

“Criminal Evidence”.

- In Section 1 of this course you will cover these topics:
- Fundamentals Of Criminal Evidence
- The Criminal Trial Process
- Pleadings, Motions, Sentencing And Appeals

Topic : Fundamentals Of Criminal Evidence

Topic Objective:

After studying this topic the student should be able to:

- Define Evidence
- Explain Types of Evidence
- Discuss Burden of proof
- Distinguish Problems in evidence
- Define Evidence in science
- Explain techniques of Gathering evidence
- Discuss Evidence in law

Definition/Overview:

Direct Evidence: Evidence that proves a fact without the necessity of an inference or a presumption, and, when true, conclusively establishes that fact

Circumstantial Evidence: Involves a series of facts that, although not the fact at issue, tends, through inference, to prove a fact at issue. This type of evidence is usually a set of circumstances from which an assumption can be made

Testimonial Evidence: is the Evidence given by a lay person or expert witness. The main issue for this type of evidence is credibility

Physical Evidence: is the Physical objects that are linked to the commission of a crime, it can be any type of physical object. To be of any value it must be recognized as potential evidence, collected in an appropriate manner, and preserved properly

Individual Characteristics of Physical Evidence: Individual characteristics of an object when unique to only one member of a class allows for the identification of the individual source of the evidence item. This is called individualization. Latent fingerprints are an example of individualized physical evidence

Exemplar: The term used to describe either a sample of the comparison standard that is collected or prepared from the comparison standard for the purposes of comparison with the questioned item. It must be a true representation of the known sample to be useful in the comparison process

Controls: Those items tested simultaneously with the questioned item to reveal any problems associated with the integrity of the evidence item or testing procedure

Key Points:**1. Evidence**

Evidence in its broadest sense includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things that are either a) presumed to be true, or b) were themselves proven via evidence, to demonstrate an assertion's truth. Evidence is the currency by which one fulfills the burden of proof.

There are many issues that surround evidence, making it the subject of much discussion and disagreement. In addition to its subtle nature, evidence plays an important role in many academic disciplines, including science and law, adding to the discourse surrounding it.

An important distinction in the field of evidence is that between circumstantial evidence and direct evidence, or evidence that suggests truth as opposed to evidence that directly proves truth. Many have seen this line to be less-than-clear and significant arguments have arisen over the difference.

2. Types of Evidence

- Direct
- Circumstantial
- Testimonial
- Physical

3. Burden of proof

The burden of proof is the burden of providing sufficient evidence to shift a conclusion from an oppositional opinion. Whoever does not carry the burden of proof carries the benefit of assumption. Whoever bears the burden of proof must present sufficient evidence to move the conclusion to their own position. The burden of proof must be fulfilled both by establishing positive evidence and negating oppositional evidence.

There are two primary burden-of-proof considerations:

- The question of on whom the burden rests.

- The question of the degree of certitude the proof must support. This depends on both the quantity and quality of evidence and the nature of the point under contention.

Some common degrees of certitude include the most probable event, reasonable doubt, and beyond the shadow of a doubt.

Conclusions (from evidence) may be subject to criticism from a perceived failure to fulfill the burden of proof.

4. Problems in evidence

The theory of evidence is a field wrought with dispute. Many of these disputes stem from the limits of human knowing, a field known as epistemology. Possibly the most salient question of evidence is how, if, and what, one can know. (Or, in other words, the question is to what extent is it even possible to fulfill the burden of proof.) This is the question of evidence's limits. Some believe all evidence to be circumstantial, denying the possibility of direct evidence.

To help deal with this problem, many fields have found it useful to talk about levels of evidence and certainty, particularly the field of law.

5. Evidence in science

In scientific research evidence is accumulated through observations of phenomena that occur in the natural world, or which are created as experiments in a laboratory. Scientific evidence usually goes towards supporting or rejecting a hypothesis.

One must always remember that the burden of proof is on the person making the claim. Within science, this translates to the burden resting on presenters of a paper, in which the presenters argue for their specific findings. This paper is placed before a panel of judges where the presenter must defend the thesis against all challenges.

When evidence is contradictory to predicted expectations, the evidence and the ways of making it are often closely scrutinized and only at the end of this process the hypothesis is rejected: this can be referred to as 'refutation of the hypothesis'. The rules for evidence used by science are collected systematically in an attempt to avoid the bias inherent to anecdotal evidence: nonetheless even anecdotal evidence is enough to reject a theory incompatible with that evidence, if there are sufficient repeated examples.

6. Evidence in law

Many might say evidence forms the very foundation of any legal system, without which law would be subject to the whims of those with power.

In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lies. There are two primary burden-of-proof considerations in law. The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution. The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases, the former requiring evidence beyond a reasonable doubt, the later considering only what most likely happened. The decision maker, often a jury, but sometimes a judge, decides whether the burden of proof has been fulfilled.

After deciding who will carry the burden of proof, evidence is first gathered and then presented before the court:

7. Gathering evidence

In criminal investigation, rather than attempting to prove an abstract or hypothetical point, the evidence gatherers attempt to determine who is responsible for a criminal act. The focus of criminal evidence is to connect physical evidence and reports of witnesses to a specific person. While this is supposedly a non-biased act, detectives sometimes have agendas of their own.

8. Evidence before the court

Presenting evidence before the court differs from the gathering of evidence in important ways. Gathering evidence may take many forms; presenting evidence that tend to prove or disprove the point at issue is strictly governed by rules. Failure to follow these rules leads to any number of consequences. In law, certain policies allow (or require) evidence to be excluded from consideration based either on indicia relating to reliability, or broader social concerns. Testimony (which tells) and exhibits (which show) are the two main categories of evidence presented at a trial or hearing. In federal court, evidence is admitted or excluded under the Federal Rules of Evidence.

Topic : The Criminal Trial Process**Topic Objective:**

After studying this topic the student should be able to:

- Distinguish Between Civil Law And Common Law Systems
- Define Basic rights
- Discuss the Difference in criminal and civil procedures
- Define the Types of trial divided by the finder of fact
- Define Types of trial divided by the type of dispute
- Discuss Mistrials

Definition/Overview:

Allen charge: A judge's instruction to jurors who are deadlocked, encouraging them to listen to one another's arguments and reappraise their own positions in an effort to arrive at a verdict.

Attorney-client privilege: The right of a person (client) not to testify about matters discussed in confidence with an attorney in the course of the attorney's representation.

Bench trial: A trial held before a judge without a jury present.

Best evidence: Primary evidence used to prove a fact-usually an original written document that evidences a communication or transaction.

Challenge for cause: Objection to a prospective juror on some specified ground (for example, a close relationship to a party in the case).

Child shield statutes: Laws that allow a screen to be placed between a child victim of sexual abuse and a defendant while the child testifies in court.

Circumstantial evidence: Indirect evidence from which the existence of certain facts may be inferred.

Clergy-penitent privilege: The exemption of a clergy-person and a penitent from disclosing communications made in confidence by the penitent.

Closing arguments: Arguments presented at trial by counsel at the conclusion of the presentation of evidence.

Competent to testify: A person who has the legal capacity to offer evidence under oath in court.

Deadlocked jury: A jury where the jurors cannot agree on a verdict.

Death qualification of a jury: In a death penalty case, the process by which potential jurors are removed if they have scruples against the imposition of the death penalty.

Direct evidence: Evidence that applies directly to proof of a fact or proposition.

Directed verdict: A verdict rendered by a jury by direction of the presiding judge.

Dna testing: Laboratory tests that compare DNA molecules extracted from a suspect's specimen with DNA molecules extracted from specimens found at a crime scene to determine whether the samples match.

Evidentiary presumption: Establishment of one fact allows inference of another fact or circumstance.

Eyewitness testimony: Testimony given by a person based on personal observation of an event.

Forensic experts: Persons qualified in the application of scientific knowledge to legal principles, usually applied to those who participate in discourse or who testify in court.

Foreperson: The person selected by fellow jurors to chair deliberations and report the jury's verdict.

Gender-based peremptory challenges: A challenge to a prospective juror's competency to serve based solely on the prospective juror's gender.

General acceptance test: Also known as the Frye test, this test is used by many state courts to determine whether to admit expert testimony in scientific matters.

General objection: An objection raised against a witness's testimony or introduction of evidence when the objecting party does not recite a specific ground for the objection.

Hearsay evidence: Statements made by someone other than a witness offered in evidence at a trial or hearing to prove the truth of the matter asserted.

Hypnotically enhanced testimony: Testimony offered by a witness whose memory has been refreshed through hypnosis.

Hypothetical question: A question based on an assumed set of facts.

Indirect evidence: Inferences and presumptions that are probative of various facts in issue.

Judgment of acquittal: In a nonjury trial, a judge's order exonerating a defendant based on a finding that the defendant is not guilty.

Judicial notice: The act of a court recognizing, without proof, the existence of certain facts that are commonly known. Such facts are often brought to the court's attention through the use of a calendar or almanac.

Jury instructions: A judge's explanation of the law applicable to a case being heard by a jury.

Jury nullification: The fact of a jury disregarding the court's instructions and rendering a verdict on the basis of the consciences of the jurors.

Jury pardon: An action taken by a jury, despite the quality of the evidence, acquitting a defendant or convicting the defendant of a lesser crime than charged.

Jury trial: A judicial proceeding to determine a defendant's guilt or innocence conducted before a body of people sworn to render a verdict based on the law and the evidence presented.

Leading questions: A question that suggests an answer.

Marital privilege: The privilege of married persons not to be compelled to testify against each other.

Motion for a new trial: A formal request made to a trial court to hold a new trial in a particular case that has already been adjudicated.

Open public trial: A trial that is held in public and is open to spectators.

Opening statement: A prosecutor's or defense lawyer's initial statement to the judge or jury in a trial.

Opinion evidence: Testimony in which the witness expresses an opinion, as distinct from knowledge of specific facts.

Peremptory challenge: An objection to the selection of a prospective juror in which the attorney making the challenge is not required to state the reason for the objection.

Polling the jury: Practice in which trial judge asks each member of the jury whether he or she supports the jury's verdict.

Polygraph evidence: Results of lie detector tests (generally inadmissible into evidence).

Power of contempt: The authority of a court of law to punish someone who insults the court or flouts its authority.

Privileges: Rights extended to persons by virtue of law-for example, the right accorded a spouse in not being required to testify against the other spouse.

Proof beyond a reasonable doubt: The standard of proof in a criminal trial or a juvenile delinquency hearing.

Putting witnesses under the rule: Placing witnesses under the traditional rule that requires them to remain outside the courtroom except when testifying.

Racially based peremptory challenges: Peremptory challenges to prospective jurors that are based solely on racial animus or racial stereotypes.

Real evidence: Refers to maps, blood samples, X-rays, photographs, stolen goods, fingerprints, knives, guns, and other tangible items introduced into evidence.

Rebuttal witnesses: Witnesses called to dispute the testimony of the opposing party's witnesses.

Right of confrontation: The right to face one's accusers in a criminal case.

Right of cross-examination: The right to question witnesses for the opposing side in a criminal trial.

Scientific evidence: Evidence obtained through scientific and technological innovations.

Sequestration: Holding jurors incommunicado during trial and deliberations.

Similar fact evidence: Refers to evidence of facts similar to the facts in the crime charged.

Specific objection: Counsel's objection to a question posed to a witness by opposing trial counsel where a specific reason is given for the objection—for example, that the question calls for hearsay evidence.

Standby counsel: An attorney appointed to assist an indigent defendant who elects to represent himself or herself at trial.

Testimonial evidence: Evidence received by a court from witnesses who have testified under oath.

Venire: The group of citizens from whom a jury is chosen in a given case.

Verdict: The formal decision rendered by a jury in a civil or criminal trial.

Voir dire: "To speak the truth." The process by which prospective jurors are questioned by counsel and/or the court before being selected to serve on a jury.

Key Points:

1. Differences Between Civil Law And Common Law Systems

- The majority of civil law jurisdictions follow an inquisitorial system of adjudication, in which judges undertake an active investigation of the claims by examining the evidence and preparing reports.
- In common law systems, the trial judge, the investigators, and the prosecution are separate functions. After an investigation has been completed and charges lodged, the trial judge presides over proceedings grounded in the adversarial system of dispute resolution, where both the

prosecution and the defense prepare arguments to be presented before the court. Some civil law systems have adopted adversarial procedures.

Proponents of either system tend to consider that their system defends best the rights of the innocent. There is a tendency in common law countries to believe that civil law / inquisitorial systems do not have the so-called "presumption of innocence", and do not provide the defense with adequate rights. Conversely, there is a tendency in countries with an inquisitorial system to believe that accusatorial proceedings unduly favor rich defendants who can afford large legal teams, and are very harsh on poorer defendants.

2. Basic rights

Currently, in many countries with a democratic system and the rule of law, criminal procedure puts the burden of proof on the prosecution that is, it is up to the prosecution to prove that the defendant is guilty, as opposed to having the defense prove that s/he is innocent, and any doubt is resolved in favor of the defendant. This provision, known as the presumption of innocence, is required, for example, in the 46 countries that are members of the Council of Europe, under Article 6 of the European Convention on Human Rights, and it is included in other human rights documents. However, in practice it operates somewhat differently in different countries.

Similarly, all such jurisdictions allow the defendant the right to legal counsel and provide any defendant who cannot afford their own lawyer with a lawyer paid for at the public expense (which is in some countries called a "court-appointed lawyer"). Again, the efficiency of this system depends greatly on the jurisdictions. In some jurisdictions, the lawyers provided to indigent defendants are often overworked or less competent, or may not take much interest in the cases they have to defend.

3. Difference in criminal and civil procedures

Most countries make a rather clear distinction between civil and criminal procedures. For example, an English criminal court may force a defendant to pay a fine as punishment for his crime, and he may sometimes have to pay the legal costs of the prosecution. But the victim of the

crime pursues his claim for compensation in a civil, not a criminal, action. In France, Italy, and many countries besides, the victim of a crime (known as the "injured party") may be awarded damages by a criminal court judge.

The standards of proof are higher in a criminal action than in a civil one since the loser risks not only financial penalties but also being sent to prison (or, in some countries, executed). In English law the prosecution must prove the guilt of a criminal beyond reasonable doubt; but the plaintiff in a civil action is required to prove his case on the balance of probabilities. Thus, in a criminal case a crime cannot be proven if the person or persons judging it doubt the guilt of the suspect and have a reason (not just a feeling or intuition) for this doubt. But in a civil case, the court will weigh all the evidence and decide what is most probable.

Criminal and civil procedure are different. Although some systems, including the English, allow a private citizen to bring a criminal prosecution against another citizen, criminal actions are nearly always started by the state. Civil actions, on the other hand, are usually started by individuals.

In Anglo-American law, the party bringing a criminal action (that is, in most cases, the state) is called the prosecution, but the party bringing a civil action is the plaintiff. In both kinds of action the other party is known as the defendant. A criminal case against a person called Ms. Sanchez would be described as *The People vs. (=versus, or against) Sanchez* in the United States and *R. (Regina, that is, the Queen) vs. Sanchez* in England. But a civil action between Ms. Sanchez and a Mr. Smith would be *Sanchez vs. Smith* if it was started by Sanchez, and *Smith vs. Sanchez* if it was started by Mr. Smith.

Evidence from a criminal trial is not necessarily admissible as evidence in a civil action about the same matter. For example, the victim of a road accident does not directly benefit if the driver who injured him is found guilty of the crime of careless driving. He still has to prove his case in a civil action. In fact he may be able to prove his civil case even when the driver is found not guilty in the criminal trial.

Once the plaintiff has shown that the defendant is liable, the main argument in a civil court is about the amount of money, or damages, which the defendant should pay to the plaintiff.

4. Types of trial divided by the finder of fact

- Where the trial is held before a group of members of the community, it is called a jury trial.
 - Where the trial is held solely before a judge, it is called a bench trial. Bench trials involve fewer formalities, and are typically resolved faster. Furthermore, a favorable ruling for one party in a bench trial will frequently lead the other party to offer a settlement.
- Hearings before administrative bodies may have many of the features of a trial before a court, but are typically not referred to as trials.

An appellate proceeding is also generally not deemed a trial, because such proceedings are usually restricted to review of the evidence presented before the trial court, and do not permit the introduction of new evidence.

5. Types of trial divided by the type of dispute

Trials can also be divided by the type of dispute at issue.

- **Criminal trial**

A criminal trial is designed to resolve accusations brought by the government against a person accused of a crime. In common law systems, most criminal defendants are entitled to a trial held before a jury. Because the state is attempting to use its power to deprive the accused of life, liberty, or property, criminal defendants are afforded greater leeway to defend themselves than parties to a civil suit.
- **Civil trial**

A civil trial is generally held to settle a dispute between private parties, (although the government can both sue and be sued in a civil capacity, in some countries).

- **Administrative hearing and trial**

Although administrative hearings are not ordinarily considered trials, they retain many elements found in more "formal" trial settings. When the dispute goes to judicial setting, it is called an administrative trial, to review the administrative hearing, depending on the jurisdiction. The types of disputes handled in these hearings is governed by administrative law and auxiliarily by the civil trial law

6. Trial

There are two primary systems for conducting a trial:

- **Adversarial:** In common law systems, an adversarial or accusatory approach is used to adjudicate guilt or innocence. The assumption is that the truth is more likely to emerge from the open contest between the prosecution and the defense in presenting the evidence and opposing legal arguments with a judge acting as a neutral referee and as the arbiter of the law. In several jurisdictions in more serious cases, there is a jury to determine the facts. although some common law jurisdictions have abolished the jury trial. This polarizes the issues, with each competitor acting in its own self-interest, and so presenting the facts and interpretations of the law in a deliberately biased way. The intention is that through a process of argument and counter-argument, examination-in-chief and cross-examination, each side will test the truthfulness, relevancy, and sufficiency of the opponent's evidence and arguments. To maintain fairness, there is a presumption of innocence, and the burden of proof lies on the prosecution. Critics of the system argue that the desire to win is more important than the search for truth. Further, the results are likely to be affected by structural inequalities. Those defendants with resources can afford to hire the best lawyers.
- **Inquisitorial:** In civil law legal systems, the responsibility for supervising the investigation by the police into whether a crime has been committed falls on an examining magistrate or judge who then conducts the trial. The assumption is that the truth is more likely to emerge from an impartial and exhaustive investigation both before and during the trial itself. The examining magistrate or judge acts as an inquisitor who directs the fact-gathering process by questioning witnesses, interrogating the suspect, and collecting other evidence. The lawyers who represent

the interests of the State and the accused have a limited role to offer legal arguments and alternative interpretations to the facts that emerge during the process. All the interested parties are expected to co-operate in the investigation by answering the magistrate or judge's questions and, when asked, supplying all relevant evidence. The trial only takes place after all the evidence has been collected and the investigation is completed. Thus, most of the factual uncertainties will already be resolved, and the examining magistrate or judge will already have resolved that there is prima facie of guilt. The trial is no more than the public resolution of the ongoing investigation where the accused has the burden of rebutting the presumption of guilt. Critics argue that the examining magistrate or judge has too much power in that he or she will both investigate and adjudicate on the merits of the case. Although lay assessors do sit as a form of jury to offer advice to the magistrate or judge at the conclusion of the trial, their role is subordinate. Further, because a professional has been in charge of all aspects of the case to the conclusion of the trial, there are fewer opportunities to appeal the conviction alleging some procedural error. The first signs of trial date back the early 18th century, please also see Hanging

7. Mistrials

A judge may cancel a trial prior to the return of a verdict; legal parlance designates this as a mistrial. A judge may declare a mistrial due to:

- The court determining that it lacks jurisdiction over a case,
- Evidence being admitted improperly,
- Misconduct by a party, juror, or an outside actor, if it prevents due process,
- A hung jury which cannot reach a verdict with the required degree of unanimity
- Disqualification of a juror after the jury is impanelled, if no alternate juror is available and the litigants do not agree to proceed with the remaining jurors.

A declaration of a mistrial generally means that the court must hold a retrial on the same subject.

An important exception occurs in criminal cases in the United States. If the court erroneously declares a mistrial, or if prosecutorial misconduct forced the defendant into moving for a mistrial, then the US Constitution's protection against double jeopardy bars any retrial; so the prosecution must be terminated.

8. Other kinds of trials

Some other kinds of processes for resolving conflicts are also expressed as trials. For example, the United States Constitution requires that, following the impeachment of the President, a judge, or another federal officer by the House of Representatives, the subject of the impeachment may only be removed from office by a trial in the Senate.

In earlier times disputes were often settled through a trial by ordeal, where parties would have to endure physical suffering in order to prove their righteousness; or through a trial by combat, in which the winner of a physical fight was deemed righteous in their cause.

Topic : Pleadings, Motions, Sentencing And Appeals

Topic Objective:

After studying this topic the student should be able to:

- Define pleading
- Define Appeal
- Explain how appeals are made

Definition/Overview:

Legal motion: A legal motion is a procedural device in law to bring a limited, contested matter before a court for decision. A motion may be thought of as a request to the judge (or judges) to make a decision about the case. Motions may be made at any point in administrative, criminal or civil proceedings, although that right is regulated by court rules which vary from place to place. The party requesting the motion may be called the movant, or may simply be the moving party.

Key Points:**1. Appeal**

A party who files an appeal is called an appellant or petitioner, and a party on the other side is called a respondent (in most common-law countries) or an appellee (in the United States). A cross-appeal is an appeal brought by the respondent. For example, suppose at trial the judge found for the plaintiff and ordered the defendant to pay \$50,000. If the defendant files an appeal arguing that he should not have to pay any money, then the plaintiff might file a cross-appeal arguing that the defendant should have to pay \$200,000 instead of \$50,000.

The appellant is the party who, having lost part or all their claim in a lower court decision, is appealing to a higher court to have their case reconsidered. This is usually done on the basis that the lower court judge erred in the application of law, but it may also be possible to appeal on the basis of court misconduct, or that a finding of fact was entirely unreasonable to make on the evidence.

The appellant in the new case can be either the plaintiff (or claimant), defendant, or respondent (appellee) from the lower case, depending on who was the losing party. The winning party from the lower court, however, is now the respondent. In unusual cases the appellant can be the victor in the court below, but still appeal. For example, in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, the claimant appealed (successfully) on the basis that, although he won in the court below, the lower court had applied the wrong measure of damages and he had not been fully recompensed.

An appellee is the party to an appeal in which the lower court judgment was in its favor. The appellee is required to respond to the petition, oral arguments, and legal briefs of the appellant. In general, the appellee takes the procedural posture that the lower court's decision should be affirmed.

2. Ability to appeal

An appeal as of right is one that is guaranteed by statute or some underlying constitutional or legal principle. The appellate court cannot refuse to listen to the appeal. An appeal by leave or permission requires the appellant to move for leave to appeal; in such a situation either or both of the lower court and the appellate court may have the discretion to grant or refuse the appellant's demand to appeal the lower court's decision. A good example of this is the U.S. Supreme Court in which at least four justices must agree to hear the case if there is a constitutional issue.

In tort, equity, or other civil matters either party to a previous case may file an appeal. In criminal matters, however, the state or prosecution generally has no appeal as of right. And due to the double jeopardy principle, in the United States the state or prosecution may never appeal a jury or bench verdict of acquittal. But in some jurisdictions, the state or prosecution may appeal as of right from a trial court's dismissal of an indictment in whole or in part or from a trial court's granting of a defendant's suppression motion. Likewise, in some jurisdictions, the state or prosecution may appeal an issue of law by leave from the trial court and/or the appellate court. The ability of the prosecution to appeal a decision in favor of a defendant varies significantly internationally. All parties must present grounds to appeal, or it will not be heard.

By convention in some law reports, the appellant is named first. This can mean that where it is the defendant who appeals, the name of the case in the law reports reverses (in some cases twice) as the appeals work their way up the court hierarchy. This is not always true, however. In the United States federal courts, the parties' names always stay in the same order as the lower court when an appeal is taken to the circuit courts of appeals, and are re-ordered only if the appeal reaches the United States Supreme Court.

3. Direct or collateral

Many jurisdictions recognize two types of appeals, particularly in the criminal context. The first is the traditional "direct" appeal in which the appellant files an appeal with the next higher court of review. The second is the collateral appeal or post-conviction petition, in which the petitioner-appellant files the appeal in a court of first instance--usually the court that tried the case.

The key distinguishing factor between direct and collateral appeals is that the former only reviews evidence that was presented in the trial court, but the latter allows review of evidence dehors the record: depositions, affidavits, and witness statements that did not come in at trial. The standard for post-conviction relief is high, typically requiring the petitioner to demonstrate that the evidence presented was not available in the usual course of trial discovery.

Relief in post-conviction is rare and is most often found in capital or violent felony cases. The typical scenario involves an incarcerated defendant locating DNA evidence demonstrating the defendant's actual innocence.

4. Types of appeal

There are a number of appeal actions, their differences being potentially confusing, thus bearing some explanation. Three of the most common are an appeal to which the defendant has as a right, a writ of certiorari and a writ of habeas corpus.

An appeal to which the defendant has a right cannot be abridged by the court which is, by designation of its jurisdiction, obligated to hear the appeal. In such an appeal, the appellant feels that some error has been made in his trial, necessitating an appeal. A matter of importance is the basis on which such an appeal might be filed: generally appeals as a matter of right may only address issues which were originally raised in trial (as evidenced by documentation in the official

record). Any issue not raised in the original trial may not be considered on appeal and will be considered estoppel. A convenient test for whether a petition is likely to succeed on the grounds of error is confirming that (1) a mistake was indeed made (2) an objection to that mistake was presented by counsel and (3) that mistake negatively affected the defendant's trial.

A writ of certiorari, otherwise known as simply as cert, is an order by a higher court directing a lower court to send record of a case for review, and is the next logical step in post-trial procedure. While states may have similar processes, a writ of cert is usually only issued, in the United States, by the Supreme Court, although some states retain this procedure. Unlike the aforementioned appeal, a writ of cert is not a matter of right. A writ of cert will have to be petitioned for, the higher court issuing such writs on limited bases according to constraints such as time. In another sense, a writ of cert is like an appeal in its constraints; it too may only seek relief on grounds raised in the original trial.

A writ of habeas corpus is the last opportunity for the defendant to find relief against his guilty conviction. Habeas corpus may be pursued if a defendant is unsatisfied with the outcome of his appeal and has been refused (or did not pursue) a writ of cert, at which point he may petition one of several courts for a writ of habeas corpus. Again, these are granted at the discretion of the court and require a petition. Like appeals or writs of cert, a writ of habeas corpus may overturn a defendant's guilty conviction by finding some error in the original trial. The major difference is that writs of habeas corpus may, and often, focus on issues that lay outside the original premises of the trial, i.e., issues that could not be raised by appeal or writs of cert. These often fall in two logical categories: (1) that the trial lawyer was ineffectual or incompetent or (2) that some constitutional right has been violated.

As one moves farther down the chain of post-trial actions, relief becomes progressively more unlikely. Knowing the differences between these actions and their intended use are an important

tool in increasing one's chances for a favorable outcome. Use of a lawyer is therefore often considered advisable to aid one attempting to traverse the complex post-trial landscape.

5. Notice of appeal

A notice of appeal is a form or document that in many cases is required to begin an appeal. The form is completed by the appellant or by the appellant's legal representative. The nature of this form can vary greatly from country to country and from court to court within a country.

The specific rules of the legal system will dictate exactly how the appeal is officially begun. For example, the appellant might have to file the notice of appeal with the appellate court, or with the court from which the appeal is taken, or both.

Some courts have samples of a notice of appeal on the court's own web site.

The deadline for beginning an appeal can often be very short; traditionally, it is measured in days, not years. This can vary from country to country, as well as within a country, depending on the specific rules in force.

6. How an appeal is processed

Generally speaking the appellate court examines the record of evidence presented in the trial court and the law that the lower court applied and decides whether that decision was legally sound or not. The appellate court will typically be deferential to the lower court's findings of fact (such as whether a defendant committed a particular act), unless clearly erroneous, and so will focus on the court's application of the law to those facts (such as whether the act found by the court to have occurred fits a legal definition at issue).

If the appellate court finds no defect, it "affirms" the judgment. If the appellate court does find a legal defect in the decision "below" (i.e., in the lower court), it may "modify" the ruling to correct the defect, or it may nullify ("reverse" or "vacate") the whole decision or any part of it. It

may, in addition, send the case back ("remand" or "remit") to the lower court for further proceedings to remedy the defect.

In some cases, an appellate court may review a lower court decision de novo (or completely), challenging even the lower court's findings of fact. This might be the proper standard of review, for example, if the lower court resolved the case by granting a pre-trial motion to dismiss or motion for summary judgment which is usually based only upon written submissions to the trial court and not on any trial testimony.

Another situation is where appeal is by way of re-hearing. Certain jurisdictions permit certain appeals to cause the trial to be heard afresh in the appellate court. An example would be an appeal from a Magistrates' court to the Crown Court in England and Wales.

Sometimes, the appellate court finds a defect in the procedure the parties used in filing the appeal and dismisses the appeal without considering its merits, which has the same effect as affirming. (This would happen, for example, if the appellant waited too long, under the appellate court's rules, to file the appeal.) In England and many other jurisdictions, however, the phrase appeal dismissed is equivalent to the U.S. term affirmed; and the phrase appeal allowed is equivalent to the U.S. term reversed.

Generally, there is no trial in an appellate court, only consideration of the record of the evidence presented to the trial court and all the pre-trial and trial court proceedings are reviewed unless the appeal is by way of re-hearing, new evidence will usually only be considered on appeal in very rare instances, for example if that material evidence was unavailable to a party for some very significant reason such as prosecutorial misconduct.

In some systems, an appellate court will only consider the written decision of the lower court, together with any written evidence that was before that court and is relevant to the appeal. In

other systems, the appellate court will normally consider the record of the lower court. In those cases the record will first be certified by the lower court.

The appellant has the opportunity to present arguments for the granting of the appeal and the appellee (or respondent) can present arguments against it. Arguments of the parties to the appeal are presented through their appellate lawyers, if represented, or pro se if the party has not engaged legal representation. Those arguments are presented in written briefs and sometimes in oral argument to the court at a hearing. At such hearings each party is allowed a brief presentation at which the appellate judges ask questions based on their review of the record below and the submitted briefs.

It is important to note that in an adversarial system appellate courts do not have the power to review lower court decisions unless a party appeals it. Therefore if a lower court has ruled in an improper manner or against legal precedent that judgment will stand even if it might have been overturned on appeal.

7. United States legal system of appeals

The United States legal system generally recognizes two types of appeals: a trial de novo or an appeal on the record.

A trial de novo is usually available for review of informal proceedings conducted by some minor judicial tribunals in proceedings that do not provide all the procedural attributes of a formal judicial trial. If unchallenged, these decisions have the power to settle more minor legal disputes once and for all. If a party is dissatisfied with the finding of such a tribunal, one generally has the power to request a trial de novo by a court of record. In such a proceeding, all issues and evidence may be developed newly, as though never heard before, and one is not restricted to the evidence heard in the lower proceeding. Sometimes, however, the decision of the lower proceeding is itself admissible as evidence, thus helping to curb frivolous appeals.

In an appeal on the record from a decision in a judicial proceeding, both appellant and respondent are bound to base their arguments wholly on the proceedings and body of evidence as they were presented in the lower tribunal. Each seeks to prove to the higher court that the result they desired was the just result. Precedent and case law figure prominently in the arguments. In order for the appeal to succeed, the appellant must prove that the lower court committed reversible error, that is, an impermissible action by the court acted to cause a result that was unjust, and which would not have resulted had the court acted properly. Some examples of reversible error would be erroneously instructing the jury on the law applicable to the case, permitting seriously improper argument by an attorney, admitting or excluding evidence improperly, acting outside the court's jurisdiction, injecting bias into the proceeding or appearing to do so, juror misconduct, etc. The failure to formally object at the time, to what one views as improper action in the lower court, may result in the affirmance of the lower court's judgment on the grounds that one did not "preserve the issue for appeal" by objecting.

In cases where a judge rather than a jury decided issues of fact, an appellate court will apply an abuse of discretion standard of review. Under this standard, the appellate court gives deference to the lower court's view of the evidence, and reverses its decision only if it were a clear abuse of discretion. This is usually defined as a decision outside the bounds of reasonableness. On the other hand, the appellate court normally gives less deference to a lower court's decision on issues of law, and may reverse if it finds that the lower court applied the wrong legal standard.

In some rare cases, an appellant may successfully argue that the law under which the lower decision was rendered was unconstitutional or otherwise invalid, or may convince the higher court to order a new trial on the basis that evidence earlier sought was concealed or only recently discovered. In the case of new evidence, there must be a high probability that its presence or absence would have made a material difference in the trial. Another issue suitable for appeal in criminal cases is effective assistance of counsel. If a defendant has been convicted and can prove that his lawyer did not adequately handle his case and that there is a reasonable probability that

the result of the trial would have been different had the lawyer given competent representation, he is entitled to a new trial.

In the United States, a lawyer traditionally starts an oral argument to any appellate court with the words "May it please the court."

After an appeal is heard, the mandate is a formal notice of a decision by a court of appeal; this notice is transmitted to the trial court and, when filed by the clerk of the trial court, constitutes the final judgment on the case, unless the appeal court has directed further proceedings in the trial court. The mandate is distinguished from the appeal court's opinion, which sets out the legal reasoning for its decision. In some U.S. jurisdictions the mandate is known as the remittitur.

8. Appellate review

Appellate review is the general term for the process by which courts with appellate jurisdiction take jurisdiction of matters decided by lower courts. It is distinguished from judicial review, which refers to the court's overriding constitutional or statutory right to determine if a legislative act or administrative decision is defective for jurisdictional or other reasons (which may vary by jurisdiction).

In most jurisdictions the normal and preferred way of seeking appellate review is by filing an appeal of the final judgment. Generally, an appeal of the judgment will also allow appeal of all other orders or rulings made by the trial court in the course of the case. This is because such orders cannot be appealed as of right. However, certain critical interlocutory court orders, such as the denial of a request for an interim injunction, or an order holding a person in contempt of court, can be appealed immediately although the case may otherwise not have been fully disposed of.

In American law, there are two distinct forms of appellate review, direct and collateral. For example, a criminal defendant may be convicted in state court, and lose on direct appeal to higher state appellate courts, and if unsuccessful, mount a collateral action such as filing for a writ of habeas corpus in the Federal courts. Generally speaking, "[d]irect appeal statutes afford defendants the opportunity to challenge the merits of a judgment and allege errors of law or fact. ... [Collateral review], on the other hand, provide[s] an independent and civil inquiry into the validity of a conviction and sentence, and as such are generally limited to challenges to constitutional, jurisdictional, or other fundamental violations that occurred at trial." *Graham v. Borgen*, __ F.3d. __ (7th Cir. 2007) (no. 04-4103) (slip op. at 7) (citation omitted).

In Anglo-American common law courts, appellate review of lower court decisions may also be obtained by filing a petition for review by prerogative writ in certain cases. There is no corresponding right to a writ in any pure or continental civil law legal systems, though some mixed systems such as Quebec recognize these prerogative writs.

9. Types of pleading

9.1 Common law pleading

Common law pleading was the system of civil procedure used in England, where each cause of action had its own separate procedure: law and equity were entirely different judicial systems, each with its own causes of action and available remedies. Because the list of causes eligible for consideration was capped early during the development of the English legal system, claims that might be acceptable to the evolving court often did not match up perfectly with any of the established causes. Lawyers might have to engage in great ingenuity to shoehorn their clients' claims into the necessary "elements" required to bring an action. Some claims for debt were alleged together in common counts in an effort to prevent the defendant from squirming out of liability on some technicality on one of the counts.

9.2 Code pleading

Code pleading was introduced in the 1850s in New York and California. Code pleading sought to abolish the distinction between law and equity. It unified civil procedure for all

types of actions as much as possible, and the required elements of each action are set out in carefully codified statutes.

However, code pleading was criticized because many lawyers felt that it was too difficult to fully research all the facts needed to bring a complaint before one had even initiated the action, and thus meritorious plaintiffs could not bring their complaints in time before the statute of limitations expired. Code pleading has also been criticized as promoting "hypertechnical reading of legal papers".

9.3 Notice pleading

Notice pleading is the dominant form in the United States today. In 1938, the Federal Rules of Civil Procedure were adopted. One goal was to relax the strict rules of code pleading. Code pleading had served four purposes: notice, issue narrowing, pleading facts with particularity and eliminating meritless claims. The Federal Rules eliminated all of those requirements except for the notice requirement (hence we call it notice pleading). The requirements that were eliminated were shifted to discovery (another goal of the FRCP). In notice pleading, plaintiffs are required to state in their initial complaint only a short and plain statement of their cause of action. The idea is that a plaintiff and their attorney who have a reasonable but not perfect case can file a complaint first, put the other side on notice of the lawsuit, and then strengthen their case by compelling the defendant to produce evidence during the discovery phase.

9.4 Alternative pleading

In alternative pleading, legal fiction is employed to permit a party to argue two mutually exclusive possibilities, for example, submitting an injury complaint alleging that the harm to the plaintiff caused by the defendant was so outrageous that it must have either been intended as a malicious attack or, if not, must have been due to gross negligence.

- In Section 2 of this course you will cover these topics:
- Defense Counsel Role And Strategies
- The Prosecutors Role

■ The Exclusionary Rule Of Evidence

Topic : Defense Counsel Role And Strategies

Topic Objective:

After studying this topic the student should be able to:

- Define The Critical Role of Defense Counsel
- Explain A Safeguard of Liberty
- Discuss Defense tactics

Definition/Overview:

Defense Counsel: A defense counsel is a professionally trained and licensed attorney of law whose job it is to represent the defendant in all phases of the criminal justice system. Whether hired by the defendant as a private criminal lawyer, working as a public defender, or appointed by the court, defense counsels are needed to ensure the defendants civil rights are protected, and to present the best defense possible.

Key Points:

1. The Critical Role of Defense Counsel

Defense lawyers are called upon by our system of justice for a variety of tasks. They explain to their clients what is happening, and make sure that each defendant knows his rights, and is fully aware of what is happening. As defense counsel, the lawyer is charged with protecting those rights, and ensuring that the client receives the protections afforded to every citizen by our laws.

The lawyer will take over dealing with the prosecution, call and examine any witnesses in court, and do everything the law allows to keep his client from harm, at the least, to minimize the damage. This means challenging the prosecution's case, its conduct, and on occasion, the very laws that govern the case.

We often take these protections for granted, or scoff at them as mere technicalities that do little but allow criminals to escape justice. It is easy, and often tempting, to dismiss defense lawyers (and, for that matter, all lawyers) as professional hacks, whose only function is to confuse juries and confound courts. And sometimes, when defending people who are clearly guilty, it may seem that defense lawyers are a needless extravagance, who only get in the way of protecting people from the worst elements of society. But just as crimes come in a variety of shapes and sizes, criminals are often indistinguishable from the ordinary citizen, a fact that some of us only come to realize when we find ourselves seated at the defendant's table, with fingers pointing at us. It is then that we realize just how critical a vigorous and independent defense bar is to a free society allowing ordinary citizens to challenge the actions of their own government. Viewed in this light, the bedrock of American liberty is our right to use the rules we have all agreed to live by to defend ourselves in a public setting, where the actions of the same government that seeks to condemn us must prove that we have broken the law.

Defense lawyers don't exist just to make everyone else's life difficult. And their job is a critical, if often misunderstood safeguard against tyranny. Just imagine what would happen if the government could decide whom to jail without the messiness of subjecting their actions to the test of law. The freedom of all of us would be in the hands of government bureaucrats, like all others, who have their likes, dislikes, biases, and petty grievances.

2. A Safeguard of Liberty

In large measure, the law exists to protect us from bullies. But without the means of challenging the actions of our own government, there would be little protection for the common citizen against a bully who happened to wear a policeman's badge, or a prosecutor's suit, or who

happened to enjoy the friendship of someone for whom justice means doing right by his friends. And if you should ever find yourself on the wrong end of action taken by the government, you will find that the ability to resort to the law to defend yourself will be critical. Among the first casualties of Nazi Germany and Stalinist Russia was the independence of the courts and the legal profession. Once those bulwarks against tyranny fell, there was nothing to protect common people against the unbridled assertion of governmental power no matter how misguided, petty, or malevolent it might prove to be. But it is the rare government that will attack its own citizens directly: instead, the attacks come against marginal groups, ones that nobody would rise to defend, and who seem to everyone to be a threat to the security of the state. Unfortunately, those threats never seemed to end; and so the knocks on doors of enemies of the state continued, as the government kept finding new enemies to fight, and new threats to fear.

The example cited at the beginning is from one of the most famous confrontations in American History told from the side of the defendant, rather than the victim. It was the Boston Massacre, which arose at a time of growing tensions between the Colonies and Great Britain. The encounter between soldiers and the angry mob led to shots nobody knows for sure who fired the first one, although some testimony indicated that it was a terrified British soldier and in a country without a strong defense bar, the young soldiers would likely have been swiftly taken out and hung, if not by the Law, then by the mob itself.

Thanks to a courageous Boston attorney, the defendants received a fair trial and most were acquitted on grounds of self-defense, the sentiments of the mob notwithstanding. A couple were convicted of the lesser charge of manslaughter and released the proper verdict when emotions and provocations don't quite excuse a homicide, but make it less an outrage and more a fallible human reaction to extreme stress.

The defense lawyer was a prominent member of the state bar, who later served his country in a variety of ways: statesman, ambassador, signer of the Declaration of Independence, and the second president of the new United States.

3. Defense tactics

There is much to be said for this argument. However, it fails to justify some of the defender's favorite tactics.

- Misleading investigators and prosecutors

Particularly in the defense of white-collar crime, where arrest and indictment are typically preceded by lengthy investigation, defenders devote most of their efforts to forestalling the indictment. Defenders will caution potential witnesses that cooperating with prosecutors may be bad for their business careers. They will try to coordinate the stories of all the targets of investigation, and persuade them to stonewall investigators. Avoiding overt lies, defenders will shower prosecutors with half-truths to throw them off the track. And, in order to avoid being put in the position of lying to prosecutors, they will intentionally refrain from asking their clients questions when hearing the "wrong" answers would prevent them from arguing a plausible falsehood (Mann.). None of these tactics can plausibly be described as merely testing the prosecution's case by raising reasonable doubts. They are attempts to prevent the prosecution from assembling a case in the first place.

- Undermining the fairness of the forum

Where it is possible, defenders will "forum shop" for a venue with favorable jury demographics. They will try to disqualify any juror whom they suspect will be skeptical of their defense. And they will energetically seek to delay trials so that witnesses have time to forget details, leave town, or die. (It should not be forgotten, however, that prosecutors also have a formidable repertoire of dirty tricks, and defenders argue that they are merely fighting fire with fire.)

- Playing to bias and emotion

The defender will make sure that the accused arrives for trial neatly coiffed, cleanly shaven, and dressed in a suit and tie (which actually may belong to the defender); the defendant's sweet, sorrowful wife and adorable children will be arrayed behind him, even if in reality he deserted them months before. The exploitation of appearance and

manipulation of emotion have always been the defender's stock in trade. When Phryne, the most famous and beautiful courtesan in classical Athens, was tried for impiety, her defense counsel Hyperides delivered the greatest oration of his life. But, observing that the jury remained unmoved, Hyperides dramatically bared Phryne's breasts and secured her acquittal by telling the Athenians that it would be sacrilegious to condemn Aphrodite's own representative among mortals (Davidson). Today, mafia lawyers borrow stirring paragraphs from the speeches of Martin Luther King to defend charismatic but murderous dons, and demagogic defenders play the "race card" to secure acquittals in racially charged cases (Dannen). Two thousand years ago, Plato's Apology and Gorgias criticized trials and lawyers for substituting emotionalism and sentiment for truth, and today as in Plato's time this criticism remains fundamental.

Topic : The Prosecutors Role

Topic Objective:

After studying this topic the student should be able to:

- Define Prosecutors Role
- Explain Common law jurisdictions
- Understand Directors of Public Prosecutions
- Discuss Investigation led by the prosecutor
- Define the Decision to prosecute
- Explain No prosecution
- Discuss Objectivity demand
- Explain Legal Proceedings

Definition/Overview:

Prosecutor: The prosecutor is the chief legal representative of the prosecution in countries with either the common law adversarial system, or the civil law inquisitorial system. The prosecution is the legal party responsible for presenting the case against an individual suspected of breaking the law in a criminal trial.

Key Points:**1. Prosecutors Role**

The prosecutor has three main tasks: to investigate crimes, to decide whether or not to instigate legal proceedings and to appear in court.

The prosecutor investigates crimes together with the police. He or she shall have contact with the person suspected of the crime, the victim and witnesses, and have close contact with the police.

Once the preliminary investigations have been completed, the prosecutor judges whether there is sufficient evidence to bring the case to court. If it is a minor crime, and the suspect admits his or her guilt, the prosecutor imposes a fine. This is referred to as an order of summary punishment, and no trial will be held.

If an action is initiated there will be a trial in a court of law. The task of the prosecutor is to prove that the suspect has committed the crime. He or she questions the suspect, the witnesses and experts in order to establish that the suspect is guilty.

2. Common law jurisdictions

Prosecutors are typically lawyers who possess a law degree, and are recognized as legal professionals by the court in which they intend to represent the state (that is, they have been admitted to the bar).

They usually only become involved in a criminal case once charges need to be laid or have already been. They're typically employed by an office of the government, with safeguards in place to ensure such an office can successfully pursue the prosecution of government officials. Often, multiple offices exist in a single country, due to the various legal jurisdictions that exist.

Being backed by the power of the state, prosecutors are usually subject to special professional responsibility rules, in addition to those binding all lawyers. For example, in the United States, Rule 3.8 of the ABA Model Rules of Professional Conduct requires prosecutors to "make timely disclosure to the defense of all evidence or information ... that tends to negate the guilt of the accused or mitigates the offense."

3. Directors of Public Prosecutions

In Australia, Canada, England and Wales, Hong Kong, Northern Ireland, Southern Ireland and South Africa, the head of the prosecuting authority is typically known as the Director of Public Prosecutions, and is appointed, not elected. A DPP may be subject to varying degrees of control by the Attorney General, usually by a formal written directive which must be published.

In Australia, at least in the case of very serious matters, the DPP will be asked by the police, during the course of the investigation, to advise them on sufficiency of evidence, and may well be asked, if he or she thinks it proper, to prepare an application to the relevant court for search, listening device or telecommunications interception warrants.

More recent constitutions, such as South Africa's or Fiji's, tend to guarantee the independence and impartiality of the DPP.

4. Investigation led by the prosecutor

The prosecutor leads the preliminary investigation:

- when the suspect is being deprived of his/her liberty
- when violence or a threat within the family or against a close relative can be suspected
- when the suspect is aged between 15 and 17
- when the victim is less than 18 years old, or
- when it is a question of a crime of a serious or complicated nature

The prosecutor leads the preliminary investigation in a juvenile case owing to the special regulations that apply for young people. He or she conducts the criminal investigations when it is a case of serious crime, for example murder or an offence against a close relative. The prosecutor is always in charge of the preliminary investigation when a suspect has been deprived of his/her liberty, or in other words has been arrested or detained. If the arrest or detention is reversed and the suspect is released, the police will take over responsibility for leading the preliminary investigation.

5. Decision to prosecute

Once the preliminary investigations have been completed, it is time for the prosecutor to decide whether or not to prosecute. If the prosecutor, on objective grounds, judges that there is sufficient evidence to establish that the suspect has committed an offence, he/she is obliged to prosecute. A number of considerations must be taken into account before this decision is made.

If a prosecution is initiated, it is the task of the prosecutor to prove to the court that a crime has been committed

6. No prosecution

If there is insufficient evidence to prove that an offence has been committed, the suspect cannot be prosecuted. It could, for example, be because the suspect denies committing the offence or

that there are no witnesses or forensic evidence linking the suspect to the crime. Sometimes it becomes apparent during the course of the preliminary investigation that it is not possible to prove that a crime has been committed. Under these circumstances the prosecutor decides to discontinue the preliminary investigation. A decision like this has the same significance as a decision to drop the charges against a suspect. In the case of both decisions it means that the preliminary investigations can be resumed if new information is received concerning the crime. The victim of the crime, the injured party, is always informed of the decision reached by the prosecutor.

7. Objectivity demand

The prosecutor is obliged to be objective. This means that the prosecutor must remain completely neutral in his/her assessment of what has happened and whether or not it can be proven in court.

The demand for objectivity means that the prosecutor is also responsible for investigating those factors that are to the benefit of the suspect.

If a person claims to have been the victim of a crime, the prosecutor must, for example, check the credibility of the account. If there were any witnesses present at the scene of the crime, it is important that as many of them as possible were questioned so that as complete a picture as possible is given of what happened.

Forensic evidence must, of course, be gathered and investigated in a correct and secure manner. The prosecutor must also be objective when he or she initiates a prosecution. During the course of the trial it is admittedly the prosecutors task to prove that a crime has been committed, but the prosecutor is obliged to give due consideration to anything that could change the situation with respect to evidence.

8. Legal Proceedings

An important part of the prosecutors work is preparation and representation in court. Most prosecutors spend at least one or two days a week in court.

Through the decision to prosecute and the description of the offence that the prosecutor gives, he/she sets the framework for the criminal action.

During the course of the trial, the prosecutor is a party in the action. The prosecutor asserts during the trial that a certain person has committed a certain offence, after which the court judges whether or not this is in fact the case.

The task of the prosecutor during the trial is to prove that the offence has been committed. If the suspect denies committing the offence, the prosecutor has to present so much evidence that it is deemed proven without reasonable doubt that the assertions are in fact true. The prosecutor must, however, be objective, and shall also present any evidence that is in the suspects favour.

If any new information is presented during the course of the trial that changes the case, the prosecutor may need to reconsider the question of prosecution. In exceptional cases the charges may be dropped during the course of an ongoing trial.

The prosecutor plays a very active role in court.

9. Sanctions and appeals

The sanctions to which a suspect may be sentenced include fines, conditional sentence, probation, imprisonment, care, foot-cuffs and community service. Different punishments may be combined.

If the prosecutor is dissatisfied with the sentence passed by a district court, he or she may appeal against it to the court of appeal, which is a higher instance. The suspect, and in some cases the victim, may also appeal against the court ruling. In the new appeal-court trial, the victim and the suspect must sometimes appear in court, despite the fact that they have already given evidence in the district court. Otherwise, their testimony from the district court is read aloud in the court of appeal. Sometimes a so-called leave to appeal is required in the court of appeal.

An appeal may also be made to the Supreme Court against the ruling of the court of appeal. In the Supreme Court, only prosecutors specially appointed by the Prosecutor-General are allowed to appear in court. In order to have a case tried in the Supreme Court, it must be a so-called precedent, or in other words the ruling of the Supreme Court may be of importance to how courts of law pass judgement in similar cases.

Topic : The Exclusionary Rule Of Evidence

Topic Objective:

After studying this topic the student should be able to:

- Define Exclusionary Rule
- Explain Applications of the exclusionary rule
- Discuss Limitations of the rule
- Explain Hudson v. Michigan
- Discuss Criticism
- Discuss Exceptions

Definition/Overview:

Exclusionary rule: the introduction of criminal evidence collected or analyzed in violation of the Constitution is forbidden

Silver platter doctrine allowed state authorities to serve up illegally obtained evidence to federal agents

Attenuation exception: evaluates whether the causal connection between the illegal action and the seizure of evidence is sufficiently attenuated

Good Faith Exception: evidence may be admissible if the state can demonstrate that the evidence was discovered while the officers were acting with reasonable assurance of the validity of their action

Independent Source Exception: evidence which derives from an independent source may be admissible in court even if it had been collected on some level via illegal police actions

Inevitability of Discovery Exception: evidence which would normally be suppressible due to unwarranted or unlawful government action may be introduced if the discovery of such would have occurred anyway

Throw-away evidence: voluntary abandonment of an item negates any expectation of privacy that an individual may claim to it in the future

Open fields doctrine: open fields are not protected with exclusionary rule

Key Points:

1. Exclusionary Rule

The exclusionary rule is a legal principle in the United States, under constitutional law, which holds that evidence collected or analyzed in violation of the defendant's constitutional rights is

sometimes inadmissible for a criminal prosecution in a court of law. This may be considered an example of a prophylactic rule formulated by the judiciary in order to protect a constitutional right. However, in some circumstances at least, the exclusionary rule may also be considered to follow directly from the constitutional language, such as the Fifth Amendment's command that no person "shall be compelled in any criminal case to be a witness against himself" and that no person "shall be deprived of life, liberty or property without due process of law."

The exclusionary rule is designed to provide a remedy and disincentive, short of criminal prosecution, in response to prosecutors and police who illegally gather evidence in violation of the Fourth and Fifth Amendments in the Bill of Rights, by conducting unreasonable searches and seizure or compelled self-incrimination. The exclusionary rule also applies to violations of the Sixth Amendment, which guarantees the right to counsel.

This rule is occasionally referred to as a legal technicality because it allows defendants a defense that does not address whether the crime was actually committed. In this respect, it is similar to the explicit rule in the Fifth Amendment protecting people from double jeopardy.

The exclusionary rule judges the admissibility of evidence based on deontological ethics; that is, it is concerned with how evidence is acquired, rather than what the evidence proves. For this reason, in strict cases, when an illegal action is used by police/prosecution to gain any incriminating result, all evidence whose recovery stemmed from the illegal action this evidence is known as "fruit of the poisonous tree" can be thrown out from a jury (or be grounds for a mistrial if too much information has been irrevocably revealed).

The exclusionary rule applies to all persons within the United States regardless of whether they are citizens, immigrants (legal or illegal), or visitors.

2. Applications of the exclusionary rule

The exclusionary rule originally often applies to evidence obtained through unauthorized search and seizure. Under the Fourth Amendment, a warrant, which required probable cause, should be obtained in order to conduct a search. A number of exceptions to the warrant requirement have developed, based on other interpretations of what "reasonableness" entails. A strict interpretation

of the Fourth Amendment says that a search without a warrant is unreasonable. This interpretation is favored by civil liberties advocates.

The rule was expanded in the 1960s to cover other aspects of law enforcement procedure, including "involuntary" confessions, suspect identification obtained in violation of the Fifth and Sixth Amendments, wiretapping evidence in violation of federal law, and other evidence obtained through very unreasonable or "shocking" means in violation of Constitutional rights. In Illinois, *People v. Albea* (1954) ruled that testimony from witnesses found in course of an unlawful search cannot be admitted into court.

3. Limitations of the rule

The exclusionary rule does not apply in a civil case, in a grand jury proceeding, or in a parole revocation hearing.

Even in a criminal case, the exclusionary rule does not simply bar the introduction of all evidence obtained in violation of the Fourth, Fifth, or Sixth Amendment. In *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (June 15, 2006), Justice Scalia wrote for the U.S. Supreme Court: Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautious against expanding" it, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364-365 (1998) (citation omitted). We have rejected "indiscriminate application" of the rule, *Leon*, supra, at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States v. Calandra*, 414 U.S. 338, 348 (1974) that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott*, supra, at 363, (quoting *Leon*, supra, at 907). Whether the exclusionary sanction is appropriately imposed in a particular case is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.

Limitations on the exclusionary rule have included the following:

- Evidence unlawfully obtained from the defendant by a private person is admissible. The exclusionary rule is designed to protect privacy rights, with the Fourth Amendment applying specifically to government officials.
 - Evidence can only be suppressed if the illegal search violated the person's own (the person making the court motion) constitutional rights. The exclusionary rule does not apply to privacy rights of a third party.
 - The defendant cannot take advantage of the situation (police breaching rules) to turn the case to their advantage, in face of other evidence against them.
 - The Silver Platter doctrine applied before the *Elkins v. United States* ruling in 1960. State officials that obtained evidence illegally were allowed to turn over evidence to federal officials, and have that evidence be admitted into trial.
 - If the court determines that the evidence obtained in the unlawful search would have been found in a later, warranted search, the evidence may be brought forth in court.
- The exclusionary rule is not applicable to aliens residing outside of U.S. borders. In *United States v. Alvarez-Machain*, 504 U.S. 655, the U.S. Supreme Court decided that property owned by aliens in a foreign country is admissible in court. Certain persons in the U.S. receive limited protections, such as prisoners, probationers, parolees, and persons crossing U.S. borders. Corporations, by virtue of being, also have limited rights under the Fourth Amendment.

4. *Hudson v. Michigan*

The court in *Hudson v. Michigan* further held that a search whose only illegality is the failure to announce cannot uncover any evidence that would not have been uncovered if the announcement had been properly made, and therefore the suppression of evidence is not an appropriate remedy. The Court followed the general judicial trend, which views the exclusionary rule as a judicial remedy rather than a requirement under the Fourth Amendment. The Court there found that the costs of applying the exclusionary rule to the necessarily gray area of the "knock and announce" requirement were outweighed by the deterrence benefit. Over vigorous dissent the Court wrote, "But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises dangers which, if there is even "reasonable suspicion" of their existence, suspend the knock-and-announce requirement anyway. Massive deterrence is hardly

required."Limitations of the exclusionary rule have been criticized for reducing the effectiveness of rule in deterring police misconduct.

5. Criticism

In the 1970s, Dallin H. Oaks, Malcolm Wilkey, and others called for the exclusionary rule to be abolished. By the 1980s, the exclusionary rule remained controversial and was strongly opposed by President Ronald Reagan. But, some opponents began seeking to have the rule modified, rather than abolished altogether. The case, *Illinois v. Gates*, before the Supreme Court brought the exclusionary rule for reconsideration. The Supreme Court also considered allowing exceptions for errors made by police in good faith. The Reagan administration also asked Congress to ease the rule.

- In Section 3 of this course you will cover these topics:
- Search Warrants
- The Crime Scene
- Physical Evidence

Topic : Search Warrants

Topic Objective:

After studying this topic the student should be able to:

- Define Warrant
- Define Search Warrant
- Explain Types of Warrants
- Discuss Exceptions
- Define Preparations

- Discuss Probable Cause
- Explain Reasonable suspicion
- Understand Precedent
- Explain Beyond reasonable doubt
- Elaborate Beyond the shadow of a doubt
- Discuss Difference between reasonable doubt

Definition/Overview:

Search Warrant: is a court order issued by a judge or magistrate that authorizes law enforcement to conduct a search of a person or location for evidence of a criminal offense and seize such items.

Key Points:

1. Search Warrant

All jurisdictions with a rule of law and a right to privacy put constraints on the powers of police investigators, and typically require search warrants, or an equivalent procedure, for searches within a criminal enquiry. There typically also exist exemptions for "hot pursuit": if a criminal flees the scene of a crime and the police officer follows him, the officer has the right to enter an edifice in which the criminal has sought shelter.

Conversely, in authoritarian regimes, the police typically have the right to search property and people without having to provide justifications, or without having to secure an authorization from the judiciary.

Under the Fourth Amendment to the United States Constitution, most searches by the police require a search warrant based on probable cause, although there are exceptions. Any police

entry of an individual's home always requires a warrant (for either search or arrest), absent exigent circumstances, or the free and voluntary consent of a person with reasonably apparent use of or control over the property. Some commonly cited exigent circumstances are: hot pursuit of a felon (to prevent a felon's escape or ability to harm others); imminent destruction of evidence before a warrant can properly be obtained; emergency searches (such as where someone is heard screaming for help inside a dwelling); or a search incident to arrest (to mitigate the risk of harm to the arresting officers specifically).

Under the Fourth Amendment, searches must be reasonable and specific. This means that a search warrant must be specific as to the specified object to be searched for and the place to be searched. Other items, rooms, outbuildings, persons, vehicles, etc. may require additional search warrants.

To obtain a search warrant, an officer must first prove that probable cause exists before a magistrate or judge, based upon direct information (i.e. obtained by the officer's personal observation) or hearsay information. Hearsay information can even be obtained by oral testimony given over a telephone, or through an anonymous or confidential informant, so long as probable cause exists based on the totality of the circumstances. Both property and persons can be seized under a search warrant. The standard for a search warrant is lower than the quantum of proof required for a later conviction. The rationale is that the evidence that can be collected without a search warrant may not be sufficient to convict, but may be sufficient to suggest that enough evidence to convict could be found using the warrant.

US police do not need a search warrant to search a vehicle they stop on the road or in a non-residential area if they have probable cause to believe it contains contraband or evidence of a crime. In that case, police may search the passenger compartment, trunk, and any containers inside the vehicle capable of holding the suspected article. By comparison, under Australian law, police can exhaustively search any vehicle on a public road, and any electronic devices therein (mobile phone, computer), without the responsible persons' permission, for evidence of criminal acts, with or without proof or suspicion of any kind.

Police do not need a search warrant, or even probable cause, to perform a limited search of a suspect's outer clothing for weapons, if police have a reasonable suspicion to justify the intrusion - a Terry 'stop and frisk.'

In the United States, the issue of federal warrants is determined under Title 18 of the United States Code. The law has been restated and extended under Rule 41 of the Federal Rules of Criminal Procedure.

Each state also promulgates its own laws governing the issuance of search warrants.

2. Types of Warrants

- **Alias Warrant**

If a subject fails to make an initial appearance after a citation is issued and alias warrant will be issued.

- **Bench Warrant**

If a subject sets a court date, and then fails to show at scheduled court date a bench warrant will be issued.

- **Capias Warrant**

If a subject has a guilty judgment either through court appearance, plea, or arraignment in jail, but then fails to pay the fine within the required time period a capias warrant will be issued.

- **Parole Revocation Warrant (Blue Warrant)**

The issuance of a parole revocation warrant is as follows:

"The supervising parole officer submits a report of violation when an offender on parole or mandatory release status is believed to have violated terms or conditions of supervised release. The report of violation is what determines whether a warrant will be issued.

Personnel within the Parole Division will review the report of violation and determine if there is probable cause to believe a violation of parole conditions has occurred. If such a finding is made, and no other suitable sanctions appear warranted, a warrant is issued to detain the offender pending an administrative hearing. The warrant is typically published in the National Crime Information Center (NCIC) and/or the Texas Crime Information Center (TCIC) fugitives warrant database.

Once an offender is detained on a parole warrant and the sheriff having custody has notified the Parole Division of arrest, the Parole Division determines whether to place the case into the hearing process. If the violations are administrative only (no criminal law violations pending disposition in a court of law), or include adjudicated charges (a conviction) and the offender has discharged any imposed sentence, a request is made for a hearing to be scheduled. The sheriff having custody is also required to notify the Parole Division when criminal charges have been dismissed and when any imposed sentence resulting from a conviction has been discharged. In instances where there are criminal charges pending adjudication, the Parole Division will normally defer the revocation process pending final disposition of the criminal charges."

3. Exceptions

In some cases a search warrant is not required, such as where consent is given by a person in control of the object or property to be searched. Another exception is when evidence is in plain view - if the officer is legitimately on the premises, his observation is from a legitimate vantage point, and it is immediately apparent that the evidence is contraband (for example, a marijuana cigarette on the front seat of a car while the officer has pulled the suspect over for a seat belt violation), the officer is within his right to seize the object in question. When police arrest an individual shortly after he exits a vehicle, the police may conduct a full search of the suspect's person, any area within that person's immediate reach, and the passenger compartment of the vehicle which was recently occupied, for weapons or other contraband. If the subject is arrested in a home, police may search the room in which they were arrested, and perform a 'protective sweep' of the premises where there is reasonable suspicion that other individuals may be hiding. Searches are also allowed in emergency situations where the public is in danger.

With rented property, a landlord may not authorize law enforcement to search a tenant's premises without a search warrant, and a warrant must be obtained under the same guidelines as if it were the tenant's own home. But in some jurisdictions, a hotel room may be searched by consent of the hotel's management without the guest's approval or a warrant.

4. Preparations

Generally, a law enforcement agency planning to execute a search warrant will make preparations prior to entry to a premises. The officers involved in the search will attempt to gather information obtained from reliable sources, such as undercover cops or informants, as to the layout of the premises being searched and the location within the premises of the items for which the search is conducted. When there is a flight risk involved, officers will try to surround the premises, guarding all doors, windows, and other possible escape routes.

5. Probable Cause

In United States criminal law, probable cause refers to the standard by which a police officer has the right to make an arrest, conduct a personal or property search, or to obtain a warrant for arrest. It is also used to refer to the standard to which a grand jury believes that a crime has been committed. This term comes from the Fourth Amendment of the United States Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The most well-known definition of probable cause is "a reasonable belief that a person has committed a crime". Another common definition is "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true".

In the context of warrants, the Oxford Companion to American Law defines probable cause as "information sufficient to warrant a prudent person's belief that the wanted individual had committed a crime (for an arrest warrant) or that evidence of a crime or contraband would be found in a search (for a search warrant)". "Probable cause" is a stronger standard of evidence than a reasonable suspicion, but weaker than what is required to secure a criminal conviction. Even hearsay can supply probable cause if it is from a reliable source or supported by other evidence, according to the Aguilar-Spinelli test.

Facts or evidence that would lead a reasonable person to believe that a crime has been, is being, or will be committed and the person arrested is responsible. At this stage, police may perform a search, and often an arrest. Probable cause generally means police know what crime they suspect you of and have discovered evidence to support that belief. Common examples include seeing or smelling evidence which is in plain view, or receiving an admission of guilt for a specific crime.

For the conscientious citizen, the best advice regarding police authority is to stick to your guns and not waive your constitutional rights under any circumstances. Police officers will often give misleading descriptions of what their authority is, but you have nothing to gain by submitting to coercive police tactics. Police must make ad hoc decisions in the streets regarding their authority level in a given situation and these decisions are subject to review in court. Asserting your rights properly is good way to avoid arrest, but it is an even better way to avoid a conviction.

6. Reasonable suspicion

Reasonable suspicion is a legal standard in United States law that a person has been, is, or is about to be engaged in criminal activity based on specific and articulable facts and inferences. It is the basis for an investigatory or Terry stop by the police and requires less evidence than probable cause, the legal requirement for arrests and warrants. Reasonable suspicion is evaluated using the "reasonable person" or "reasonable officer" standard, in which said person in the same circumstances could reasonably believe a person has been, is, or is about to be engaged in criminal activity; such suspicion is not a mere hunch. Police may also, based solely on reasonable suspicion of a threat to safety, frisk a suspect for weapons, but not for contraband like drugs. A combination of particular facts, even if each is individually innocuous, can form the basis of reasonable suspicion.

The Fourth Amendment prohibits unreasonable searches and seizures and its protections extended to brief investigatory stops of persons or vehicle falling short of arrest. A reasonable suspicion determination is made by the totality of the circumstances of each case to see whether the detaining officer had a particularized and objective basis for suspecting legal wrongdoing. Past cases have recognized reasonable suspicion was a somewhat abstract notion a deliberate

intent to avoid a neat set of legal rules. Rather than viewing incidents in isolation, the proper test is to look at factors as a whole to determine if there is reasonable suspicion.

A police officer can conduct an investigative stop and briefly detain and question a person for investigative purposes when the officer has a reasonable suspicion supported by articulable facts. Subsequent to a valid Terry stop, a police officer can search the individual for weapons where the officer has reason to believe the person is armed and dangerous. In assessing whether the suspect is armed, the officer doesn't have to be absolutely certain; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger.

7. Precedent

In Terry v. Ohio, the Supreme Court ruled that a person can be stopped and frisked by a police officer based on a reasonable suspicion. Such a detention does not violate the Fourth Amendment prohibition on unreasonable searches and seizure. In Hiibel v. Sixth Judicial District Court of Nevada the court further established that a state may require, by law, that a person identify himself or herself to an officer during a stop. An arrest is not permitted based on reasonable suspicion; probable cause is required for an arrest. Further, a person is not required to answer any other questions during a Terry stop, and the detention must be brief. However if the officer's suspicions were correct and the situation escalates to a point of where the officer has probable cause, the officer can arrest the suspect.

8. Beyond reasonable doubt

This is the standard required by the prosecution in most criminal cases within an adversarial system and is the highest level of burden of persuasion. This means that the proposition being presented by the government must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the defendant is guilty. There can still be a doubt, but only to the extent that it would not affect a "reasonable person's" belief that the defendant is guilty. If the doubt that is raised does affect a "reasonable person's" belief that the defendant is guilty, the jury is not satisfied beyond a "reasonable doubt". The precise meaning of words such as "reasonable" and "doubt" are usually defined within jurisprudence of the applicable country.

What is the burden of proof? First, we must address the meaning of the word burden. Most often jurors interpret this word as meaning weight. Jurors picture the state in the person of the prosecutor with a massive object on his back attempting to carry it up some incline for some distance defense attorneys have been heard to say that the state has a heavy burden. The word burden has nothing to do with weight, mass or any other physical properties the word simply means responsibility. It is the states responsibility to prove the defendants guilt. It has nothing to do with the degree or intensity of proof. Who has to prove the defendants guilt? The State does. To what degree must guilt be proven? Beyond a reasonable doubt. What does that mean? Again the problem is with words being used in an abnormal or special way. The word beyond normally means farther than or more than. Clearly this is not the meaning of the word in the phrase beyond a reasonable doubt. The state does not have to carry its burden beyond some point that constitutes reasonable doubt. The state certainly is not trying to prove that there is more than a reasonable doubt. If anything the states responsibility is to prove that there is less than a reasonable doubt. The word beyond in the phrase beyond a reasonable doubt means to the exclusion of. That is the state must exclude any and all reasonable doubt as to the defendants guilt. Simply put, the phrase means that if a juror has a reasonable doubt it is her duty to return a verdict of not guilty. On the other hand, if a juror does not have a reasonable doubt then the state has met its burden of proof and it is the jurors duty to return a verdict of guilty.

What is a reasonable doubt? Jury instructions typically say that a reasonable doubt is a doubt based on reason and common sense and typically use phrases such as fully satisfied or entirely convinced in an effort to quantify the standard of proof. These efforts tend to create more problems than they solve. For example, take the phrases fully satisfied and entirely convinced. A person is satisfied when she is content, pleased, happy, comfortable or at ease. The fellow leans back in his chair after a meal, pats his stomach and says, that was one satisfying meal. Is that what the state must do - offer sufficient proof that a juror is content, happy, pleased or comfortable with her verdict. Absolutely not. A juror is not required to be pleased with the verdict or happy with the verdict. The state is not required to produce sufficient evidence to eliminate all reasonable doubt AND to please the juror or to eliminate all reservations about whether the juror has done the right thing. Satisfied in the phrase fully satisfied simply means convinced. . Likewise the modifiers "entirely" and "fully" do not mean that you have to be 100

percent certain of the defendants guilt. The standard of proof is not absolute certainty. A juror is "fully satisfied" or "entirely convinced" when the state had eliminated all reasonable doubt.

Jury instructions often state that a reasonable doubt can arise from the "lack or insufficiency of the evidence." This phrase is rich with possibilities for concocting doubt Where are the fingerprints? Where is the DNA evidence? Where are the other officers who assisted with the arrest? These arguments invite, actually require that the jury engage in speculation something a jury is specifically instructed not to do. An example, a person enters a store. The clerk who is talking to her friend on the telephone sees the man. She tells her friend that the man appeared to be casing the place and asks her friend to call the police. A few minutes later the man leaves the store, walks to his car, opens the trunk, and retrieves a ski-mask and a shotgun. The man dons the mask, re-enters the store and tells the clerk to give it up. The clerk does as she is told and put the contents of the till into a bag which she hands to the man. The man then leaves the store. As he is running to his car the police arrive. The man flees from the scene with the police officers in hot pursuit. As he runs the man tosses the bag, gun and mask. He is caught shortly thereafter, returned to the store and is positively identified by the clerk as the man who cased the store and then robbed her. The bag is retrieved and the money in the bag exactly matches to the penny the amount taken from the register. At the trial, the defense attorney asks the lead investigator whether hair samples were taken from the mask and submitted to the lab for analysis. The investigator says no. During closing arguments the defense attorney conveniently ignores all the evidence of guilt and pounds away at the sloppy investigation and argues that had the hair analysis could have provided the jury with "irrefutable evidence" of the defendant's guilt or innocence. Is the absence of the hair evidence what the phrase lack of insufficiency of the evidence refers to. No. The phrase refers to the convincing force of the evidence presented. The presence or absence of reasonable doubt is to be determined by the evidence presented at trial not what might have been presented. There is a standard objection- Calls for speculation that is exactly what the defense attorney is asking the jury to do, to speculate. Not simple speculation but a series of "what ifs." What if a hair sample had been found, what if the hair sample had been sent to the lab for DNA analysis, what if he DNA profile had not matched the defendants. What if + what if + what if = reasonable doubt. Remember that the states duty is to eliminate any reasonable doubt, any logical explanation that arises from the evidence. The defense's argument

is not a proper argument. It is a tool of logical inversion All the evidence would compel one to say the defendant is guilty. However, the defendant wants the jurors to think, "but still there is that missing hair analysis evidence. I wonder what that would have shown?" A jury properly draw conclusion based on the evidence and inferences drawn from the evidence. The strength of the conclusions is based on the persuasive force of the evidence. With one exception, "Lack or insufficiency" refers to the convincing force of the evidence presented. The exception is the missing witness rule.

The missing witness rule, is:

"The failure to call a witness raises a presumption of inference that the testimony of such person would be unfavorable to the party failing to call him, but there is no such presumption or inference where the witness is not available, or where his testimony is unimportant or cumulative, or where he is equally available to both sides."

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." . Proof beyond a reasonable doubt did not become the accepted standard in criminal cases until the middle of the nineteenth century. Proof beyond a reasonable doubt was not the standard by which guilt was determined when the Bill of Rights was drafted in 1789. This may explain the absence of the phrase in the constitution. Nor was it an element of due process.

Attempts to quantify the burden of proof are exercises in futility. It is more a qualitative than quantitative concept. As Rembar notes, "Proof beyond a reasonable doubt is a quantum without a number."

9. Beyond the shadow of a doubt

Beyond the shadow of a doubt is the most strict standard of proof. It requires that there be no doubt as to the issue. Widely considered an impossible standard, a situation stemming from the nature of knowledge itself, it is valuable to mention only as a comment on the fact that evidence

in a court never need reach this level. This phrase, has, nonetheless, come to be associated with the law in popular culture.

10. Difference between reasonable doubt

The term is often, though mistakenly, used interchangeably with beyond a reasonable doubt. Many feel the former an impossible standard of proof while the latter is more logically accommodating, allowing for the limits of human reason. On the other hand, others discuss "beyond a the shadow of a doubt" as a religious conviction, arguing that the standard could never be fulfilled in logical discourse, but could be the result of divine revelation or affirmation. Beyond a reasonable doubt is famously used in courts to describe the level of evidence that must be presented to find the defendant guilty. (Criminal proceedings require evidence of this sort; civil offenses consider only what most likely happened, called the "balance of probabilities.") "Beyond the shadow of a doubt" has been used in popular discussions of court, possibly to dramatize court proceedings, though in reality this level of proof in court is inaccurate and potentially misleading.

11. Warrant

Most often, the term **warrant** refers to a specific type of authorization; a writ issued by a competent officer, usually a judge or magistrate, which commands an otherwise illegal act that would violate individual rights and affords the person executing the writ protection from damages if the act is performed.

Warrants are typically issued by courts and are directed to the sheriff, constable or a police officer. The warrants issued by a court normally are search warrants, arrest warrants, and execution warrants. A typical arrest warrant in the United States will take the approximate form of:

"This Court orders the Sheriff or Constable to find the named person, wherever he may be found, and deliver said person to the custody of the Court."

Warrants are also issued by other government entities, particularly legislatures, since most have the power to compel the attendance of their members. This is called a call of the house.

In the United Kingdom, senior public appointments are made by **warrant** under the Royal sign-manual, the personal signature of the monarch, on the recommendation of the government. In an interesting survival from medieval times, these warrants abate (lose their force) on the death of the sovereign if they have not already been executed. This particularly applied to Death Warrants in the days when England authorized capital punishment. Perhaps the most celebrated example of this occurred on the 17 November 1558, when several Protestant heretics were tied to their stakes in Smithfield, and the faggots were about to be lit, when a royal messenger rode up to announce that Queen Mary had died, and that the warrants had lost their force. The first formal act of Mary's successor, Elizabeth I, was to decline to re-issue the warrants, and the heretics were quietly released a few weeks later.

For many years, the English government had used a "general warrant" to enforce its laws. These warrants were broad in nature and did not have specifics as to why they were issued or what the arrest was being made for. A general warrant placed almost no limitations on the search or arresting authority of a soldier or sheriff. This concept had become a serious problem when those in power issued general warrants to have their enemies arrested when no wrongdoing had been done. During the Middle Ages, the English government outlawed all general warrants. This study of the history of England made the American Founding Fathers ensure that general warrants would be illegal in the United States as well when the Fourth Amendment to the U.S. Constitution was ratified in 1791.

6. Exceptions

There are three exceptions to the exclusionary rule. In these cases, while the situation meets the three elements needed to trigger the exclusionary rule, the evidence will be allowed anyway.

The first exception is the Independent Source Doctrine. This exception was created in the Supreme Court case of Segura and Colon v U.S in 1984. In this situation, evidence is seized in two different physical ways. One of them is illegal, but the second seizure of the same evidence is legal. For example, if one were to photo-copy financial records without a warrant of someone suspected of embezzlement, but then later returned with a warrant and re-copied the information, that evidence would be allowed.

The second exception is the Inevitable Discovery Doctrine. The case that added this exception was Nix vs. Williams, in 1984. This exception states that the evidence is seized in two different ways, but only one being physical. The evidence is secured physically by illegal means, but there is also a hypothetical seizure of the evidence that would not have been illegal. For example, if a dead body was buried, and the police violated a defendants rights in order to force him to tell where the body was, this would be the illegal physical seizure. However, if there was a search for the body in progress that would have eventually crossed the area where the body was to be found, this would be the hypothetical seizure. The prosecution must prove by a preponderance of the evidence that the evidence would have been located by this hypothetical means had it not been sized illegally.

The third and final exception is that of Good Faith, which was added in the Supreme Court cases of U.S. vs. Leon and Mass. vs. Sheppard, both in 1984. In this case, a police officer receives a warrant from a magistrate and acts on it to seize evidence. However, there may have been an error in allowing the police officer to have the warrant. Since the point of the exclusionary rule is to deter police misconduct, and there would have been no misconduct by a police officer, the evidence would not be suppressed.

The Good Faith exception itself has limitations. If the defense can show that the police officer misled the magistrate to issue the warrant by providing information he knew to be false, or showed a reckless disregard for the truth, this would prove that there was no good faith. Also, the magistrate must be performing his duty in a neutral and detached manner. If the magistrate was simply acting as a rubber stamp, this too invalidates the good faith. The warrant must also specifically state what is to be seized, and where it is to be seized. If the warrant is facially deficient in these regards, once again the good faith argument is invalidated. The final limitation on the good faith rule is that of probable cause. The warrant must show probable cause for the seizure of evidence. If a logical person cannot determine logical cause from the warrant, good faith is eliminated once more.

The exclusionary rule cannot be found in the United States Constitution, it was a judicial construction. The U.S. Supreme Court created the exclusionary rule out of necessity. They deemed that it was the only method to enforce the protections of the 4th amendment. The Supreme Court originally created the exclusionary rule in the case of Weeks vs. US in 1914. This case only applied the exclusionary rule to defendants being prosecuted in federal court. The Supreme Court later expanded the protection to defendants in state court in the case of Mapp vs. Ohio in 1961.

Topic : The Crime Scene

Topic Objective:

After studying this topic the student should be able to:

- Define physical evidence
- Discuss the responsibilities of the first police officer who arrives at a crime scene
- Explain the steps to be taken to thoroughly record the crime scene

- Describe proper procedures for conducting a systematic search of a crime scene for physical evidence
- Describe proper techniques for packaging common types of physical evidence
- Define and understand the concept of chain of custody

Definition/Overview:

Buccal swab: A swab of the inner portion of the cheek; cheek cells are usually collected to determine the DNA profile of an individual.

Chain of custody: A list of all people who came into possession of an item of evidence.

Finished sketch: A precise rendering of the crime scene, usually drawn to scale.

Physical evidence: Any object that can establish that a crime has been committed or can link a crime and its victim or its perpetrator.

Rough sketch: A draft representation of all essential information and measurements at a crime scene. This sketch is drawn at the crime scene.

Standard/reference sample: Physical evidence whose origin is known, such as blood or hair from a suspect, that can be compared to crime-scene evidence.

Substrate control: Uncontaminated surface material close to an area where physical evidence has been deposited. This sample is to be used to ensure that the surface on which a sample has been deposited does not interfere with laboratory tests.

Key Points:

1. Physical evidence

Physical evidence is any evidence introduced in a trial in the form of a physical object, intended to prove a fact in issue based on its demonstrable physical characteristics. Physical evidence can conceivably include all or part of any object.

In a murder trial for example (or a civil trial for assault), the physical evidence might include DNA left by the attacker on the victim's body, the body itself, the weapon used, pieces of carpet spattered with blood, or casts of footprints or tire prints found at the scene of the crime.

Where physical evidence is of a complexity that makes it difficult for the average person to understand its significance, an expert witness may be called to explain to the jury the proper interpretation of the evidence at hand.

A piece of evidence is not physical evidence if it merely conveys the information that would be conveyed by the physical evidence, but in another medium. For example, a diagram comparing a defective part to one that was properly made is documentary evidence only the actual part, or a replica of the actual part, would be physical evidence. Similarly, a film of a murder taking place would not be physical evidence (unless it was introduced to show that the victim's blood had splattered on the film), but documentary evidence (as with a written description of the event from an eyewitness).

2. First Police Officer

Most police investigations begin at the scene of a crime. The scene is simply defined as the actual site or location in which the incident took place. It is important that the first officer on the crime scene properly protect the evidence. The entire investigation hinges on that first person being able to properly identify, isolate, and secure the scene. The scene should be secured by establishing a restricted perimeter. This is done by using some type of rope or barrier. The purpose of securing the scene is to restrict access and prevent evidence destruction.

It is the duty of the first police officer on the scene to take any steps necessary to make certain that the scene is kept as undisturbed as possible. If there too much movement at the scene by too many people, vital evidence is likely to be moved or destroyed. Securing a scene can be very complicated say in the case of a fire or a road accident as the preservation of life will take precedence over anything else.

Once the scene is secured, the restrictions should include all nonessential personnel. An investigation may involve a primary scene as well as several secondary scenes at other locations. On major scenes a safe space or comfort area should be designated at the crime scene to brief investigators, store needed equipment, or as a break area.

In critical incident management the protocol that is being taught today identifies a three layer or tier perimeter. The outer perimeter is established as a border larger than the actual scene, to keep unlookers and nonessential personal safe and away from the scene, an inner perimeter allowing for a command post and comfort area just outside of the scene, and the core or scene itself. An extreme advantage will be seen by taking the time to properly teach the uniform officers and first responders to evaluate and secure the scene.

3. Recording a Crime Scene

Police officers and crime scene examiners will have limited time to investigate a scene, it is important therefore to record the scene, normally through still photography and videotaping by specialist photographers. Sketch diagrams and contemporaneous notes by attending police officers will also be important in recording the scene.

3.1 The Camera

Forensic photographers usually prefer to use 35 mm cameras, or medium format, as it tends to balance the portability and ease of use with quality images. When taking close-up photos of evidence, the camera is often mounted onto a tripod for stability to ensure the necessary quality required of photographs presented as evidence in court. Some forensic labs have their own darkroom facilities, which then enable photographers to develop the pictures themselves.

3.2 Digital Cameras

Digital cameras have a number of advantages when used in forensic photography as they require no chemical processing, can be displayed on the camera straight after being taken to ensure that the image was captured and the photos can be immediately transferred to a computer and stored in the database. However, digital photos are very easy to alter which therefore prevents them from being used as evidence in court.

3.3 Video Cameras

Video cameras also provide an easy and inexpensive way to document crime scenes and can give the jury with a more realistic sense of the crime scene than still pictures of a room. The zoom on video cameras are however, more often digital rather than optical and thus provide pictures of slightly less clarity than actual photographs. Videos are in general a good briefing tool for police officers who have not visited the crime scene.

3.4 Techniques

Close-up shots of evidence have precise requirements, such as exactness, angle taken and balance, in order to achieve the best possible shots. These pictures of evidence form a factual record and must be able to be reproduced in terms of size, shape and colour,

thus, balance and accuracy is an absolute must. The use of basic camera flash and flood lights are quite sufficient for general crime scene photography, but close-up shots of evidence require careful lighting. Artificial sources of light have proved very useful in the photography of evidence. An example of this concerns oblique-angled light, whereby the light is angled or slanted towards the subject. This is used for bringing out the detail in textured surfaces, such as foot and shoe prints left in mud.

3.5 Light

With the help of coloured filters and adaptable light-guides, lamps can direct a narrow beam of light at the subject of the photograph to enhance the object details. Different light filters also allow for the exposure of distinct evidence. For example, ultraviolet light can make stains and fingerprints glow, violet makes gunshot residue and blood more visible and blue and green lights are used with enhanced fingerprints to show up fibres and urine. This is because some materials absorb the ultraviolet light, while others reflect it, causing the material to become present under the ultraviolet light and flash of the camera when the photo is taken.

A crime scene is also documented by writing down what the scene was like upon discovery, sketching, videoing, evidence tables to document artifacts found, voice recording and witness interviews.

4. Systematic screening of the scene for evidence

Searching the crime scene is obviously important, how it is carried out depends on the scene. It may be as small and contained as a single room or it may be as large as a forest. It may include the dead (or living) body of the victim. Whatever the scene the search has to be as systematic and thorough as possible. Training is important, but so also is experience as it is often the experience eye which will pick up something that does not seem "quite right".

The goal of the evidence-collection stage is to find, collect and preserve all physical evidence that might serve to recreate the crime and identify the perpetrator in a manner that will stand up in court. Evidence can come in any form. Some typical kinds of evidence a CSI might find at a crime scene include:

- Trace evidence (gunshot residue, paint residue, broken glass, unknown chemicals, drugs)
- Impressions (fingerprints, footwear, tool marks)
- Body fluids (blood, semen, saliva, vomit)
- Hair and fibers
- Weapons and firearms evidence (knives, guns, bullet holes, cartridge casings)
- Questioned documents (diaries, suicide note, phone books; also includes electronic documents like answering machines and caller ID units)

With theories of the crime in mind, CSIs begin the systematic search for incriminating evidence, taking meticulous notes along the way. If there is a dead body at the scene, the search probably starts there.

4.1 Examining the body

A CSI might collect evidence from the body at the crime scene or he might wait until the body arrives at the morgue. In either case, the CSI does at least a visual examination of the body and surrounding area at the scene, taking pictures and detailed notes.

Before moving the body, the CSI makes note of details including:

- Are there any stains or marks on the clothing?
- Is the clothing bunched up in particular direction? If so, this could indicate dragging.
- Are there any bruises, cuts or marks on body? Any defense wounds? Any injuries indicating, consistent with or inconsistent with the preliminary cause of death?
- Is there anything obviously missing? Is there a tan mark where a watch or ring should be?
- If blood is present in large amounts, does the direction of flow follow the laws of gravity? If not, the body may have been moved.
- If no blood is present in the area surrounding the body, is this consistent with the preliminary cause of death? If not, the body may have been moved.
- Are there any bodily fluids present beside blood?

- Is there any insect activity on the body? If so, the CSI may call in a forensic entomologist to analyze the activity for clues as to how long the person has been dead.

After moving the body, he performs the same examination of the other side of the victim. At this point, he may also take the body temperature and the ambient room temperature to assist in determining an **estimated time of death** (although most forensic scientists say that time of death determinations are extremely unreliable -- the human body is unpredictable and there are too many variables involved). He will also take **fingerprints** of the deceased either at the scene or at the ME's office.

Once the CSI is done documenting the conditions of body and the immediately surrounding area, technicians wrap the body in a white cloth and put paper bags over the hands and feet for transportation to the morgue for an autopsy. These precautions are for the purpose of preserving any trace evidence on the victim. A CSI will usually attend the autopsy and take additional pictures or video footage and collect additional evidence, especially tissue samples from major organs, for analysis at the crime lab.

4.2 Examining the scene

There are several search patterns available for a CSI to choose from to assure complete coverage and the most efficient use of resources. These patterns may include:

While searching the scene, a CSI is looking for details including:

- Are the doors and windows locked or unlocked? Open or shut? Are there signs of forced entry, such as tool marks or broken locks?
- Is the house in good order? If not, does it look like there was a struggle or was the victim just messy?
- Is there mail lying around? Has it been opened?

- Is the kitchen in good order? Is there any partially eaten food? Is the table set? If so, for how many people?
- Are there signs of a party, such as empty glasses or bottles or full ashtrays?
- If there are full ashtrays, what brands of cigarettes are present? Are there any lipstick or teeth marks on the butts?
- Is there anything that seems out of place? A glass with lipstick marks in a man's apartment, or the toilet seat up in a woman's apartment? Is there a couch blocking a doorway?
- Is there trash in the trash cans? Is there anything out of the ordinary in the trash? Is the trash in the right chronological order according to dates on mail and other papers? If not, someone might have been looking for something in the victim's trash.
- Do the clocks show the right time?
- Are the bathroom towels wet? Are the bathroom towels missing? Are there any signs of a cleanup?
- If the crime is a shooting, how many shots were fired? The CSI will try to locate the gun, each bullet, each shell casing and each bullet hole.
- If the crime is a stabbing, is a knife obviously missing from victim's kitchen? If so, the crime may not have been premeditated.
- Are there any shoe prints on tile, wood or linoleum floors or in the area immediately outside the building?
- Are there any tire marks in the driveway or in the area around the building?
- Is there any blood splatter on floors, walls or ceilings?

The actual collection of physical evidence is a slow process. Each time the CSI collects an item, he must immediately preserve it, tag it and log it for the crime scene record.

Different types of evidence may be collected either at the scene or in lab depending on conditions and resources. Mr. Clayton, for instance, never develops latent fingerprints at the scene. He always sends fingerprints to the lab for development in a controlled environment. In the next section, we'll talk about collection methods for specific types of evidence.

5. Chain of custody

Chain of custody refers to the chronological documentation, and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, physical or electronic. Because evidence can be used in court to convict persons of crimes, it must be handled in a scrupulously careful manner to avoid later allegations of tampering or misconduct which can compromise the case of the prosecution toward acquittal or to overturning a guilty verdict upon appeal. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for example, having been planted fraudulently to make someone appear guilty.

Establishing chain of custody is especially important when the evidence consists of fungible goods. In practice, this most often applies to illegal drugs which have been seized by law enforcement personnel. In such cases, the defendant at times disclaims any knowledge of possession of the controlled substance in question. Accordingly, the chain of custody documentation and testimony is presented by the prosecution to establish that the substance in evidence was in fact in the possession of the defendant.

An identifiable person must always have the physical custody of a piece of evidence. In practice, this means that a police officer or detective will take charge of a piece of evidence, document its collection, and hand it over to an evidence clerk for storage in a secure place. These transactions, and every succeeding transaction between the collection of the evidence and its appearance in court, should be completely documented chronologically in order to withstand legal challenges to the authenticity of the evidence. Documentation should include the conditions under which the evidence is gathered, the identity of all evidence handlers, duration of evidence custody, security conditions while handling or storing the evidence, and the manner in which evidence is transferred to subsequent custodians each time such a transfer occurs (along with the signatures of persons involved at each step).

An example of "chain of custody" would be the recovery of a bloody knife at a murder scene:

Officer Andrew collects the knife and places it into a container, then gives it to forensics technician Bill. Forensics technician Bill takes the knife to the lab and collects fingerprints and other evidence from the knife. Bill then gives the knife and all evidence gathered from the knife to evidence clerk Charlene. Charlene then stores the evidence until it is needed, documenting everyone who has accessed the original evidence (the knife, and original copies of the lifted fingerprints).

The chain of custody requires that from the moment the evidence is collected, every transfer of evidence from person to person be documented and that it be provable that nobody else could have accessed that evidence. It is best to keep the number of transfers as low as possible.

In the courtroom, if the defendant questions the chain of custody of the evidence it can be proven that the knife in the evidence room is the same knife found at the crime scene. However, if there are discrepancies and it cannot be proven who had the knife at a particular point in time, then the chain of custody is broken and the defendant can ask to have the resulting evidence declared inadmissible.

Chain of custody is also used in most chemical sampling situations to maintain the integrity of the sample by providing documentation of the control, transfer, and analysis of samples. Chain of custody is especially important in environmental work where sampling can identify the existence of contamination and can be used to identify the responsible party.

Topic : Physical Evidence

Topic Objective:

After studying this topic the student should be able to:

- Review the common types of physical evidence encountered at crime scenes

- Explain the difference between the identification and comparison of physical evidence
- Define and contrast individual and class characteristics of physical evidence
- Appreciate the value of class evidence as it relates to a criminal investigation

Definition/Overview:

Class characteristics: Properties of evidence that can be associated only with a group and never with a single source.

Comparison: The process of ascertaining whether two or more objects have a common origin.

Identification: The process of determining a substance's physical or chemical identity. Drug analysis, species determination, and explosive residue analysis are typical examples of this undertaking in a forensic setting.

Individual characteristics: Properties of evidence that can be attributed to a common source with an extremely high degree of certainty.

Product rule: Multiplying together the frequencies of independently occurring genetic markers to obtain an overall frequency of occurrence for a genetic profile.

Reconstruction: The method used to support a likely sequence of events by observing and evaluating physical evidence and statements made by those involved with the incident.

Key Points:**1. Physical Evidence**

Physical evidence is any object that could link a suspect to a crime scene, a victim to a crime scene, or it can tell us something about whether a crime has taken place or not. Now, what is an object? That in itself is pretty interesting. An object can be anything such as a gun or it can be a bullet, but it also can be something as small as a human cell, because with current technology we can extract information from a single cell that can tell us something about the DNA type of an individual that was present at the crime scene. So I use the term 'object' very loosely. It can be anything from the large to the infinitely small.

2. Types of Physical Evidence

There are certain items that we see on a repeated basis at crime scenes, such as hairs, fibers, paint chips, glass, guns, bullets, cartridges, and different types of ropes. Also, what's interesting and very important are these carriers of physical evidence - things that we see at scenes that somebody may have touched with their lips or their fingers and have deposited a finger print or DNA onto. We're not going to know much about that until we get it back to the crime lab and we have it analyzed.

The types of physical evidence that can be collected from crime scenes vary greatly and depend heavily on location and type of crime. For example, the physical evidence available for collection at the scene of a robbery is quite different from that available at a murder scene. Physical evidence might include marks on a victim's body, such as abrasions or bite marks. Fingerprints on a door or a window frame also constitute physical evidence, as does blood left behind by a likely perpetrator. Trace evidence is a type of physical evidence that can be collected and forensically examined; this kind of evidence is commonly depicted in CSI episodes. Trace evidence is found when a small amount of material has transferred from either one location or

person to another location or person. Examples of trace evidence include gunshot residue and fibers from clothing or carpeting.

2. Trace evidence

Trace evidence might include gun-shot residue (GSR), paint residue, chemicals, glass and illicit drugs. To collect trace evidence, a CSI might use tweezers, plastic containers with lids, a filtered vacuum device and a knife. He will also have a biohazard kit on hand containing disposable latex gloves, booties, face mask and gown and a biohazard waste bag.

If the crime involves a gun, the CSI will collect clothing from the victim and anyone who may have been at the scene so the lab can test for GSR. GSR on the victim can indicate a close shot, and GSR on anyone else can indicate a suspect. The CSI places all clothing in sealed paper bags for transport to the lab. If he finds any illicit drugs or unknown powders at the scene, he can collect them using a knife and then seal each sample in a separate, sterile container. The lab can identify the substance, determine its purity and see what else is in the sample in trace amounts. These tests might determine drug possession, drug tampering or whether the composition could have killed or incapacitated a victim.

Technicians discover a lot of the trace evidence for a crime in the lab when they shake out bedding, clothing, towels, couch cushions and other items found at the scene. At the CBI Denver Crime Lab, technicians shake out the items in a sterile room, onto a large, white slab covered with paper.

The technicians then send any trace evidence they find to the appropriate department. In the Denver Crime Lab, things like soil, glass and paint stay in the trace-evidence lab, illicit drugs and unknown substances go to the chemistry lab, and hair goes to the DNA lab.

2.1. Body fluids

Body fluids found at a crime scene might include blood, semen, saliva, and vomit. To identify and collect these pieces of evidence, a CSI might use smear slides, a scalpel, tweezers, scissors, sterile cloth squares, a UV light, protective eyewear and luminol. He'll also use a blood collection kit to get samples from any suspects or from a living victim to use for comparison.

If the victim is dead and there is blood on the body, the CSI collects a blood sample either by submitting a piece of clothing or by using a sterile cloth square and a small amount of distilled water to remove some blood from the body. Blood or saliva collected from the body may belong to someone else, and the lab will perform DNA analysis so the sample can be used later to compare to blood or saliva taken from a suspect. The CSI will also scrape the victim's nails for skin -- if there was a struggle, the suspect's skin (and therefore DNA) may be under the victim's nails. If there is dried blood on any furniture at the scene, the CSI will try to send the entire piece of furniture to the lab. A couch is not an uncommon piece of evidence to collect. If the blood is on something that can't reasonably go to the lab, like a wall or a bathtub, the CSI can collect it by scraping it into a sterile container using a scalpel. The CSI may also use luminol and a portable UV light to reveal blood that has been washed off a surface.

If there is blood at the scene, there may also be blood spatter patterns. These patterns can reveal the type of weapon that was used -- for instance, a "cast-off pattern" is left when something like a baseball bat contacts a blood source and then swings back. The droplets are large and often tear-drop shaped. This type of pattern can indicate multiple blows from a blunt object, because the first blow typically does not contact any blood. A "high-energy pattern," on the other hand, is made up of many tiny droplets and may indicate a gun shot. Blood spatter analysis can indicate which direction the blood came from and how many separate incidents created the pattern. Analyzing a blood pattern involves studying the size and shape of the stain, the shape and size of the blood droplets and the

concentration of the droplets within the pattern. The CSI takes pictures of the pattern and may call in a blood-spatter specialist to analyze it.

2.2. Hair and Fibers

A CSI may use combs, tweezers, containers and a filtered vacuum device to collect any hair or fibers at the scene. In a rape case with a live victim, the CSI accompanies the victim to the hospital to obtain any hairs or fibers found on the victim's body during the medical examination. The CSI seals any hair or fiber evidence in separate containers for transport to the lab.

A CSI might recover carpet fibers from a suspect's shoes. The lab can compare these fibers to carpet fibers from the victim's home. Analysts can use hair DNA to identify or eliminate suspects by comparison. The presence of hair on a tool or weapon can identify it as the weapon used in the crime. The crime lab can determine what type of animal the hair came from (human? dog? cow?); and, if it's human, analysts can determine the person's race, what part of the body the hair came from, whether it fell out or was pulled and whether it was dyed.

2.3. Fingerprints

Tools for recovering fingerprints include brushes, powders, tape, chemicals, lift cards, a magnifying glass and Super Glue. A crime lab can use fingerprints to identify the victim or identify or rule out a suspect. There are several types of prints a CSI might find at a crime scene:

- Visible: Left by the transfer of blood, paint or another fluid or powder onto a surface that is smooth enough to hold the print; evident to the naked eye
- Molded: Left in a soft medium like soap, putty or candle wax, forming an impression
- Latent: Left by the transfer of sweat and natural oils from the fingers onto a surface that is smooth enough to hold the print; not visible to the naked eye

A perpetrator might leave prints on porous or nonporous surfaces. Paper, unfinished wood and cardboard are porous surfaces that will hold a print, and glass, plastic and metal are non-porous surfaces. A CSI will typically look for latent prints on surfaces the perpetrator is likely to have touched. For instance, if there are signs of forced entry on the front door, the outside door knob and door surface are logical places to look for prints. Breathing on a surface or shining a very strong light on it might make a latent print temporarily visible. When you see a TV detective turn a doorknob using a handkerchief, she's probably destroying a latent print. The only way not to corrupt a latent print on a non-porous surface is to not touch it. Proper methods for recovering latent prints include:

- Powder (for non-porous surfaces): Metallic silver powder or velvet black powder

A CSI uses whichever powder contrasts most with the color of material holding the print. He gently brushes powder onto the surface in a circular motion until a print is visible; then he starts brushing in the direction of the print ridges. He takes a photo of the print before using tape to lift it (this makes it stand up better in court). He adheres clear tape to the powdered print, draws it back in a smooth motion and then adheres it to a fingerprint card of a contrasting color to the powder.

- Chemicals (for porous surfaces): Iodine, ninhydrin, silver nitrate

The CSI sprays the chemical onto the surface of the material or dips the material into a chemical solution to reveal the latent print.

- Cyanoacrylate (Super Glue) fuming (for porous or non-porous surfaces)

The CSI pours Super Glue into a metal plate and heats it to about 120 F. He then places the plate, the heat source and the object containing the latent print in an airtight container. The fumes from the Super Glue make the latent print visible without disturbing the material it's on.

2.4. Footwear Impressions and Tool Marks

A latent fingerprint is an example of a two-dimensional impression. A footwear

impression in mud or a tool mark on a window frame is an example of a three-dimensional impression. If it's not possible to submit the entire object containing the impression to the crime lab, a CSI makes a casting at the scene.

A casting kit might include multiple casting compounds (dental gypsum, Silicone rubber), snow wax (for making a cast in snow), a bowl, a spatula and cardboard boxes to hold the casts.

If a CSI finds a footwear impression in mud, she'll photograph it and then make a cast. To prepare the casting material, she combines a casting material and water in a Ziploc-type bag and kneads it for about two minutes, until the consistency is like pancake batter. She then pours the mixture into the edge of the track so that it flows into the impression without causing air bubbles. Once the material overflows the impression, she lets it set for at least 30 minutes and then carefully lifts the cast out of the mud. Without cleaning the cast or brushing anything off it (this would destroy any trace evidence), she puts the cast into a cardboard box or paper bag for transport to the lab.

For toolmark impressions, a cast is much harder to use for comparison than it is with footwear. If it's not feasible to transport the entire item containing the tool mark, a CSI can make a silicone-rubber cast and hope for the best. There are two types of tool marks a CSI might find at a crime scene:

- Impressed: A hard object contacts a softer object without moving back and forth (for example, a hammer mark on a door frame). The tool mark is an impression of the tool's shape. It's difficult to make a definite match with an impressed tool mark.

- **Striated:** A hard object contacts a softer object and moves back and forth (for example, pry marks on a window frame). The tool mark is a series of parallel lines. It's easier to make a definite match with a striated tool mark.

In toolmark analysis, the lab might determine what sort of tool made the mark and whether a tool in evidence is the tool that made it. It can also compare the tool mark in evidence to another toolmark to determine if the marks were made by the same tool.

2.5. Firearms

If a CSI finds any firearms, bullets or casings at the scene, she puts gloves on, picks up the gun by the barrel (not the grip) and bags everything separately for the lab. Forensic scientists can recover serial numbers and match both bullets and casings not only to the weapon they were fired from, but also to bullets and casings found at other crime scenes throughout the state (most ballistics databases are statewide). When there are bullet holes in the victim or in other objects at the scene, specialists can determine where and from what height the bullet was fired from, as well as the position of the victim when it was fired, using a laser trajectory kit. If there are bullets embedded in a wall or door frame, the CSI cuts out the portion of the wall or frame containing the bullet -- digging the bullet out can damage it and make it unsuitable for comparison.

2.6. Documents

A CSI collects and preserves any diaries, planners, phone books or suicide notes found at a crime scene. He also delivers to the lab any signed contracts, receipts, a torn up letter in the trash or any other written, typed or photocopied evidence that might be related to the crime. A documents lab can often reconstruct a destroyed document, even one that has been burned, as well as determine if a document has been altered.

Technicians analyze documents for forgery, determine handwriting matches to the victim and suspects, and identify what type of machine was used to produce the document. They can rule out a printer or photocopier found at the scene or determine compatibility or incompatibility with a machine found in a suspect's possession.

Whenever a CSI discovers a piece of evidence at the scene, she photographs it, logs it, recovers it and tags it. An evidence tag may include identification information such as time, date and exact location of recovery and who recovered the item, or it may simply

reflect a serial number that corresponds to an entry in the evidence log that contains this information. The **crime scene report** documents the complete body of evidence recovered from the scene, including the photo log, evidence recovery log and a written report describing the crime scene investigation.

2.7. Bite Marks

Bite marks are found many times in sexual assaults and can be matched back to the individual who did the biting. They should be photographed using an ABFO No. 2 Scale with normal lighting conditions, side lighting, UV light, and alternate light sources. Color slide and print film as well as black and white film should be used. The more photographs under a variety of conditions, the better. Older bitemarks which are no longer visible on the skin may sometimes be visualized and photographed using UV light and alternate light sources. If the bitemark has left an impression then maybe a cast can be made of it. Casts and photographs of the suspect's teeth and maybe the victim's teeth will be needed for comparison. For more information consult a forensic odontologist.

2.8. Fracture Matches

Fracture matches can positively link broken pieces at the scene with pieces found in the possession of a suspect. For example, headlight fragments found at the scene of a hit and run could be positively matched to a broken headlight (just like putting together a jigsaw puzzle) on a suspect's vehicle. Larger fragments should be placed in paper bags or envelopes. Smaller fragments should be placed in a paper packet and then placed in an envelope

- In Section 4 of this course you will cover these topics:
- Audio, Video, Photographic And Computer Evidence
- Confessions And Admissions
- Lay And Police Witnesses

Topic : Audio, Video, Photographic And Computer Evidence**Topic Objective:**

After studying this topic the student should be able to:

- Explain Audio, Video, Photographic And Computer Evidence
- Define Audio Recording Devices
- Discuss The Law
- Define Wire taps
- Explain Video tape
- Discuss Digital Photography

Definition/Overview:

Surveillance: Surveillance: is the monitoring of behavior. Systems surveillance is the process of monitoring the behavior of people, objects or processes within systems for conformity to expected or desired norms in trusted systems for security or social control. Clinical surveillance refers to the monitoring of diseases or public healthrelated indicators (for example symptoms indicating an act of bioterrorism) by epidemiologists and public health professionals.

Key Points:**1. Audio, Video, Photographic And Computer Evidence**

Modern police agencies routinely use a variety of analog and digital audio, video, and photographic equipment during the course of criminal investigations. Recognizing the many advantages of recording crime as it occurs, within the last dozen or so years, police departments have even equipped their patrol vehicles with fixed video cameras. This videotape equipment has

proved especially useful in the prosecution of drunk driving cases and police pursuits. No matter what the media might convey, to be admissible, the activity captured by one of these devices must be relevant, accurate, and portray a correct depiction of the subject matter.

2. Audio Recording Devices

2.1 Audio Tape

Audio tape recordings have been used by law enforcement agencies for many years. With the advent of digital voice recording, where a memory chip is used in lieu of magnetic tape, police agencies have embraced the new technology because of the compact size of the recorders, making them easily concealable on undercover agents and informants.

2.2 Body Wire

Body wire transmitters can easily be concealed in clothing, hats, backpacks, etc. They have no mechanical or moving parts and are totally silent. They do, however, have certain limitations.

2.3 Microphones

When the police have information that a suspect has a reputation for either physically searching people before discussing illegal activities, or carries a transmitter detector, a concealed room microphone may be a viable solution. Microphones can be easily concealed in any item commonly found in a hotel room or home. These items may include a television, alarm clock, or lamp.

3. The Law

Federal law, and many states allow for the recording of conversations with one party consent.

This means so long as one party to the conversation grants permission for the conversation to be

recorded, it is admissible at trial. State and local police investigators should always check with their local prosecutor before attempting such an investigative technique.

For many years, federal agencies have relied on wiretaps, or the interception of verbal communication from telephones, to enhance their criminal investigations, particularly in drug and organized crime cases. A specific court order has to be obtained before wire communications are intercepted, and there are severe limitations on law enforcement agencies that use this investigative technique.

4. Wire taps

Wiretaps often produce substantial evidence of guilty, and often leave the defendants with little choice but to plead guilty or enter into a plea-bargain agreement with the prosecutor, once challenges to the probable cause leading to the granting of a wiretap are overcome.

5. Video tape

With the invention of videotape, law enforcement and prosecutors immediately recognized its tremendous potential to prove guilt. It can also be used to prove innocence as well, but overwhelmingly it provides evidence of guilt that is hard to dispute.

Videotape has been used extensively in criminal trials to provide juries with a first-hand account of criminal activity. Videotaping a drug transaction, or the intoxicated state of a motorist provides members of a jury with an accurate account of exactly what happened. No longer do law enforcement officers or confidential informants have to rely solely on their memories to recount what transpired.

6. Digital Photography

With the advent of digital photography, photographs taken by police agencies using film have declined rapidly, for both cost and storage reasons. Digital photographs cost nothing to develop and be stored electronically. Scores of crime scene and other photographs can be stored on a memory card, and rapidly distributed to other law enforcement agencies, prosecutors, and defense attorneys as part of discovery material.

Criminals are increasingly using computers to assist them in their crimes. If a computer is included as evidence to be seized during a search warrant execution, then it is important for the officers to know how to properly unplug and transport it to a laboratory, where data from its hard drive can be safely obtained.

Because monitors do not store data, it is not necessary to remove them from the seized computer. However, printers should also be seized, because they have memories that may contain vital data.

Topic : Confessions And Admissions

Topic Objective:

After studying this topic the student should be able to:

- Define Fifth Amendment: Right to Remain Silent
- Explain The ban on forced confessions
- Understand Requirements for asserting the right against self-incrimination
- Explain Confessions and counsel
- Define The Common Law Rule
- Elaborate Miranda warnings

- Discuss The erosion of Miranda
- Define Double jeopardy
- Explain Self-incrimination
- Define Due process
- Explain Eminent domain

Definition/Overview:

Grand Jury System: in which private citizens serve as criminal justice gatekeepers

Double Jeopardy: prohibits trying of an individual more than once for the same crime

Protections Of 5th Amendment: right to due process generally protected citizens from the possibility of an oppressive federal government and the right to procedural certainty , the freedom from arbitrary seizures of personal property (impressment of personal property)

Miranda V. Arizona (1966): no statement which stemmed from the custodial questioning of a suspect by law enforcement officials, could be introduced unless the state demonstrated that procedural safeguards to secure the 5th Amendments privilege against self-incrimination were taken

Sequential Interrogations: Just as Miranda attaches to all custodial situations in which special circumstances are not present, it also applies to all interrogations, partial or comprehensive, which are attempted during the custodial period

Key Points:**1. Fifth Amendment: Right to Remain Silent**

Taking the Fifth refers to the practice of invoking the right to remain silent rather than incriminating oneself. It protects guilty as well as innocent persons who find themselves in incriminating circumstances. This right has important implications for police interrogations, a method that police use to obtain evidence in the form of confessions from suspects.

2. The ban on forced confessions

If the accused did not have the right to remain silent, the police could resort to torture, pain, and threats. Such methods might cause an innocent person to confess to avoid further punishment. In fact, there have been occasions in American history when the police have wrung confessions out of suspects. One of the most brutal incidents took place in 1936 and resulted in the case of *Brown v. Mississippi*. Police accused three black men of a murder and whipped them until they confessed. A Mississippi court sentenced the men to death, but the U.S. Supreme Court reversed the verdict. Confessions obtained by physical torture cannot serve as the basis of a conviction in state or federal courts. The rationale behind this point of law is that forced confessions offend the dignity of human beings, undermine the integrity of government, and tend to be unreliable.

3. Requirements for asserting the right against self-incrimination

The right against self-incrimination applies mainly to confessions and it pertains only to incriminating communications that are both compelled and testimonial. If a suspect waives his or her right to remain silent and voluntarily confesses, the government can use the confession against the suspect. The Fifth Amendment protects witnesses from giving testimonial evidence or answering questions that may incriminate them. Testimonial evidence is provided by live witnesses or through a transcript of a live witness. The Fifth does not apply to physical evidence (for example, the taking of blood samples when there is reason to believe that the suspect was driving while intoxicated).

4. Confessions and counsel

How is the Fifth Amendment's privilege against self-incrimination linked to the Sixth Amendment's right to counsel? In *Escobedo v. Illinois* (1964), the Supreme Court required the police to permit an accused person to have an attorney present during interrogation. Whenever police officers shift their questioning from investigatory to accusatory, defendants are entitled to counsel.

5. The Common Law Rule

Not until the latter part of the eighteenth century did there develop a rule excluding coerced confessions from admission at trial; prior to that time, even confessions obtained by torture were admissible. As the rule developed in England and in early United States jurisprudence, the rationale was the unreliability of the confession's contents when induced by a promise of benefit or a threat of harm. In its first decision on the admissibility of confessions, the Court adopted the common-law rule, stressing that while a "voluntary confession of guilt is among the most effectual proofs in the law, from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution." "[T]he presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law." Subsequent cases followed essentially the same line of thought. Then, in *Bram v. United States* the Court assimilated the common-law rule thus mentioned as a command of the Fifth Amendment and indicated that henceforth a broader standard for judging admissibility was to be applied. Though this rule and the case itself were subsequently approved in several cases, the Court could hold within a few years that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent, and more than once later Courts could doubt "whether involuntary confessions are excluded from federal criminal trials on

the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy. . . ."

6. Miranda warnings

Expanding upon Escobedo, the Supreme Court set forth stringent interrogation procedures for criminal suspects to protect their Fifth Amendment freedom from self-incrimination. Miranda's confession to kidnapping and rape was obtained without counsel and without his having been advised of his right to silence, so it was ruled inadmissible as evidence.

This decision, *Miranda v. Arizona* (1966), obliged the police to advise suspects of their rights upon taking them into custody. Prior to any questioning of suspects in custody, the police must warn the suspects that they have a right to remain silent, that anything they say may be used against them, and that they have the right to counsel. The suspect may voluntarily waive these rights. If, at any time during the interrogation, the suspect indicates that he or she wishes to remain silent, the police must stop the questioning. Additionally, Miranda mandates that confessions obtained without complete Miranda warnings are inadmissible in court.

7. The erosion of Miranda

Conservatives branded Miranda a technicality that would handcuff the police. In the 1970s, 1980s, and 1990s, the Supreme Court narrowed Miranda's scope. Although the Court has not yet overruled Miranda, it has limited its impact. In *Harris v. New York* (1971), for example, the Burger Court ruled that statements made by an individual who had not been given the Miranda warnings could be used to challenge the credibility of his testimony at trial. In *New York v. Quarles* (1984), the Court created the public safety exception: officers can ask questions before giving the Miranda warnings if the questions deal with an urgent situation affecting public safety. In *Nix v. Williams* (1984), the Court invented the inevitable discovery exception to Miranda. It allows for the introduction of illegally seized evidence if a court determines that the police would have inevitably discovered the evidence without improper police questioning of the defendant.

- When a Miranda warning is required

Miranda applies only when the police have a suspect in custody.

- When a Miranda warning isn't necessary

Police don't have to give the warnings in these situations.

- When the police have not focused on a suspect and are questioning witnesses at a crime scene.
- When a person volunteers information before the police ask a question.
- When the police stop and briefly question a person on the street.
- During a traffic stop.

8. Double jeopardy

Generally, individuals may be tried only once for a particular offense under the double jeopardy clause. Originally, the protection against double jeopardy did not extend to prosecutions in state courts. In *Benton v. Maryland* (1969), the Supreme Court "incorporated" the clause under the Fourteenth Amendment.

The Fifth Amendment refers to being put in "jeopardy of life or limb." The clause, however, has been interpreted as providing protection regarding "every indictment or information charging a party with a known and defined crime or misdemeanor." The clause, it has been held, does not prevent separate trials by different governments, and the state and federal governments are considered "separate sovereigns". Thus, one may be prosecuted for a crime in a state court, and also prosecuted for the same crime in another state, a foreign country, or (most commonly) in a federal court.

Once acquitted, a defendant may not be retried for the same offense. Acquittals by both juries and judges are generally deemed final. A trial judge may normally enter an acquittal if he deems the evidence insufficient for conviction. If the judge makes this ruling before the jury reaches its verdict, his determination is final. If, however, the judge overrules a conviction by the jury, the prosecution may appeal to have the conviction reinstated.

Defendants may not be retried following conviction except in limited circumstances. If a defendant appeals a decision and is successful in having it overturned, he is subject to retrial. An

exception arises if the verdict is overturned on the grounds of evidentiary insufficiency, rather than on the grounds of procedural faults. As noted above, if the trial court made a determination of evidentiary insufficiency, the determination would constitute a final acquittal; in *Burks v. United States* (1978), it was held that "it should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient." Another exception arises in cases of conviction for lesser offenses. For instance, if a defendant is charged with murder in the first degree, is convicted by the jury of murder in the second degree, and then has the jury's conviction overturned on procedural grounds, he may be retried for second but not first degree murder; the jury, by convicting the defendant of second degree murder, is deemed to have implicitly acquitted him of first degree murder.

The defendant may not be punished twice for the same offense. In certain circumstances, however, a sentence may be increased. It has been held that sentences do not have the same "finality" as acquittals, and may therefore be reviewed by the courts. Sentence increases may not, however, be made once the defendant has already begun serving his term of imprisonment. If a defendant's conviction is overturned on procedural grounds, the retrial may result in a harsher penalty than the original trial. The only exception is that the prosecution may not seek capital punishment in the retrial if the jury did not impose it in the original trial. The reason for this exception is that before imposing the death penalty the jury has to make several factual determinations and if the jury does not make these it is seen as the equivalent of an acquittal of a more serious offense.

Mistrials are generally not covered by the double jeopardy clause. If a judge dismisses the case or terminates the trial without deciding the facts in the defendant's favor (for example, by dismissing the case on procedural grounds), the case is a mistrial and may normally be retried. Furthermore, if a jury cannot reach a verdict, the judge may declare a mistrial and order a retrial. When the defendant moves for a mistrial, there is no bar to retrial, even if the prosecutor or judge caused the error that forms the basis of the motion. An exception exists, however, where the prosecutor or judge acted in bad faith. In *Oregon v. Kennedy* (1982), the Supreme Court held that "only where the governmental conduct in question is intended to 'goad' the defendant into

moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion."

Defendants may not more than once be placed in jeopardy for the "same offense." Sometimes, however, the same conduct may violate different statutes. In *Blockburger v. United States* (1932), the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." For example, the test was applied in *Brown v. Ohio* (1977). The defendant had first been convicted of operating an automobile without the owner's consent, and later of stealing the same automobile. The Supreme Court concluded that the same evidence was necessary to prove both offenses, and that in effect there was only one offense. Therefore, it overturned the second conviction.

In other cases, the same conduct may constitute multiple offenses under the same statute, for instance where one robs many individuals at the same time. There is no explicit bar to separate prosecutions for different offenses arising under the same "criminal transaction," but it is not permissible for the prosecution to relitigate facts already determined by a jury. In *Ashe v. Swenson* (1970), the defendant was accused of robbing seven poker players during a game. He was first tried for, and acquitted of, robbing only one of the players; the defense did not contest that a robbery actually took place. The state then tried the defendant for robbing the second player; stronger identification evidence led to a conviction. The Supreme Court, however, overturned the conviction. It was held that in the first trial, since the defense had not presented any evidence that there was no robbery, the jury's acquittal had to be based on the conclusion that the defendant's alibi was valid. Since one jury had held that the defendant was not present at the crime scene, the State could not relitigate the issue.

9. Self-incrimination

The Fifth Amendment protects witnesses from being forced to incriminate themselves. To "plead the Fifth" or to "take the Fifth" is to refuse to answer a question because the response could form incriminating evidence. Fifth Amendment protections apply wherever and whenever an

individual is compelled to testify, including in settings such as grand jury or congressional hearings (in the 1950s, many witnesses testifying before the House Committee on Un-American Activities and the Senate Internal Security Subcommittee cited their rights under the amendment in response to questions concerning their alleged membership in the Communist Party, and the amendment has also been used extensively by defendants and witnesses in criminal cases involving the Mafia). The Supreme Court has also incorporated the self-incrimination clause under the Fourteenth Amendment.

In some cases, individuals may be compelled to report or disclose evidence that may be used against them in criminal cases. In *United States v. Sullivan* (1927), the Supreme Court held that an individual could not refuse to file an income tax return on the grounds that he would in doing so have to disclose the illegal source of his revenue. In *Albertson v. SACB* (1965), however, the Supreme Court struck down a law requiring members of the Communist Party to register with the government because it was "directed at a highly selective group inherently suspect of criminal activities." Corporations may also be compelled to keep and turn over records; the Supreme Court has held that Fifth Amendment protections against self-incrimination extend only to "natural persons." There are, however, a few restraints on the government; it may not, for instance, compel a person to keep records for a corporation if those records could be used against the record-keeper himself.

If the government gives an individual immunity, then that individual may be compelled to testify. Immunity may be "transactional immunity" or "use immunity"; in the former, the witness is immune from prosecution for offenses related to the testimony; in the latter, the witness may be prosecuted, but his testimony may not be used against him. The Supreme Court has held that the government need only grant use immunity to compel testimony. The use immunity, however, must extend not only to the testimony made by the witness, but also to all evidence derived therefrom. This scenario most commonly arises in cases related to organized crime.

The Fifth Amendment's protections often relate to police interrogations and confessions by suspects. Originally, at common law, any confession, however obtained (even by torture), was admissible in court. In the eighteenth century, common law in England came to provide that

coerced confessions were inadmissible; the common law rule was incorporated into American law by the courts. Physical torture is not the only element that renders a confession involuntary and inadmissible. *Chambers v. Florida* (1940) held a confession obtained after five days of prolonged questioning, during which time the defendant was held incommunicado, to be coerced; a similar finding was reached in *Ashcraft v. Tennessee* (1944), the suspect having been interrogated under electric lights by officers continuously for a period of thirty-six hours. *Haynes v. Washington* (1963) held that an "unfair and inherently coercive context" (for instance, a prolonged interrogation) rendered a confession inadmissible.

Miranda v. Arizona (1966) was a landmark case involving confessions. Ernesto Miranda had signed a statement confessing the crime, but the Supreme Court held that the confession was inadmissible because the defendant had not been warned of his rights. The Court held, "the prosecution may not use statements [...] stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." The warning Chief Justice Earl Warren referred to is now called the Miranda Warning, and is delivered by police before interrogations.

Miranda has been clarified by several further Supreme Court rulings. For the warning to be necessary, the questioning must be under "custodial" circumstances. A person detained in jail or under arrest is deemed to be in police custody. Mere presence in a police station does not indicate that the circumstances of questioning were custodial unless a reasonable person in the suspect's situation would believe that he is not free to leave. The questioning need not be explicit; for example, two police officers engaging in a conversation designed to goad the suspect into interjecting an incriminatory remark would constitute questioning. A person may

choose to waive his Miranda rights, but the prosecution bears the burden of showing that such a waiver was actually made.

A confession not preceded by a Miranda warning (where one is necessary) cannot be admitted as evidence against the confessing party in normal judicial proceedings. The Supreme Court, however, has held that if a defendant voluntarily testifies at the trial that he did not commit the crime, his confession may be introduced to challenge his credibility (i.e. to "impeach" the witness), even if it was obtained without giving the required warnings.

In *Hiibel v. Sixth Judicial District Court of Nevada*, the Supreme Court ruled 5-4 on June 21, 2004 that the First, Fifth, and Fourteenth Amendments do not give people the right to refuse to give their name when questioned by police.

10. Due process

The Fifth Amendment prevents individuals from being punished without "due process of law." Due process extends to all persons (including aliens) and corporate entities. The Fourteenth Amendment explicitly binds the states with due process protections. (See due process in the United States for a discussion of what constitutes due process in both state and federal contexts.)

11. Eminent domain

The Supreme Court has held that the federal government and each state has eminent domain, that is to say, the power to take private property. The Fifth Amendment provides that private property may only be taken for public use if just compensation is paid. The provision did not, originally, directly apply to the states. Like all clauses except the grand jury clause, however, the Supreme Court has extended the eminent domain clause to the states under the Fourteenth Amendment.

What exactly constitutes "public use" is up to determination by the courts, which have, however, shown much deference to the determinations of Congress and state legislatures. The property need not actually be used by the public; rather, it must be used or disposed of in such a manner as to benefit the public welfare or public interest. One exception that restrains the federal

government is that the property must be used in exercise of the government's enumerated powers.

The owner of the property that is taken by the government must be justly compensated. Speculative schemes that the owner claims the property was intended for use in need not be taken into account when determining the amount that must be paid. Normally, the fair market value of the property determines "just compensation." If the property is taken before the payment is made, interest (though the courts have refrained from using that term) accrues.

The courts have not refrained from seizing land for commercial development on the behalf of said developers when the state stand to gain sizable compensation through taxation of such a business.

Topic : Lay And Police Witnesses

Topic Objective:

After studying this topic the student should be able to:

- Define Expert Witness
- Explain Methods of impeachment
- Discuss Bolstering and Rehabilitating

Definition/Overview:

Subpoena: formal directive from a court which requires an individual to appear at a particular place and time to provide testimony or evidence

Impeachment: opposing counsel may also introduce evidence to contradict the sworn testimony; designed to discredit a witness

Witness: A witness is someone who has firsthand knowledge about a crime or dramatic event through their senses (e.g. seeing, hearing, smelling, touching), and can help certify important considerations to the crime or event. A witness who has seen the event firsthand is known as an "eye-witness". Witnesses are often called before a court of law to testify in trials.

Subpoena Commands: A subpoena commands a person to appear. In many jurisdictions it is compulsory to comply, to take an oath, and tell the truth, under penalty of perjury. It is used to compel the testimony of witnesses in a trial. Usually it can be issued by a judge or by the lawyer representing the plaintiff or the defendant in a civil trial or by the prosecutor or the defense attorney in a criminal proceeding.

Key Points:**1. Eyewitness testimony**

Eyewitness testimony is generally presumed to be better than circumstantial evidence. Studies have shown, however, that individual, separate witness testimony is often flawed, and parts of it can be meaningless. This can occur because of a person's faulty observation and recollection, because of a person's bias, or because the witness is lying. If several people witness a crime it is probative to look for similarities in their collective descriptions to substantiate the facts of an event, keeping in mind the contrasts of individual descriptions.

One study involved an experiment in which subjects acted as jurors in a criminal case. Jurors heard a description of a robbery-murder, then a prosecution argument, then an argument for the defense. Some jurors heard only circumstantial evidence, others heard from a clerk who claimed to identify the defendant. In the first case, 18% percent found the defendant guilty, but in the second, 72% found the defendant guilty. Lineups, where the eyewitness picks out a suspect from a group of people in the police station, are often grossly suggestive, and give the false impression that the witness remembered the suspect. In another study, students watched a staged crime. An hour later they looked through photos. A week later they were asked to pick the suspect out of lineups. 8% of the people in the lineups were mistakenly identified as criminals. 20% of the innocent people whose photographs were included were mistakenly identified. Weapon focus effects in which the presence of a weapon impairs memory for surrounding details is also an issue.

Another study looked at sixty-five cases of "erroneous criminal convictions of innocent people." In 45% of the cases, eyewitness mistakes were responsible. The formal study of eyewitness memory is usually undertaken within the broader category of cognitive processes the different ways in which we make sense of the world around us. We do this by employing the mental skills at our disposal such as thinking, perception, memory, awareness, reasoning and judgment. Although cognitive processes can only be inferred and cannot be seen directly, they all have very important practical implications within a legal context.

If one were to accept that the way we think, perceive, reason and judge is not always perfect, then it becomes easier to understand why cognitive processes and the factors influencing these processes are studied by psychologists in matters of law; not least because of the grave implications that this imperfection can have within the criminal justice system.

The study of witness memory has dominated this realm of investigation and for a very good reason because as Huff and Rattner note: the single most important factor contributing to wrongful conviction is eyewitness misidentification.

2. Five Components of Witness Credibility

Witness credibility is measured through five categories: expertise, reliability, trustworthiness, objectivity, and dynamism. While other characteristics certainly influence perceptions of credibility, these five factors comprise the basis for believability. In order for a witness to be perceived as fully credible, all five categories must be present.

- Expertise measures reliability of the witness's knowledge of the topic being discussed. Expertise is built through interactions. Primarily, these interactions are between the witness, the audience, and the message delivered. In order to be credible, one must be perceived to be an expert on the subject. While attorneys prize education and credentials for expertise, jurors often value common sense, practical wisdom, and hands-on experience. In short, jurors value completely different types of interactions than most attorneys. Even though high scholastic achievement is impressive, jurors often prefer hands-on, real-world experience with the topic at hand. A witness with a bachelor's degree in engineering who built a similar structure to the one discussed is often more impressive than a professor with a doctorate who has dealt in purely abstract or theoretical designs. Jurors want experts to have examined, seen, and touched the materials in question. Jurors want witnesses to demonstrate how they have interacted with the topics at issue in the case at hand. This is especially important for expert witnesses (as opposed to eyewitnesses or other fact witnesses).
- Reliability measures the impression that a witness has performed consistently, dependably, and responsibly. Jurors value reliable information, and the more consistent the witness can be, the more reliable the information will seem. Inconsistencies, however, only matter when they are significant; that is, jurors will often excuse normal inconsistencies resulting from recall errors or misunderstandings. Nit-picking at a witness's minor inconsistencies, especially on cross-examination, can be seen as annoying to jurors, rather than an example of the witness giving unreliable testimony. This does not mean that small inconsistencies do not matter. Quite the contrary, small differences are a big deal so long as opposing counsel can make the differences significant to the witness's testimony or recall. When it comes to reliability, consistency in demeanor can be just as important. Confidence and cooperation with opposing counsel give jurors the impression that the information coming from the witness is more reliable, because the witness has nothing to hide. Additionally, major changes in a witness's demeanor from direct

examination to cross-examination often prove damaging to reliability, showing inconsistency and reducing the credibility of the witness testimony.

- Trustworthiness in a witness often comes into play when jurors make comparisons between conflicting testimony or points of view. The more trustworthy of two accounts is the most believable and credible. Honesty is a large part of trust, but many complex interactions take place when a person trusts another. Honesty is not a simple concept, either after all, how many lies make a liar? How many mistakes is a person allowed? Often, the common touch signifies trustworthiness. This means trust is a function of position, not performance, on some level. Presenting oneself as management can lead to distrust from those who have spent their entire lives as workers. Prestige can be a turn-off for those who have never garnered any. While you cannot undo these elements of a witness background, it is useful to relate the witness actions, testimony, opinions, or experience to what the average person (or juror) would have done, thought, or experienced. Nonverbal communication often cements whether a person is accepted as trustworthy demeanor, expression, mannerisms, and tone all help a juror relate to a witness. These characteristics must be scrutinized before trial and, if necessary, either improved or explained.
- Objectivity in the courtroom is rooted in freedom from bias, prejudice, and partisan interest. Objectivity is related not only to a witness words and actions, but also to the relationships between the witness and other parties. Parents have an obvious bias toward their children, for example. Attorneys are viewed as advocates for their clients, who will do anything to win a trial. Thus, credibility can be enhanced when behavior is opposite of what would normally be expected from potentially biased witnesses. When someone admits some problems with their employer, or an executive admits corporate wrongdoing, objectivity is more easily attributed. Admitting to bad facts, especially in a controlled environment under direct examination, can help to enhance credibility through objectivity. An expert's opinion will certainly not be neutral, however; instead, the expert witness must achieve objectivity through neutral methods and valid experience.
- Dynamism measures nonverbal attributes, including assertiveness, forcefulness, strength, and activity (versus passivity). Dynamism works best at a moderate level; if a witness is too dynamic, it can be a turn-off for some jurors, making the witness appear to be pushy, aggressive, or over the top. Dynamic speakers avoid hesitant or equivocal language, instead choosing to be

forceful and direct. Use of active voice, concrete nouns, and sparing use of adverbs and adjectives lends itself to increased dynamism. The witness should use direct, simple declarative statements to make points, creating a moderate air of dynamic speech and action.

3. Expert Witness

An expert witness is a witness who has knowledge beyond that of the ordinary lay person enabling him/her to give testimony regarding an issue that requires expertise to understand. Experts are allowed to give opinion testimony which a non-expert witness may be prohibited from testifying to. In court, the party offering the expert must lay a foundation for the expert's testimony. Laying the foundation involves testifying about the expert's credentials and experience that qualifies him/her as an expert. Sometimes the opposing party will stipulate (agree to) to the expert's qualifications in the interests of judicial economy.

Experts are qualified according to a number of factors, including but not limited to, the number of years they have practiced in their respective field, work experience related to the case, published works, certifications, licensing, training, education, awards, and peer recognition. They may be called as upon as consultants to a case and also used to give testimony at trial. Once listed as a witness for trial, the materials they rely upon in forming an opinion in the case is subject to discovery by the opposing parties. Expert testimony is subject to attack on cross-examination in the form of questioning designed to bring out any limitations in the witness's qualifications and experience, lack of witness's confidence in his opinions, lack of the preparation done, or unreliability of the expert's sources, tests, and methods, among other issues.

Experts in a wide variety of backgrounds may testify, such as construction, forensics, gemstones, and many more areas. They are allowed to be compensated for their time and expenses in preparing for and giving testimony, as long as they are not being paid to perjure themselves. For example, doctors often serve as expert witnesses and may provide testimony regarding the following issues, among others:

- Physician Projected Future Medical Costs Analysis
- Vocational Assessments

- Loss of Future
- Earnings Capacity Analysis
- Reduction of Work Life Expectancy Analysis
- Disability Assessments
- Permanent and Total Disability Determination
- Independent Medical Evaluations

3. Methods of impeachment

A party may be impeached through introducing evidence of any of the following (remembered via the mnemonic **BICCC**):

- **Bias**--The witness is biased against one party or in favor of the other. The witness has a personal interest in the outcome of the case. A classic example is a witness for the prosecution who is awaiting sentencing. He's more likely to be pro-prosecution in hopes of better treatment. The proper way to handle this is first to question the witness to see if he will admit to the bias. If not, then the cross-examiner may bring in other witnesses to expose the bias.
- **Inconsistent Statement**--The witness has made two or more conflicting statements. By exposing his conflicting statements, you reduce his credibility.
- **Character Show** that the witness has a community-recognized reputation for dishonesty. Specific examples are inadmissible unless the witness admits them himself under cross-examination but to present witnesses who can attest to the witness's character is helpful. This might seem tedious, especially when it is realized that a character witness against the principal witness may himself be impeached the same way, but normally witnesses are total unknowns to jurors, and people with reputations in their community for being total fabricators do show up in court from time to time. Coupled with character are prior criminal acts by the witness. This is handled in one of three ways:
 - If the witness has committed any crime involving dishonesty (i.e. larceny-by-trick, embezzlement, fraud, etc.) then the prior conviction is admissible under every circumstance.
 - If the witness is the criminal defendant, a felony conviction (i.e., conviction of a crime that is punishable by more than one year in prison) is admissible if the judge determines that the probative value outweighs the potential for prejudice.

- If the witness is not the criminal defendant, a felony conviction is admissible unless the judge determines that its prejudicial nature substantially outweighs its probativity.
- Stale felonies, that is, felonies where the witness was released at least ten years ago (or was found guilty ten years ago if no incarceration) are admissible only if the probative value substantially outweighs its prejudice.
- Competency Basically show that the witness was unable to sense what he claimed to have (i.e., could not see from where he was, etc.) or that he lacked the requisite mental capacity. Older common law would exclude an incompetent witness from testifying. Modern rules, and the Federal Rules of Evidence allow the witness on the stand (in most cases) considering competence but one of many factors juries are to consider when determining credibility of the witness.
- Contradiction This occurs when the witness is induced to contradict his own testimony during the present proceeding. This differs from inconsistent statements, above. Inconsistent statements involve statements made out-of-court (cf. hearsay) or in prior proceedings. Contradiction involves the witness saying two different things while presently testifying. Another form of impeachment by contradiction has a subtle effect on the order in which the attorneys present their evidence. When a defense attorney calls a witness who testifies about what happened, this gives the opposing attorney the opportunity to present evidence contradicting that witness. Had impeachment by contradiction not been allowed by the rules of evidence, the second attorney would have been barred from presenting the contradicting evidence because he already had his one (and only) chance to prove the facts of the case as he claims them to be. But since his opponent put on a witness, this "opens the door" to him to strengthen his case by going again with more proof of what happened: the only legal excuse for this re-hash of his claim is that he is impeaching by contradiction his opponent's witness. Another use of impeachment by contradiction can be explained negatively: while an attorney cannot contradict an opponent's witness on a trivial ("collateral") fact, like the color of the hat she testified she was wearing on the day she witnessed the accident, on more important matters normally excluded by the rules of relevance, contradiction may be allowed. Thus, a witness might not normally be permitted to testify she is a safe driver, and the opponent cannot normally prove she is in general an unsafe driver, but should the witness nonetheless happen to testify she

is a safe driver (say because no objection was made to the question), her opponent can now contradict her by eliciting on cross-examination that she has been involved in several accidents. Had contradiction impeachment not be permitted, then the unsafe character of the witness would have been barred by the rules of evidence. This impeachment-by-contradiction evidence is admitted solely to impeach, that is, cannot be used to prove anything about the events being litigated, but can only be used to discredit the witness's credibility.

The theory is when a witness can be contradicted, that should be taken into account in determining the reliability of the witness. Hence, the jury is instructed by the judge "do not use [the impeachment evidence] as proof of any facts, but only to consider whether the witness in question should be believed." All experienced courtroom observers agree that jurors will have great difficulty understanding this distinction, known as "limited admissibility" or "admissibility for a limited purpose". Even more unlikely is the prospect that a juror who understands the instruction will be psychologically capable of obeying it. The only practical impact of this limited admissibility is that the evidence cannot be used to prop up a weak case that would otherwise be dismissed by the court for insufficient evidence--because it was admitted only for the impeachment of a witness.

4. Who may impeach?

Under the common law of England, a party could not impeach his own witness unless one of four special circumstances was met. This was due to the Voucher Rule, which required that the proponent of the witness "vouch" for the truthfulness of the witness. The special circumstances were:

- If the witness was an adverse party (e.g. if the plaintiff called the defendant to the stand, or vice-versa).
- If the witness was hostile (e.g. refused to cooperate).
- If the witness was one that the party was required by law to call as a witness.
- If the witness surprised the party who called him by giving damaging testimony against that party.

This rule has been eliminated in many jurisdictions. Under the United States' Federal Rules of Evidence, (F.R.E. 607), any party may attack the credibility of any witness.

5. Bolstering and Rehabilitating

The general rule is that the proponent of a witness may not attempt to build up the witness's credibility prior to his being impeached. The rationale is that the witness is presumed trustworthy. It also speeds proceedings by not spending time bolstering when the other side may not even impeach the witness.

In order to rehabilitate a witness, the proponent is confined to using the same techniques used by the opponent to impeach the witness. That is, if the opponent impeached via bias, then rehabilitation is limited to negating the claim of bias. If the opponent brought in a rebuttal witness who testified to the character of principal witness as that of a liar, rehabilitation is limited to a character witness who testifies principal witness is a truthful person. (Note: this is a different consideration from the ever-present right to cross-examine any witness, including character witnesses).

If the opponent showed the witness made a prior inconsistent statement and implies that after that statement and prior to trial the witness was "gotten to" or otherwise developed a motive to lie in court, rehabilitation can be attempted by showing that the witness made a prior consistent statement (consistent with the testimony) before the alleged events that gave rise to the alleged motive to lie. The jury is left with two pre-trial statements that are inconsistent with each other, but only one is inconsistent with the testimony, and both were made before the witness was allegedly gotten to, so there might be softening of the accusation that the testimony flows from, e.g., a bribe. And there is always a case for allowing a prior consistent statement made at any time before trial to help explain away what is arguably only a seemingly inconsistent statement that is subject to interpretation because, e.g., it was lifted out of explanatory context.

- In Section 5 of this course you will cover these topics:
- Expert Witnesses
- Hearsay Evidence
- Testimonial Privileges

Topic : Expert Witnesses

Topic Objective:

After studying this topic the student should be able to:

- Define Expert witnesses
- Discuss Experts in the real world
- Explain Duties of experts
- Define Non-testifying experts
- Discuss Testifying experts

Definition/Overview:

Expert witnesses: can be found in every imaginable field of endeavor, including the medical field, traffic accident reconstruction, and police procedures, to name just a few. There are literally hundreds of categories in which expert witnesses can be found. They provide a useful service for both sides in civil and criminal trials to help a jury determine the truth about certain facts. They are often retained in both civil and criminal trial matters.

Key Points:**1. Expert witnesses**

An expert witness or professional witness is a witness, who by virtue of education, training, skill, or experience, is believed to have knowledge in a particular subject beyond that of the average person, sufficient that others may officially (and legally) rely upon the witness's specialized (scientific, technical or other) opinion about an evidence or fact issue within the scope of their expertise, referred to as the expert opinion, as an assistance to the fact-finder. Expert witnesses may also deliver expert evidence about facts from the domain of their expertise. At times, their testimony may be rebutted with a learned treatise, sometimes to the detriment of their reputations.

2. Experts in the real world

Typically, experts are relied on for opinions on severity of injury, degree of insanity, cause of failure in a machine or other device, loss of earnings, care costs, and the like. In an intellectual-property case, an expert may be shown two music scores, book texts, or circuit boards and asked to ascertain their degree of similarity.

The tribunal itself, or the judge, can in some systems call upon experts to technically evaluate a certain fact or action, in order to provide the court with a complete knowledge on the fact/action it is judging. The expertise has the legal value of an acquisition of data. The results of these experts are then compared to those by the experts of the parties.

The expert has a heavy responsibility, especially in penal trials, and perjury by an expert is a severely punished crime in most countries. The use of expert witnesses is sometimes criticized in the United States because in civil trials, they are often used by both sides to advocate differing positions, and it is left up to a jury of laymen to decide which expert witness to believe.

Sometimes one side has utilized an expert witness to provide fraudulent or junk science testimony in order to convince a jury. Such experts are commonly disparaged as "hired guns."

3. Duties of experts

In England and Wales, under the Civil Procedure Rules 1998 (CPR), an expert witness is required to be independent and address his or her report to the Court. A witness may be jointly instructed by both sides if the parties agree to this, especially in cases where the liability is relatively small.

Under the CPR, expert witnesses are usually instructed to produce a joint statement detailing points of agreement and disagreement to assist the court or tribunal. The meeting is held quite independently of instructing lawyers, and often assists in resolution of a case, especially if the experts review and modify their opinions. When this happens, substantial trial costs can be saved when the parties to a dispute agree to a settlement. In most systems, the trial (or the procedure) can be suspended in order to allow the experts to study the case and produce their results. More frequently, meetings of experts occur before trial.

4. History

The earliest known use of an expert witness in English law came in 1782, when a court that was hearing litigation relating to the silting-up of Wells harbour in Norfolk accepted evidence from a leading civil engineer, John Smeaton. This decision by the court to accept Smeaton's evidence is widely cited as the root of modern rules on expert evidence. However, it was still such an unusual feature in court that in 1957 in the Old Bailey, Lord Justice Patrick Devlin could describe the case of suspected serial killer Dr John Bodkin Adams thus: "It is a most curious situation, perhaps unique in these courts, that the act of murder has to be proved by expert evidence."

On the other hand, expert evidence is often the most important component of many civil and criminal cases today. Fingerprint examination, blood analysis and DNA fingerprinting are common kinds of expert evidence heard in serious criminal cases. In civil cases, the work of accident analysis, forensic engineers, and forensic accountants is usually important, the latter to assess damages and costs in long and complex cases. Intellectual property and medical negligence cases are typical examples

5. Non-testifying experts

In the U.S., a party can hire experts to help him/her evaluate the case. For example, a car maker may hire an experienced mechanic to decide if its cars were built to specification. This kind of expert opinion will be protected from discovery. If the expert finds something that is against its client, the opposite party will not know it. This privilege is similar to the work product protected by the attorney/client privilege.

6. Testifying experts

If the witness needs to testify in court, the privilege is no longer protected. The expert witness's identity and nearly all documents used to prepare the testimony will become discoverable. Usually an experienced lawyer will advise the expert not to take notes on documents because all of the notes will be available to the other party.

An expert testifying in court must satisfy the requirements of Fed. R. Evid. 702. Generally, under Rule 702, an expert is a person with scientific, technical, or other specialized knowledge" who can "assist the trier of fact, which is typically a jury. A qualified expert may testify in the form of an opinion or otherwise so long as: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Although experts can testify in any case in which their expertise is relevant, criminal cases are more likely to use forensic scientists or forensic psychologists, whereas civil cases, such as personal injury, may use forensic engineers, forensic accountants, employment consultants or care experts. Senior physicians U.K., Ireland, and Commonwealth consultants, U.S. attending physicians are frequently used in both the civil and criminal courts.

The Federal Court of Australia has issued guidelines for experts appearing in Australia courts. This covers the format of the expert's written testimony as well as their behaviour in court. Similar procedures apply in non-court forums, such as the Australian Human Rights and Equal Opportunity Commission.

Topic : Hearsay Evidence**Topic Objective:**

After studying this topic the student should be able to:

- Define Hearsay
- Explain Theory of The Hearsay Rule
- Discuss Federal Rules of Evidence
- Understand the Application
- Define Common misconceptions
- Explain Non-Hearsay under the Federal Rules
- Explain the Theories supporting hearsay exceptions

Definition/Overview:

Hearsay: out-of-court statements offered into evidence to prove the truth of the matter asserted

Former testimony exception: testimony which was offered at either a hearing or in a deposition

Dying declaration exception: statement made by a declarant regarding the cause or circumstances of his/her impending death is admissible providing that the declarant believed that death was imminent

Statements against interest: statement issued must be against pecuniary or proprietary interest of the declarant

Statement of personal or family history: includes statements about birth, adoption, marriage, etc.

Key Points:

1. Hearsay

Hearsay literally means information gathered by the first person from a second person concerning some event, condition, or thing of which the first person had no direct experience. When submitted as evidence, such statements are called hearsay evidence. As a legal term, "hearsay" can also have the narrower meaning of the use of such information as evidence to prove the truth of what is asserted. Such use of "hearsay evidence" in court is generally not allowed. This prohibition is called the hearsay rule.

For example, a witness says "Susan told me she was cold". Since the witness did not experience Susan's coldness firsthand, the statement would be hearsay evidence to the fact that Susan was cold, and not admissible. However, it would be admissible as evidence that Susan claimed to be cold, and that she was capable of speaking at that time.

There are a number of significant exceptions to the hearsay rule.

2. Theory of The Hearsay Rule

The theory of the rule excluding hearsay is that assertions made by human beings are often unreliable; such statements are often insincere, subject to flaws in memory and perception, or infected with errors in narration at the time they are given. The law therefore finds it necessary to subject this form of evidence to scrutiny or analysis calculated to discover and expose in detail

its possible weaknesses, and thus to enable the tribunal (judge or jury) to estimate it at no more than its actual value.

Three tests are calculated to expose possible weaknesses in a statement:

- Assertions must be taken under oath
- Assertions must be made in front of the tribunal (judge or jury)
- Assertions must be subject to cross-examination.

Assertions not subject to these three tests are (with some exceptions) prohibited insofar as they are offered testimonially (for the truth of what they assert).

3. Federal Rules of Evidence

The Federal Rules of Evidence (See Article VIII) provide a general definition of hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Subject to two classes of "exemptions," this definition classifies a statement as hearsay if the statement meets two requirements: (1) the statement must be extra-judicial (i.e. not made by this witness in this proceeding). (2) The statement must be offered to prove the truth of what the statement asserts if anything.

However, as noted below, the Federal Rules of Evidence also provide two specific categories of exemptions of certain kinds of statements from this rule; statements in these categories are defined as "Non-hearsay."

Typically, one can classify a statement as hearsay under the Federal Rules of Evidence using a three-step analysis. A statement will be considered hearsay if it is:

- An assertive statement
- Made by an out-of-court declarant
- Is being offered to prove the truth of the matter asserted therein.

An "assertive statement" is generally defined as the intentional communication of fact. Under the Federal Rules of Evidence, an assertive statement can be oral, written, or non-verbal conduct if it was intended to be an assertion. However, any verbal or non-verbal conduct that was not intended to communicate a fact will not be considered an assertive statement.

In order for the statement to satisfy the "out-of-court declarant" element of hearsay, very simply stated, the statement must have been made outside of the courtroom that the present proceeding

is taking place in -- meaning that if the statement was made in another courtroom, it is still made by an "out-of-court" declarant.

Lastly, if a statement is being offered for its truth -- meaning that its relevance depends upon the jury believing the substance of the statement -- then it is being offered to prove the truth of the matter asserted therein. If a statement is relevant for any other purpose other than proving the truth of the matter asserted therein, then the statement will not be considered hearsay under the Federal Rules of Evidence.

4. Application

Generally in common law courts the "hearsay rule" applies, which says that a trier of fact (judge or jury) cannot be informed of a hearsay statement unless it meets certain strict requirements. However, the rules for admissibility are more relaxed in court systems based on the civil law system. In the civil law system, the courts, whether consisting only of judges or featuring a jury, have wide latitude to appreciate the evidence brought before them.

[Note: Louisiana, a civil-law jurisdiction, does not share the above referenced feature generally found in civil-law jurisdictions. With few exceptions, Louisiana follows rules predicated upon the Federal Rules of Evidence.]

Furthermore, even in common-law systems, the hearsay rule only applies to actual trials. Hearsay is admissible as evidence in many other judicial proceedings, such as grand jury deliberations, probation hearings, parole revocation hearings, and proceedings before administrative bodies.

In criminal law, *Crawford v. Washington*, 541 U.S. 36 (2004), reformulated the standard for determining when the admission of hearsay statements in criminal cases is permitted under the Confrontation Clause of the Sixth Amendment to the Constitution. *Crawford* gives enhanced protection to defendants when the hearsay offered against them is testimonial in nature. When a statement is deliberately accusatory, or when the declarant knows that the statement is likely to be used in the prosecution of the defendant for a crime, the need for face-to-face confrontation is at its highest. When statements are directly accusatory, the defense needs an opportunity to explore the accusers motives. Where statements are the product of police interrogation, there is a need to ensure that the testimony is not the product of improper coercion or intimidation.

Ohio v. Roberts, 448 U.S. 56 (1980), set forth a two-pronged test in order for hearsay to be admissible against a criminal defendant: (1) the declarant generally must be shown to be unavailable; and (2) the statement must have been made under circumstances providing sufficient indicia of reliability. With respect to the second prong, a reliability determination may assume that hearsay is sufficiently reliable for constitutional purposes if it satisfies a firmly rooted hearsay exception. In practice this means that lower courts need to make reliability determinations only for hearsay that is offered under a catchall exception, such as Federal Rule of Evidence Rule 807, or under new or non-traditional hearsay exceptions that are not firmly rooted. However, Crawford v. Washington overruled Ohio v. Roberts.

5. Common misconceptions

One major misconception about the hearsay rule is that hearsay is never admissible in court. While the general rule is that such evidence is inadmissible, there are many exceptions. There are two other common misconceptions concerning the hearsay rule. The first is that hearsay applies only to oral statements. The hearsay rule applies to all out-of-court statements whether oral, written or otherwise. The Federal Rules of Evidence defines a statement as an oral or written assertion or nonverbal conduct of a person, if the conduct is intended by the person as an assertion. Even written documents made under oath, such as affidavits or notarized statements, are subject to the 'hearsay rule'.

The second common misconception is that all out-of-court statements are hearsay. This is not the case. An out of court statement may or may not be hearsay depending on the purpose for which it is offered. If the statement is being offered to prove the truth of what it asserts, then it becomes hearsay. When offered for any other purpose the statement is not hearsay. For example: Witness testifies that yesterday he spoke to Jim (who was in Vermont) on the phone and that Jim made the following statement, "It's raining in Vermont!" If the attorney is seeking to use this statement to prove that it was in fact raining in Vermont, then it is hearsay. But, if the attorney is seeking to use the statement to prove that the phone lines were working that day, or that Jim had not lost the power of speech, or for any other purpose, then the statement is not being offered to prove the truth of the matter asserted, and therefore it is not hearsay.

Consider an additional example:

Officer Friday, a police officer, hears cries of "Help, Slayer is trying to kill me!" from inside a house. Believing that there is a crime in progress, the officer kicks the front door down and enters the home to discover the homeowner, Slayer, assaulting a victim, Monica, who is crying and visibly shaking. Slayer is charged with attempted murder. Two separate trials might result from these circumstances.

- First, a criminal trial against Slayer, who proclaims his innocence and demands a trial for the criminal charges alleged.
- Second, a civil trial in which Slayer sues Officer Friday for invading his home, wherein Officer Friday will assert that there was just cause to enter the home because he had a genuine belief that a crime was occurring.

In the first trial, the issue is whether Slayer attempted to kill Monica. Officer Friday is asked to testify to what he heard Monica scream from inside the house, i.e., "Help, Slayer is trying to kill me!" This statement would be hearsay. Officer Friday is being asked to testify to what Monica said to prove that Slayer attempted to murder Monica. Unless the attorney can show that this statement falls within an exception to the hearsay rule, the factfinder (the judge or jury) will never be allowed to consider Monica's statement (this particular statement, however, would likely be admissible because of "Excited Utterance" and "Present sense impression" exceptions). In the second trial, however, the issue is not whether Slayer tried to kill Monica, but rather whether Officer Friday's entry into the home was lawful. Here, the statement is not being offered to prove that Slayer tried to kill Monica, but instead is being offered to prove that Officer Friday had probable cause to enter the home. Whether Slayer was trying to kill Monica is unimportant. What matters is whether Officer Friday believed that Monica was in danger. Monica's statement is evidence to that effect because a reasonable person having heard Monica's cries for help would fear for her safety.

A person's own prior statements can be hearsay. For example, suppose a person is testifying on the stand. In relation to an automobile accident where a blue truck struck a yellow car, the witness testifies, "I told the police officer the truck was blue." This statement is an out-of-court statement offered for the purpose of proving the truth of the matter asserted, and is therefore

hearsay. The witness is testifying about what someone said in the past. The fact that it is his own statement does not change the hearsay nature of the statement.

If the witness testifies, "The truck that struck the yellow car was blue," the statement is not hearsay. The witness is not testifying about a past statement. He is not relating in court what someone outside of court said, but is merely relating an observation.

The rule that a person's own statements can be considered hearsay may be confusing. By "forgetting" who is testifying on the stand and merely looking for statements like "I said", "I wrote", "I testified before that", "The document says", and the like, most confusion can be eliminated.

In this example, simple logic tells that there is a difference: while the first statement may be true, it does not assert anything about the truth of the matter stated. The witness may have told the officer that the truck was blue; this, however, need not have been the truth - he might have been mistaken or deliberately lying.

6. Non-Hearsay under the Federal Rules

Under the Federal Rules of Evidence, two broad categories of statements are exempt from the rule's general definition. These are referred to as hearsay exemptions and are of two types:

6.1 Admission by party-opponent

An admission by a party-opponent is a statement offered against another party that meets one of five criteria:

- The party against whom the statement is being offered is also the declarant of that statement either personally or in a representative capacity.
- The party against whom the statement is being offered manifested an adoption or belief in the statement's truth.
- The party against whom the statement is being offered authorized the declarant to make the statement.
- The statement is made by an agent of the party against whom it is being offered and concerns a matter within the scope of the employment and is made during the course of that employment.

- The declarant was a co-conspirator of the party against whom the statement is being offered and the statement is in furtherance of their conspiracy.

The theory underlying this exemption is derived from the nature of the hearsay rule itself. The hearsay rule operates to exclude extra-judicial assertions as untrustworthy because they cannot be tested by cross-examination. When an assertion is offered into evidence against the defendant and the defendant objects, hearsay, the defendant is in essence saying I object to this statement as untrustworthy because I am not afforded an opportunity to cross-examine the person who made it. How can we trust what he said? But what if the defendant is the person who made the statement that is now being offered against him? To object, hearsay in this circumstance would be as absurd as to argue, This statement is unreliable because I cannot cross-examine myself; therefore, how can I trust what I said? In this situation the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, viz. the need and prudence of affording an opportunity of cross-examination. Another way of looking at it is that a defendant who faces his own statement being used against him has an opportunity to cross-examine himself he can take the witness stand and explain his prior assertion, so the rule is satisfied.

6.2 Prior statement by a witness

A prior statement is not hearsay if the person who made the statement (the "declarant") testifies at the trial or hearing subject to cross-examination, and (A) the prior statement is inconsistent with the declarant's testimony at the trial, etc., and the prior statement was given under oath at a trial, hearing, deposition, or other proceeding, or (B) the prior statement is consistent with the declarant's testimony, and is offered to rebut a charge that the declarant has made a recent fabrication, or a charge of the declarant's improper influence or motive, or (C) the prior statement was an identification of a person made after perceiving that person.

7. Hearsay exceptions

Some statements are defined as hearsay, but may nevertheless be admissible as evidence in court. These statements relate to exceptions to the general rule on hearsay. Some (but not all) exceptions to the hearsay rule apply only when the declarant is unavailable for testimony at the trial or hearing.

Many of the exceptions listed below are treated more extensively in individual articles.

7.1 Hearsay exceptions that apply even where the declarant is available

- Excited utterances: statements relating to startling events or condition made while the declarant was under the stress of excitement caused by the event or condition. This is the exception that may apply to the 'police officer' scenario listed above. The victim's cries of help were made under the stress of a startling event, and the victim is still under the stress of the event, as is evidenced by the victim's crying and visible shaking. An excited utterance does not have to be made at the same time of the startling event. A statement made minutes, hours or even days after the startling event can be excited utterances, so long as the declarant is still under the stress of the startling event. However, the more time that elapses between a startling event and the declarant's statement, the more the statements will be looked upon with disfavor.
- Present sense impressions: A statement expressing the declarant's impression of a condition existing at the time the statement was made, such as "it's hot in here", or "we're going really fast". Unlike an excited utterance, it need not be made in response to a startling event. Instead, it is admissible because it is a condition that the witness would likely have been experiencing at the same time as the declarant, and would instantly be able to corroborate.
- Declarations of present state of mind: Much like a present-sense impression describes the outside world, declarant's statement to the effect of "I am angry!" or "I am Napoleon!" will be admissible to prove that the declarant was indeed angry, or did indeed believe himself to be Napoleon at that time. Used in cases where the declarant's mental state is at issue. Present-state-of-mind statements are also used as circumstantial evidence of subsequent acts committed by the declarant, like his saying, "I'm gonna go buy some groceries and get the oil changed in my car on my way home from work."

Another exception is statements made in the course of medical treatment, i.e., statements made by a patient to a medical professional to help in diagnosis and

treatment. Any statements contained therein that attribute fault or causation to an individual will generally NOT be admissible under this exception, unless it involves a small child. (The Tender Years Doctrine).

- the business records exception: business records created during the ordinary course of business are considered reliable and can usually be brought in under this exception if the proper foundation is laid when the records are introduced into evidence. Depending on which jurisdiction the case is in, either the records custodian or someone with knowledge of the records must lay a foundation for the records, however.

The use of police records, especially as substantive evidence against the accused in a criminal trial, is severely restricted under the Business Records exception. Typically, only generalized evidence about police procedure is admissible under this exception, and not facts about a specific case. For example, John is stopped for speeding 70 miles per hour in a 50 mile per hour zone. The officer, who determined John's speed with radar, records the speed in an incident report. He also calibrates and runs a diagnostic on his radar every day prior to beginning his shift. He records this in a log. At trial, the report itself would not be admissible as it pertained to the facts of the case. However, the officer's daily log in which he records his calibration and the daily diagnostics of his radar unit would be admissible under the business records exception.

Because the Federal Rules of Evidence do not apply in the military tribunals in Guantanamo Bay, the hearsay rule also does not apply. How, if at all, this affects prisoner's Confrontation Clause rights, if any, is an interesting question. Other exceptions, declarant's availability immaterial: In the United States Federal Rules of Evidence, separate exceptions are made for public records, family records, and records in ancient documents of established authenticity. When regular or public records are kept, the absence of such records may also be used as admissible hearsay evidence.

7.2 Hearsay exceptions that apply only where the declarant is unavailable

- dying declarations and other statements under belief of impending death: often depicted in movies; the police officer asks the person on his deathbed, "Who attacked you?" and the victim replies, "The butler did it." However, case law has ruled out this exception in criminal law, because the witness should always be cross examined in court.
- declarations against interest: A statement that would incriminate or expose the declarant to liability to such an extent that it can be assumed he would only make such a statement if it were true. It would be assumed that one would lie to further one's interests, so a statement against his interests (such as exposing oneself to criminal or civil liability) likely would not be made unless it were true.
- prior testimony: if the testimony was given under oath and the party against whom the testimony is being proffered was present and had the opportunity to cross examine the witness at that time. Often used to enter depositions into the court record at trial.
- admission of guilt: if you make a statement, verbal or otherwise, as an admission of guilt of the matter at hand, that statement would not be regarded as hearsay. In other words, self-incriminating statements (confessions) are not hearsay.
- forfeiture by wrongdoing: the party against whom the statement is now offered (1) intentionally made the declarant unavailable; (2) with intent to prevent declarant's testimony; (3) by wrongdoing. In plain English, if you get rid of a witness, statements they made can be used against you.

8. Theories supporting hearsay exceptions

In some jurisdictions, such as Canada, the limited exceptions format to the rule have been replaced by a more general theory of exceptions to the hearsay rule that allows courts to decide when documents, testimony or other evidentiary proof can be used that might not otherwise be considered.

The underlying rationale for many of the hearsay exceptions is that the circumstances of a particular statement make them reliable enough to be heard by a trier of fact. Statements made during the course of medical treatment, for example, are considered reliable because patients

typically have little reason to lie to a doctor while they are being treated, and will generally be accurate in describing their ailments.

This, of course, is not always true. Patients do sometimes lie to their doctors (to get painkillers to which they are not entitled, for example). Hearsay exceptions do not mandate that a trier of fact (the jury or, in non-jury trials, the judge) accept the hearsay statement as being true. Hearsay exceptions mean only that the trier of fact will be informed of the hearsay statement and will be allowed to consider it when deciding on a verdict in the case. The jury is free to disregard a hearsay statement if the jury does not believe it. The hearsay rule controls only what out-of-court statements a trier of fact gets to consider in deciding a case, not how they consider the out-of-court statements.

Topic : Testimonial Privileges

Topic Objective:

After studying this topic the student should be able to:

- Define Privileged Communication
- Explain Spousal Privilege
- Discuss The spousal testimonial privilege
- Explain Other rules relating to the privileges
- Define Physician-patient privilege
- Understand Confidentiality post Tarasoff
- Define Confessional Privilege
- Define Media-Source Privilege

Definition/Overview:

Requisite Relationship: relationship is present and relationship was entered in a manner not suggestive of intentional fraud or attempt to pervert the criminal justice system

Confidentiality: communications were intended to be confidential

Marital communications privilege: protects those spousal communications made in confidence

Spousal testimonial privilege: gives witnesses the right to refuse to testify against their spouses; or for the accused to prevent testimony by that spouse; or automatically render the witness incompetent

Key Points:**1. Privileged Communication**

A privileged communication is a private statement that must be kept in confidence by the recipient for the benefit of the communicator. Even if it is relevant to a case, a privileged communication cannot be used as evidence in court. Privileged communications are controversial because they exclude relevant facts from the truth-seeking process.

Generally, the laws that guide civil and criminal trials are designed to allow the admission of relevant evidence. Parties generally have access to all information that will help yield a just result in the case. Privileged communications are an exception to this rule.

Privileged communications exist because society values the privacy or purpose of certain relationships. The established privileged communications are those between wife and husband, clergy and communicant, psychotherapist and patient, physician and patient, and attorney and client.

These relationships are protected for various reasons. The wife-husband and clergy-communicant privileges protect the general sanctity of marriage and religion. The psychotherapist or physician and patient privilege promotes full disclosure in the interests of the patient's health. If patients were unable to keep secret communications with psychotherapists or physicians relating to treatment or diagnosis, they might give doctors incomplete information. If doctors received incomplete information, they might be unable to administer HEALTH CARE to the patient, which is the very purpose of the doctor-patient relationship.

The Attorney-Client Privilege exists for roughly the same reason as the PHYSICIAN-PATIENT PRIVILEGE. In order to secure effective representation, a client must feel free to discuss all aspects of a case without the fear that her attorney will be called at trial to repeat her statements. Likewise, to retain the client's trust and do his job properly, the attorney must be allowed to withhold from the court and opposing party private communications with the client.

A communication is not confidential, and therefore not privileged, if it is overheard by a third party who is not an agent of the listener. Agents include secretaries and other employees of the listener. For example, a communication between a psychotherapist and patient would be privileged even if the psychotherapist's secretary happened to overhear it. In such a case, the secretary could not be forced to testify about the communication. However, a communication between a psychotherapist and a patient on a public elevator occupied by third parties would not be privileged and could be used in court.

Privileged communications are not always absolute. For instance, a criminal defendant may be able to access communications between an accuser and the accuser's doctor if the defendant's interest in the disclosure, in the opinion of the court, outweighs the interest in confidentiality. The court will consider such a request only if the defendant can establish a reasonable probability that important information exists in the communication that will be relevant to the case.

Various jurisdictions may apply the concept of privilege in slightly different ways. For example, some jurisdictions distinguish between the two parties to a communication, calling one party the keeper or holder of the privilege. Other states regard the privilege as being held, and capable of being asserted, by both parties. Some states, for example, give the Marital Communications Privilege to both parties, allowing either party to avoid testifying and to prevent the other from testifying as to communications made within the privacy of the marital relationship. Other states give the privilege to the testifying spouse. This gives the testifying spouse the power to waive the privilege and testify against the other spouse.

States occasionally change their laws to give the privilege to both parties or to take it from one of the parties. For example, a state may give the privilege to both clergy and communicant. Under such a law, either party to the communication could block its disclosure. In the alternative, a state could give the privilege only to the communicant, in which case the communicant could waive the privilege and obtain testimony from the cleric. These variations reflect the struggle by the courts to balance the need for information to reach a just result against the public policy of encouraging free communication within certain relationships by making these communications privileged.

For federal cases, the law of privileged communications is governed by the state law in which the federal court sits. Within particular jurisdictions, the precise rules regarding privileged communications may be periodically redefined or adjusted as new circumstances are presented. In some states a person's relationships with sexual assault counselors, social workers, and juvenile diversion officers have been given a qualified privilege of confidentiality. In these states

the court may hold a private hearing to determine whether the information is necessary to the requesting party's case or defense before ordering disclosure of the information. Many legal advocates have supported the creation of a privilege between parents and offspring, but very few courts and legislatures have recognized such a privilege.

2. Spousal Privilege

The marital confidences privilege is a form of privileged communication protecting the contents of confidential communications between husband and wife. This privilege applies in civil and criminal cases. When applied, a court may not compel one spouse to testify against the other concerning confidential communications made during marriage.

The privilege generally applies only where both of the following fact situations are present: (1) a third party was not present during the communication (the presence of a third party would destroy the confidential nature of the communication), and (2) both parties intended that the communication be confidential.

The privilege is usually restricted to confidential communications made during marriage and does not include communications made before the marriage or after divorce. The privilege does, however, generally survive the divorce; that is, a person can be prevented from testifying about confidential communications with an ex-spouse made during the marriage.

Either spouse can invoke this privilege, either refusing to testify against their spouse or preventing their spouse from testifying. Finally, courts may require that the communication relate specifically to the marriage.

3. The spousal testimonial privilege

The spousal testimonial privilege (a.k.a. "spousal immunity") can be used to prevent any party in a criminal case from calling the defendant's spouse to testify against the defendant about any

topic. Under the U.S. Federal Rules of Evidence, this privilege attaches to the witness spouse; that is, the defendant's spouse can refuse to testify against the defendant, but the defendant may not prevent his spouse from testifying against him or her.

This privilege does not survive the marriage; that is, after divorce, there is no right to refuse to testify against a defendant ex-spouse. This privilege may be restricted to testimony about events that occurred after the marriage, although in some jurisdictions it may apply to testimony about events occurring prior to the marriage (giving rise to a questionable incentive for an individual to marry a potential witness in order to prevent the potential witness from testifying against the individual). A marriage having such a motivation was depicted by Agatha Christie in a detective novel.

4. Other rules relating to the privileges

Both rules are suspended in the case of divorce proceedings or child custody disputes, and in cases where one spouse is accused of a crime against the other spouse or the spouse's child. Courts generally do not permit an adverse spouse to invoke either privilege during a trial initiated by the other spouse, or in the case of domestic abuse. The privileges may also be suspended where both spouses are joint participants in a crime, depending on the law of the jurisdiction.

Marital privilege is based on the policy of encouraging spousal harmony, and preventing people from having to condemn, or being condemned by, their spouses.

5. Physician-patient privilege

In the laws of many common law jurisdictions, the concept of legal privilege, or the rule that certain conversations are so private and confidential that they cannot be used as evidence in court, extends to communication between a patient and physician. Although the rule is sometimes thought to apply only to situations such as admissions made to a psychiatrist during

treatment, this is only one case. In some jurisdictions, conversations between a patient and physician may be privileged in both criminal and civil courts.

The privilege may cover the situation where a patient confesses to a psychiatrist that he or she committed a particular crime. It may also cover normal inquiries regarding matters such as injuries that may result in civil action. For example, any defendant that the patient may be suing at the time cannot ask the doctor if the patient ever expressed the belief that his or her condition had improved.

The rationale behind the rule is that a level of trust must exist between a physician and the patient so that the physician can properly treat the patient. If the patient were fearful of telling the truth to the physician because he or she believed the physician would report such behavior to the authorities, the treatment process could be rendered far more difficult, or the physician could make an incorrect diagnosis.

For example, a below-age of consent girl came to a doctor with a sexually transmitted disease. The doctor is usually required to obtain a list of the patient's sexual contacts to inform them that they need treatment. This is an important health concern. However, the patient may be reluctant to divulge the names of her older sexual partners, for fear that they will be charged with statutory rape. In some jurisdictions, the doctor cannot be forced to reveal the information revealed by his patient to anyone except to particular organisations, as specified by law, and they too are required to keep that information confidential. If, in the case, the police become aware of such information, they are not allowed to use it in court as proof of the sexual conduct.

In the United States, the Federal Rules of Evidence do not recognize doctor-patient privilege.

At the state level, the extent of the privilege varies depending on the law of the applicable jurisdiction. For example, in Texas there is only a limited physician-patient privilege in criminal

proceedings, and the privilege is limited in civil cases as well. See generally Texas Occupations Code section 159.003 and Texas Rules of Evidence, Rule 509(b).

6. Confidentiality post Tarasoff

The case of *Tarasoff v. Regents of the University of California* in 1974 was an important precedent; it transformed Physician-patient privilege in many parts of the world. In this case the therapist was sued for failing to warn a third person of his patient's desire to harm her. Thus, for many therapists, harm to others will trump confidentiality and a therapist can and has been held liable for failing to inform appropriate people if their client reveals a risk to self or if the client makes a specific threat against a specific, named person.

Establishing the boundaries of confidentiality is an important part of any relationship with a therapist. Most usually this may need clarification in psychiatry, psychotherapy and other forms of counseling, but also in such areas as genetic counseling and infectious diseases medicine.

7. Confessional Privilege

The Confessional Privilege is a rule of evidence that forbids the inquiry into the content or even existence of certain communications between clergy and communicants.

In American law, it grows out of the First Amendment of the U.S. Constitution, the Common Law and statutory enactments which may vary between jurisdictions.

8. Statutes

All fifty states, the District of Columbia, and the federal government have enacted statutory privileges providing that at least some communications between clergyman and parishioners are privileged.

Prior to the adoption of statutory protections, there was some protection under common law.

New York: In *People v. Phillips* (1 Southwest L. J., 90), in the year 1813, the Court of General Sessions in New York recognized the privilege as in a decision rendered by De Witt Clinton, recognized the privilege as applying to Rev. Anthony Kohlmann, S.J., who refused to reveal in court information received under the seal of confession. . (Ironically, the successful argument in favor of the privilege was made by William Sampson, a Protestant lawyer recently exiled from Ireland for defending Catholics.)

There is also Smith's case reported in the "New York City Hall Recorder", vol. II, p.77, which, apparently, was decided in the same way.

- Massachusetts: In *Commonwealth v. Drake* [(1818) 15 Mass., 154], it was argued on the one side that a confession of a criminal offence made penitentially by a member of a certain Church to other members, in accordance with the discipline of that Church, may not be given in evidence. These others (who were not clergy) were called as witnesses. The solicitor-general argued that religious confession was not protected from disclosure. He also took the point that in this case "the confession was not to the church nor required by any known ecclesiastical rule", but was made voluntarily to friends and neighbours. The court held that the evidence was rightly received (not protected).

9. Issues

The privilege is defined in over 50 separate statutes and may therefore vary in important ways:

- Who qualifies as a member of the clergy
- What communications are covered by the privilege
- Who holds the privilege: the minister, the congregant, or both?

10. Media-Source Privilege

The United States Department of Justice created self-imposed guidelines intended to protect the news media by regulating the use of subpoenas against the press. These guidelines state that "all reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media. Furthermore, the guidelines require that federal prosecutors negotiate with the press, explaining the specific needs of the case.

Before any subpoena may be issued, the attorney general must approve the issuance. The attorney general's review for a subpoena to a member of the news media shall be based on the following criteria:

- In criminal cases, there should be reasonable grounds to believe, based on information obtained from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.
- In civil cases there should be reasonable grounds, based on non-media sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.
- The government should have unsuccessfully attempted to obtain the information from alternative non-media sources.

- The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.
- Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.
- Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

While these guidelines seem extremely protective of the press, they explicitly deny the creation of any legally enforceable right in any person. Nor does the policy have any substantive punishment for the federal government violations. If the federal prosecutors fail to obtain approval from the attorney general, the extent of the authorized punishment is an administrative reprimand or other appropriate disciplinary action. In fact, some courts have found that the guidelines create no enforceable right. Therefore, in circuits taking this approach, the news media have no right to appeal for enforcement of these policies before being compelled to testify.