6 of the New York Constitution.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 balancing factors 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’s speedy trial statute, the amount of time in which the state must bring you to trial depends on the type of offense you are charged with. 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

153. 18 U.S.C. § 3161(h)(7)(C) (2012).

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

155. *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”).

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).

If the state has violated the short period for the offense for your charge, 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 state 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 state 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, starting from the time the new charges are filed.

However, there is an important exception to these time calculation rules. When you are charged with a crime, the state files a charging document against you. Sometimes, the government replaces this charging document with a new document, often to correct mistakes or add missing information to the original document. If the government replaces your original charging document with a new charging document more than 90 days (for the short period) or more than six months (for the long period) after the filing of your original charges, **minus the time periods in the chart above**, the new charging document does not restart the clock. The government cannot buy itself more time this way. If this much time has passed between the filing of your original charging document and the new charging document, the date that matters for your speedy trial rights is the date your original charges were filed.¹⁶⁷

Like the federal Speedy Trial Act, the New York statute also says that certain periods of time before you are brought to trial are not included in calculating 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

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 re-detention 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 D(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. N.Y. Crim. Proc. Law § 30.30(1) (McKinney 2003 & Supp 2011). You may hear this dismissal date referred to as a 30.30 date.

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

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 E(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 that is 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).

limits do not apply if you are charged with criminally negligent homicide,¹⁷¹ first¹⁷² or second-degree¹⁷³ manslaughter, or first¹⁷⁴ or second-degree¹⁷⁵ 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 it is 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 counsel as to which procedure best fits your case.

F. 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 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 than a post-trial prisoner.

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 the conditions violate the Eighth Amendment's prohibition on "cruel and unusual punishment." Pretrial detainees cannot be punished at all because they have not been convicted. Punishing a pretrial detainee who has been convicted of no crime would violate the Due Process Clauses of the U.S. Constitution.¹⁸³

Generally, claims 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

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 Michigan." 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 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.").

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 the same. Pretrial detainees have at least the same rights under the Due Process Clauses of the Fifth or Fourteenth Amendments as convicted prisoners do under the Eighth Amendment. So, as a pretrial detainee, you may use cases that involve Eighth Amendment violations when arguing that your rights were violated. If you do so, you should point out that your argument is that your Fifth or Fourteenth Amendment rights were violated because what happened to you was bad enough that it would have violated the Eighth Amendment if you were a convicted prisoner.

The right to be not 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 also 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 to not be discriminated against on the basis of race under the Equal Protection Clause. A chapter that 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 U.S. Supreme Court has repeated that pretrial detainees are entitled to at least the same rights as those of convicted prisoners.¹⁸⁵ Some courts have found that pretrial detainees may enjoy greater rights than convicted prisoners.¹⁸⁶ However, most courts have found that the same standards apply to convicted and pretrial detainees.¹⁸⁷ These cases are discussed in more detail below.

The rest of Part F 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.

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.¹⁸⁸ Thus, under *Bell v. Wolfish*, you cannot be punished for the crime that you are

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."). Consistency with ending the quoted sentence with a period before the second period

186. *See Gibbons v. Washoe*, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002)

187. *See City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983).

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

accused of while you are a pretrial detainee.¹⁸⁹ Under *Wolfish*, therefore, the central question is whether the conditions that you are subject to constitute punishment.¹⁹⁰

(i) Intent to Punish

The most direct way to show that the conditions constitute punishment 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 the jury should have been allowed 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, their actions were constitutional; if their intent was to punish, then their actions violated the Due Process Clause of the Fourteenth Amendment.¹⁹¹

(ii) Not Related to Non-Punitive Government Goals

It is often difficult to prove the intent of a prison imposing a set of conditions. Without proof of intent, the conditions will be considered punishment if you can show that they are not reasonably related to a legitimate, non-punitive government goal. This involves answering two questions: (1) is the goal of the conditions legitimate and non-punitive (establishing what the goal is and whether it is a valid goal that is not meant to punish); and (2) are the conditions an excessive way to achieve that goal (establishing whether the conditions were proportional to the goal).¹⁹² 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. If the goal of the conditions is punitive (to punish) or otherwise not legitimate, then the conditions amount to punishment. Likewise, if the goal is legitimate but the conditions are an excessive way to achieve that goal, then the conditions amount to punishment.

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.¹⁹³ 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 jail officials' claims.¹⁹⁴ For example, if one prison official makes up a false charge against you, and then

189. *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 a 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.”).

190. *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.”).

191. *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.”).

192. *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. [not positive whether this period is needed here]”) (citations and internal quotation marks omitted).

193. *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.”).

194. *Bell v. Wolfish*, 441 U.S. 520, 538–39, 99 S. Ct. 1861, 1873–74, 60 L. Ed. 2d 447, 468–69 (1979) (the

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.¹⁹⁵

In examining whether the measures taken were excessive, the *Wolfish* court stated that courts should grant prison authorities “wide-ranging deference” for their judgments about what practices are needed to maintain order and security in a prison or detention facility.¹⁹⁶ This means that even if the prison’s methods for maintaining order and security are unpleasant for inmates, the court is unlikely to substitute its own judgment for that of the prison officials.¹⁹⁷ Overly harsh conditions and restrictions are, nevertheless, violations.¹⁹⁸ For example, where a detainee was kept in isolation lockup for nine months without any apparent reason, the court held that, on its face, such treatment “smacks of punishment.”¹⁹⁹ The court remanded the case to determine whether there was a legitimate reason to justify the lockup in the isolation wing.²⁰⁰

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.²⁰¹ Furthermore, “a severe curtailment” of pretrial detainees’ out of cell time may be evidence of punitive intent and constitute punishment,²⁰² 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].”²⁰³

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-

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).

195. *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”).

196. *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).

197. *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.”).

198. *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.”). I believe it is four spread out dots for blue book ellipsis instead of three close ones

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

200. *Covino v. Vt. Dept. of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991); *see 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).

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

202. *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).

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

bunking of pretrial detainees,²⁰⁴ random shakedown searches of detainees' cells,²⁰⁵ a "publishers-only" rule that prohibited detainees from receiving hardcover books unless they were mailed directly from the publisher,²⁰⁶ and routine body cavity searches after contact visits²⁰⁷ were all found to be reasonable 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 as a pretrial detainee if you break prison rules or if officials have a 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.²⁰⁸ Unfortunately, there is little guidance as to what distinguishes "discipline" from "punishment."²⁰⁹ 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,²¹⁰ having privileges removed,²¹¹ and being held in handcuffs or other restraining devices.²¹²

204. *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.)

205. *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).

206. *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).

207. *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* *United States v. Calhoun*, 2002 U.S. Dist. Lexis 23277, at *14 (D. Kan. Nov. 13, 2002) (stating that strip searches of people arrested on non-violent misdemeanors must be justified by a reasonable suspicion outside the confinement context).

208. *See Rapiere v. Harris*, 172 F.3d 999, 1003 (7th Cir. 1999) (noting that though a pretrial detainee cannot be punished for the underlying crime that he has been accused of committing, 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).

209. *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.").

210. *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).

211. *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").

212. *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").

Pretrial detainees, unlike convicted prisoners, are usually entitled to procedural protections when punishments or additional restraints are imposed upon them.²¹³ Therefore, when officials subject you to additional restraints (punishment) for violating 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,²¹⁴ while others have allowed the restrictions first, so long as they are followed up in a manner that satisfies due process.²¹⁵ The due process you are entitled to when restrained or punished for breaking prison rules is equivalent to that described in *Wolff v. McDonnell*,²¹⁶ which defines the due process rights of convicted prisoners at a prison disciplinary hearing.²¹⁷ 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.²¹⁸ 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.”²¹⁹ Others have described them as “basic necessities”²²⁰ or “basic human needs.”²²¹ It remains unclear whether pretrial detainees have a right to higher standards than convicted prisoners have.²²²

(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

213. 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.

214. 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.”).

215. See *Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001). (upholding the district court holding that detainees placed in high security or restraint status should “reasonably promptly” receive due process hearings after being placed on that status).

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

217. *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); see 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).

218. *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001); see 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).

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

220. 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”).

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

222. See section 2(c)–(e) of this Chapter.

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 discussed in those chapters. Instead, this chapter will focus 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 pretrial detainees who have not been convicted because 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.”²²³ 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,” which is the standard a convicted prisoner must show to demonstrate an Eighth Amendment violation, the rights of a pretrial detainee may nevertheless be violated.²²⁴

However, like most of the cases that suggested the possibility of a higher standard for pretrial detainees than for convicted prisoners, *City of Revere* did not fully explain the different standards that should apply to pretrial detainees. Instead, it found that, in that particular case, the state had fulfilled its obligation by taking the injured detainee to the hospital promptly after he was caught by the police.²²⁵ 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 than a convicted prisoner, according to the cases cited in the footnotes of this paragraph.

(c) Courts’ Retreat from Greater Protection for Detainees

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.²²⁶ Some lower courts have considered the possibility that there is a higher standard for

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).

224. *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).

225. *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). 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 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, 669 (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 allow the prisoner to sue 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. Pretrial detainees are, at a very minimum, entitled to not be treated with deliberate indifference.

226. See *Daniels v. Williams*, 474 U.S. 327, 334, 106 S. Ct. 662, 666, 88 L. Ed. 2d 662, 670 n.3 (1986) (declining to decide whether a standard between negligence and intentional conduct violates the due process clause); *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 be enough to establish a deprivation in violation of due process of a pretrial detainee’s right to medical care); see also *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006) (describing Supreme Court decisions as “not resolving the issue” of the difference between the Substantive Due Process protections available to pretrial detainees and the Eighth Amendment protections provided convicted prisoners in the context of the standard applicable to claims concerning medical care and protection from harm).

pretrial detainees than for convicted prisoners.²²⁷ However, most of the federal circuits have abandoned trying to describe this difference²²⁸ 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.²²⁹

3. The Right Not to be Subjected to Excessive Force

As a pretrial detainee, you have a Fifth or Fourteenth Amendment right to be free from an officer using excessive (too much) force against you. In *Graham v. Connor*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from excessive force.²³⁰ At a minimum, this protects pretrial detainees from “force that amounts to punishment.”²³¹ Convicted prisoners also have a right to be free from excessive physical force. For convicted prisoners, that right stems from the Eighth Amendment prohibition on cruel and unusual punishment. For pretrial detainees, a court will analyze an excessive force claim differently depending on the constitutional right allegedly violated, which depends on which stage you are at in the criminal proceedings.²³²

227. For a description of a split in the circuit courts on the issue of whether the Fourteenth Amendment standard applicable to pretrial detainees differs from the Eighth 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 Eighth 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.

228. *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”).

229. *See, e.g.,* *Castro v. County of Los Angeles*, 797 F.3d 654, 664 (9th Cir. 2015) (affirming that “the ‘deliberate indifference’ test is the same for pretrial detainees and for convicted prisoners” despite the different constitutional sources of failure-to-protect claims in each context); *Caiozzo v. Koreman*, 581 F.3d 63, 71–2 (2d Cir. 2009) (discussing the general consensus between circuits and affirming its own position that “[c]laims for deliberate indifference to a serious medical condition or other serious threat to the health or safety of a person in custody should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment”); *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); *Butler v. Fletcher*, 465 F.3d 340, 344–45 (8th Cir. 2006) (holding that “deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety”). Often courts retain the language that pretrial detainees are *at least* afforded the Eighth 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); *see also* *Hare v. City of Corinth*, 74 F.3d 633, 643 (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 eighth amendment for convicted persons.”).

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. The Supreme Court discussed the three separate constitutional provisions governing claims of excessive force in *Graham v. Connor*. The Fourth Amendment “guarantees citizens the right ‘to be secure in their persons ... against unreasonable ... seizures’ of the person” and protects against claims of excessive force that arise “in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen.” U.S. Const. amend. IV; *Graham v. Connor*, 490 U.S. 386, 394–95, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 454 (1989) (noting that some

If you wish to make a claim that an officer has treated you with excessive force, there are two factors that courts consider: 1) the official's state of mind during the incident, and 2) the 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.

In *Kingsley v. Hendrickson*, the Court held that excessive force claims brought by pretrial detainees under the Fourteenth Amendment should be analyzed using an "objective" (rather than subjective) standard of review.²³³ This objective standard is easier to meet than the "less protective"²³⁴ Eighth Amendment standard that protects convicted prisoners. When courts apply an objective standard, they are deciding whether an officer's behavior was reasonable under the circumstances. This standard is friendlier than the standard for convicted prisoners. Unlike a convicted prisoner, a pretrial detainee does not need to show that the official wanted to cause suffering or even punish the pretrial detainee.²³⁵ Instead, the pretrial detainee must show that the force was "objectively unreasonable."²³⁶ This means that the use of force was not related to a legitimate prison purpose, such as safety, or that it was excessive in relation to that purpose. In order to determine whether the force was "objectively unreasonable," a court will consider factors including: "the relationship between the need for the use of force and the amount of force used," the extent of the pretrial detainee's injury, whether the officer tried to "limit the amount of force" he used, the security issue that prompted him to use force, the threat that the officer may have perceived, and whether the pretrial detainee was "actively resisting."²³⁷

It is important to note that a pretrial detainee still must show that an official used force intentionally or knowingly (or possibly recklessly).²³⁸ Reckless behavior is behavior that a reasonable person should know is dangerous or likely to cause harm. Officers acting recklessly do not need to be actually aware that their behavior is dangerous. This means that a pretrial detainee cannot win an

factors for determining whether excessive force under the Fourth 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 Eighth 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"). The Supreme Court in *Graham* also affirmed that the Due Process Clause of the Fourteenth Amendment "protects a pretrial detainee from the use of excessive force that amounts to punishment" but expressly declined to specify the standard of review applicable to claims brought by pretrial detainees. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 n. 10 (1989). It was not until 2015 in *Kingsley v. Hendrickson* that, "in light of disagreement among the Circuits," the Court finally ruled on "whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy [a] subjective standard or only [an] objective standard." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2471–72, 192 L. Ed. 2d 416, 425 (2015).

233. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73, 192 L. Ed. 2d 416, 425 (2015).

234. *Graham v. Connor*, 490 U.S. 386, 398, 109 S. Ct. 1865, 1873, 104 L. Ed. 2d 443, 457 (1989).

235. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473–74, 192 L. Ed. 2d 416 (2015) (citing *Bell v. Wolfish*, 441 U.S. 520, 540, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447, 465 (1979)).

236. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015).

237. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015).

238. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73, 192 L. Ed. 2d 416, 425 (2015). The Court explained the "legally requisite state of mind" under the objective standard as follows: "In a case like this one, there are, in a sense, two separate state-of-mind questions. The first concerns the defendant's state of mind with respect to his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.' [...] [A]s to the series of events that have taken place in the world, the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind. [...] Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. [...] In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' [...] we hold that courts must use an objective standard."

excessive force claim against an officer who used force accidentally (such as an officer who trips and falls on a pretrial detainee).²³⁹

A court's determination of the reasonableness or unreasonableness of a use of force will turn on the particular facts of each case.²⁴⁰ As a general rule, if you are a pretrial detainee and you can show that you were treated with excessive force that amounts to punishment, then you can establish that your due process rights have been violated. For example, where a pretrial detainee was assaulted by an officer who caught him while he was trying to escape, the court held that if the officer's purpose was to punish, injure, or discipline the inmate, then it was illegal punishment.²⁴¹

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 C 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.²⁴²

Pretrial detainees may have a greater right of access to counsel than convicted prisoners. The Supreme Court in *Maine v. Moulton* recognized that the right to counsel is especially important during the period before trial.²⁴³ *Moulton* did not involve a pretrial detainee,²⁴⁴ 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.²⁴⁵ 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."²⁴⁶

Prison regulations that make it difficult for your attorney to meet and communicate with you may violate your Sixth Amendment right to counsel. Regulations and conditions found to interfere with this right include limits on detainees' telephone conversations with attorneys,²⁴⁷ inadequate privacy

239. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416 (2015).

240. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015) (citing *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443, 455 (1989) (providing the following list of non-exclusive factors for courts to consider in determining whether a use of force was objectively unreasonable: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting").

241. *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").

242. 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.

243. *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.").

244. *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).

245. 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).

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

247. See *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

during such telephone discussions,²⁴⁸ inadequate or inadequately private space in which to meet with your attorneys,²⁴⁹ and prison regulations that create substantial and unpredictable delays when your attorneys come to meet with you.²⁵⁰ 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.²⁵¹

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.²⁵² In particular, under *Faretta v. California*,²⁵³ prisoners who wish to proceed “*pro se*” (advocating for yourself before the court) may have a right to a law library. However, not every circuit recognizes that right.²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ But, in *Benjamin v. Fraser*, the Second Circuit said that the right of access to the courts is different from the right to counsel for pre-trial detainees. The Second Circuit said that, if you assert

attempt at a 20-minute phone call with attorneys during office hours every other week).

248. See *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–53 (8th Cir. 1989) (finding inadequate privacy where phones were brought to a noisy public space and conversations could be overheard by guards and other prisoners).

249. 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).

250. See *Benjamin v. Fraser*, 264 F.3d 175, 179 (finding a Sixth 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 certain detainees not be moved to counsel rooms without escorts, and a rule prohibiting inmates from being brought to counsel rooms during inmate counts).

251. See *Covino v. Vt. Dept. of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) (*per curiam*) (remanded to determine whether detainee's transfer to a more distant jail impaired his Sixth Amendment right to counsel); see 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).

252. See, e.g., *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 marks and citation omitted). *But see* *United States v. Smith*, 907 F.2d 42, 45 (6th Cir. 1990) (finding that “by knowingly and intelligently waiving his right to counsel, [a pretrial detainee] also relinquished his access to a law library.”); *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 offered, no constitutional right to access a law library exists, and noting that “[t]he Supreme Court, in requiring meaningful access to the courts, has been careful to note that providing access to law libraries is but one of a number of constitutionally permissible means of achieving that objective. [...] When such adequate access is provided, as was here, an inmate may not reject the method provided and insist on an avenue of his or her choosing.”).

253. See *Faretta v. California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 2533–34, 45 L. Ed. 2d 562, 572–73 (1975) (upholding the right to self-representation and implying other defense tools may be guaranteed by the Sixth Amendment).

254. 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).

255. *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).

256. *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606, 616 (1996).

that there were barriers to accessing your counsel, in violation of the Sixth Amendment, then you do not need to show that your case was actually harmed by these barriers.²⁵⁷

5. Voting Rights

You still have the right to vote as a pretrial detainee.²⁵⁸ If you have not been convicted, denial of the right to vote violates your rights under the Equal Protection Clause of the Fourteenth Amendment. However, court decisions in this area are confusing about *how* you can actually vote.

In *McDonald v. Board of Election Commissioners*, the Supreme Court held that a law that prevented un-sentenced prisoners who could not get out on bail from obtaining absentee ballots (mail-in ballots) did not violate the Equal Protection Clause of the Constitution.²⁵⁹ The Court reasoned that, although the pretrial detainees were denied the ability to vote by absentee ballot, there had been no showing that the state had, in fact, precluded them from voting by, for instance, failing to provide other means of access to the polls for pretrial detainees.²⁶⁰

It appears that a better case can be made when a detainee argues that a number of possible ways to vote were also unavailable. In *Goosby v. Osser*, pretrial detainees claimed that they were kept from voting because they weren't allowed to take advantage of either way prisoners could have voted from their prison: (1) a state statute made it illegal for them to vote by absentee ballot, and (2) election officials had denied their requests to vote in person or by proxy at public polling places, at special prison polling places, or by any other means.²⁶¹ The Supreme Court suggested that the circumstances of this case might add up to a violation of the prisoners' voting rights, but the court decided not to rule on the case for other reasons.²⁶² So if you are going to make a claim that your voting rights have been violated, you should try to show that you have asked your prison or local election officials for alternative ways to vote and that they refused you.

In *O'Brien v. Skinner*, the Court considered another case involving pretrial detainees' access to absentee ballots.²⁶³ An absentee ballot is a ballot that allows you to vote through the mail. State officials had refused requests from pretrial detainees who were being confined in their home counties to vote under state absentee voting statutes, which provided that qualified voters were allowed to vote by absentee ballot if they could not physically get to a polling place on election day to vote.²⁶⁴ As a result, pretrial detainees confined in their home counties were denied the use of absentee ballots and any alternative means of voting, while detainees similarly confined but outside their home counties were able to access absentee voting.²⁶⁵ The New York Court of Appeals (the highest court in the State) had held that the detainees were not entitled to absentee rights within the meaning of the statutes, and that the state's failure to provide for absentee rights or other alternative means of voting did not violate their constitutional rights.²⁶⁶ On appeal, the U.S. Supreme Court reversed, ruling that the

257. *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).

258. *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).

259. *McDonald v. Board of Elections Comm'rs*, 394 U.S. 802, 809–810, 89 S. Ct. 1404, 1409, 22 L. Ed. 2d 739, 746 (1969).

260. *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).

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

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

263. *O'Brien v. Skinner*, 414 U.S. 524, 94 S. Ct. 740, 38 L. Ed. 2d 702 (1974).

264. *O'Brien v. Skinner*, 414 U.S. 524, 525–27, 94 S. Ct. 740, 741–2, 38 L. Ed. 2d 702, 705–06 (1974).

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

266. *O'Brien v. Skinner*, 414 U.S. 524, 532, 94 S. Ct. 740, 744, 38 L. Ed. 2d 702, 709 n.1 (1974) (Marshall,

statutes as constructed discriminated against pretrial detainees in an arbitrary manner and restricted their exercise of the voting right so severely as to constitute an “unconstitutionally onerous burden” in violation of the Fourteenth Amendment’s Equal Protection Clause.²⁶⁷

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.

G. 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.

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).

267. 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 (West, Westlaw through 2015 Sess.).

Missouri

Ann. Mo. Stat.. § 545.780 (Vernon, Westlaw through 2015 Sess.).

Montana

Mont. Code Ann. § 46-1-506 (West, Westlaw through 2015 Sess.)

Nebraska

Rev. Stat. of Neb. § 29-1207 (West, Westlaw through 2015 Sess.).

Nevada

Nev. Rev. Stat. Ann. § 178.556 (West, Westlaw through 2015 Sess.).

New Hampshire

N.H. Super. Ct. R. App. Policy Speedy Trial (Westlaw through 11/5/2015).

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 York²⁶⁸

N.Y. Crim. Proc. Law §§ 30.10 (McKinney, Westlaw through 2015).

North Carolina

Gen. Stat. N.C. Ann. § 15-10 (West, Westlaw through 2015).

North Dakota

N.D. Cent. Code Ann. § 29-19-02 (West, Westlaw through 2015).

Ohio

Ohio Rev. Code Ann. § 2945.71 (Baldwin, Westlaw through 2015).

Oklahoma

Okla. Stat. Ann. Tit. 22, § 812.1 (Westlaw through 2015 Legis. Sess.).

Oregon

Or. Rev. Stat. Ann. § 135.746 (West through 2016).

Pennsylvania

Pa. R. Crim. Proc. (State) 600 (Purdon, Westlaw through 2015).

Rhode Island

R.I. Gen. Laws § 12-13-7 (West, Westlaw through 2015 Sess.).

South Carolina

None

South Dakota

S.D. Codified Laws § 23A-44-5.1 (Westlaw through 2015 Sess.).

Tennessee

Tenn. Code Ann. § 40-14-101 (West, Westlaw through 2015 Sess.).

Texas

Tex. Stat. Ann.: Crim. Proc. Art. 32.01 (Vernon, Westlaw through 2015 Sess.).

Utah

Utah Code Ann. § 77-1-6 (West, Westlaw through 2015 Sess.).

Vermont

Vt. Stat. Ann. Tit. 13, § 7553b (West, Westlaw through 2015 portion of 2015-2016 Legis. Sess.).

Virginia

Code of Va. Ann. § 19.2-243 (West, Westlaw through 2015 Sess.).

Washington

Wash. CrR. Ann. 3.3 (West, Westlaw through 11/1/15).

West Virginia

W. Va. Code Ann. § 62-3-21 (West, Westlaw through 2015 Sess.).

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

Wisconsin

Wis. Stat. Ann. § 971.10 (West, Westlaw through 2015 Act 60).

Wyoming

Wyo. R. Cr. P. Rule 48 (Lexis 2011)