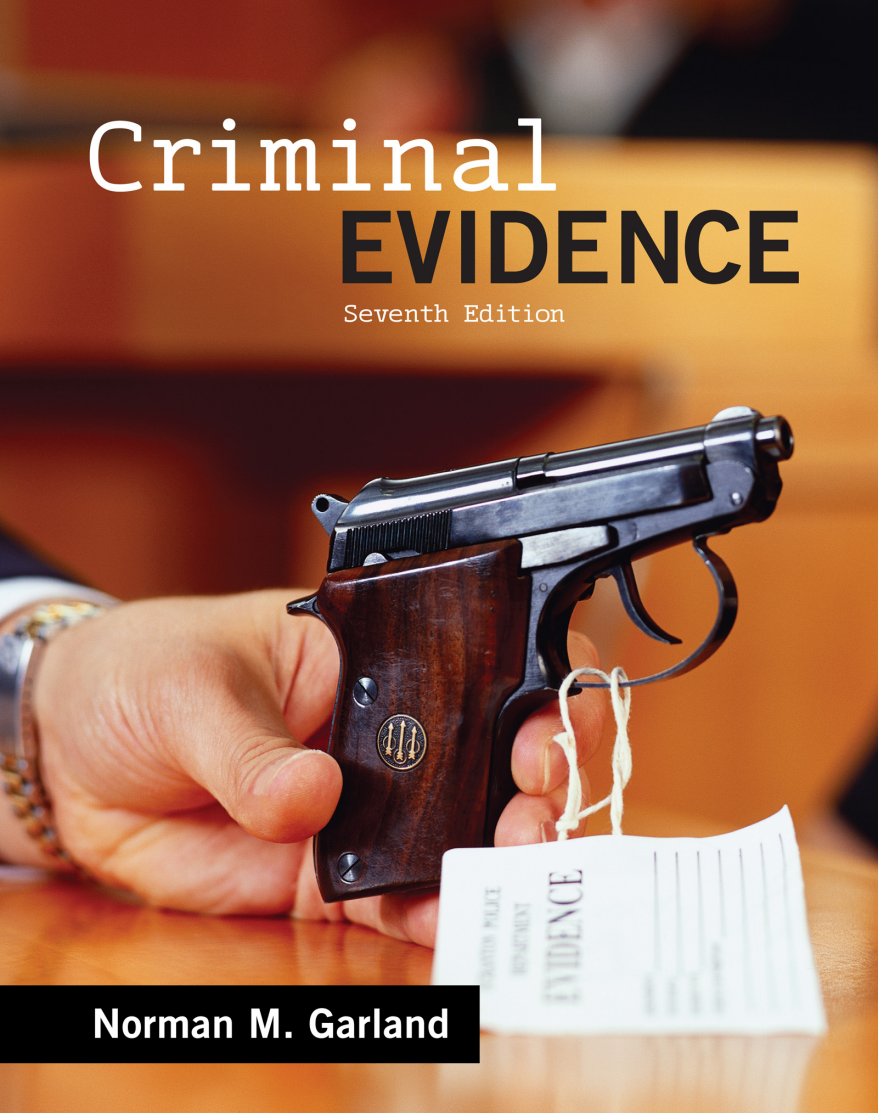
Criminal EVIDENCE

Seventh Edition



Norman M. Garland

CRIMINAL EVIDENCE

SEVENTH EDITION

Norman M. Garland

Professor of Law
Southwestern Law School—California

Mc Graw Hill Education

CRIMINAL EVIDENCE, SEVENTH EDITION

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This book is dedicated to Melissa Grossan.

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Norman M. Garland is professor of law at Southwestern Law School in Los Angeles, where he teaches Evidence, Criminal Procedure, Advanced Criminal Procedure, and Trial Advocacy. He received his B.S.B.A. and J.D. from Northwestern University and his L.L.M. from Georgetown Law Center, where he was an E. Barrett Prettyman Fellow in Trial Advocacy. Professor Garland is a member of the Illinois, District of Columbia, and California Bars. He has 10 years of trial experience as a criminal defense attorney, mainly in federal felony cases. In 1968 he joined the law faculty at Northwestern University, where he helped establish the Northwestern Legal Clinic. He joined the faculty of Southwestern Law School in 1975 to help establish the Southwestern Approach to Conceptual Legal Education (S.C.A.L.E.). In the mid-1980s, he spent two summers as Deputy District Attorney in Ventura County, California, where he gained experience as a prosecutor. He is coauthor of *Exculpatory Evidence,* 3d ed. (Lexis-Nexis, 2004), coauthor of *Advanced Criminal Procedure* (West Nutshell 2d ed., 2006), and author of *Criminal Law for the Law Enforcement Professional,* 3d ed. (McGraw-Hill, 2011). Professor Garland has published a number of CALI Lessons in criminal law and evidence (www.cali.org) and has published numerous articles in legal journals.

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BRIEF CONTENTS

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PREFACE

The seventh edition of *Criminal Evidence* presents the basic concepts of criminal evidence applied in the criminal justice environment. *Criminal Evidence,* seventh edition, includes a description of the trial process, types of evidence, the rules relating to relevance, hearsay (including the Confrontation Clause), documentary evidence, qualification of witnesses, privileges, presumptions, judicial notice, photographs, and character. The text also presents the principles relating to the impact of the Constitution of the United States on the admissibility of evidence (i.e., search and seizure, opposing party's statements (admissions) and confessions, the right to counsel, and identification procedures). Finally, the text presents those principles relating to the law enforcement professional as a witness.

This text is written in a clear, lively, and personal style to appeal to criminal justice professionals and students on the way to becoming professionals. Special attention is given to helping students understand the legal aspects of the principles relating to the admissibility of evidence at a criminal court hearing or trial. Students often perceive the law as a complex of incomprehensible rules with uncertain application in the workplace. In *Criminal Evidence,* seventh edition, when an evidence principle is presented, an example or application to the real world of law enforcement immediately follows. Relevant court decisions that affect the admissibility of evidence are discussed in the text, but only to the extent necessary to illustrate the rules. All program components fit into an integrated learning system that helps students learn and apply important course concepts.

ACKNOWLEDGMENTS

I had a lot of help in producing this seventh edition of *Criminal Evidence.* I would like to thank the dean, faculty, and board of trustees of Southwestern Law School for their generous support. I have been fortunate to have a number of research assistants at Southwestern who worked on this project. They include Tannaz Hashemi and Serena Vartazarian.

For their insightful reviews, criticisms, and suggestions, I would like to thank these colleagues: Robert C. Cerullo, Virginia Commonwealth University; Patricia A. DeAngelis, Hudson Valley Community College; Robert Edwards, Suffolk County Community College; Christopher J. Hall, Central Carolina Technical College; Thomas Higgins, Illinois Central College; Chris McFarlin, Tri-County Technical College; Thomas Tarker, Isothermal Community College.

Finally, and most important, I thank my wife, Melissa Grossan, who was truly my partner in the production of this edition as well as being my loving companion in life.

Changes Made for the Seventh Edition

Chapter 1

- Noting the restyling of the Federal Rules of Evidence—the entire FRE were rewritten to convert to plain English
- All language from the FRE throughout the book reflects the restyled language

Chapter 6

- Noting the Supreme Court's decision in *Maryland v. King*, 133 S.Ct. 1958 (June 3, 2013), holding that when officers arrest a suspect for a serious offense, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

Chapter 7

- Noting the Supreme Court's decision in *Michigan v. Bryant*, 131 S.Ct. 1143, in which the Court amplified the "ongoing emergency" doctrine articulated in *Davis v. Washington*, defining what is a testimonial statement for Confrontation Clause purposes.
- Noting the Supreme Court's decision in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), reaffirming its decision in *Melendez-Diaz v. Massachusetts* defining what is a testimonial statement for Confrontation Clause purposes in the context of laboratory reports of analysis of substances.
- Noting the Supreme Court's decision in *Williams v Illinois*, 132 S.Ct. 2221 (2012), further refining the test for statement for Confrontation Clause purposes in the context of a laboratory report, this time involving DNA profile analysis.

Chapter 8

- Noting the Supreme Court's decision in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), in which the Court concluded that a child's age is a factor in assessing whether a person is in custody for purposes of the need for *Miranda* warnings.
- Noting the Supreme Court's decision in *Berghuis v. Thompkins*, 590 U.S. 370 (2010), in which the Court found that waiver of *Miranda* rights can be established even absent formal or express statements of waiver.
- Noting the Supreme Court's decision in *Salinas v. Texas*, 133 S.Ct. 2174 (2013) focusing on the use at trial of a suspect's silence during non-custodial interrogation.
- Noting the Supreme Court's decision in *Maryland v. Shatzer*, 559 U.S. 98 (2010), in which the Court held that *Edwards v. Arizona* did not require exclusion of statements made by a prison inmate more than 14-days after his return to the general prisoner population after his invocation of his right to counsel.

Chapter 9

- Noting the Supreme Court's decision in *Davis v. United States*, 131 S.Ct. 2419 (2011), in which the Court refined the grounds upon which an appellate court can apply the exclusionary rule.
- Noting the Supreme Court's decision in *United States v. Jones*, 132 S.Ct. 945 (2012), in which the Court held that installation of a GPS tracking device on a suspect's vehicle to monitor the movements of the vehicle for 28 days constituted a search under the Fourth Amendment.
- Noting the Supreme Court's decision in *Florida v. Harris*, 133 S.Ct. 1050 (2013), in which the Court held that a dog certified in drug detection provided probable cause for a search of a vehicle when the dog alerted during a routine traffic stop.
- Noting the Supreme Court's decision in *Florida v. Jardines*, 133 S.Ct. 1409 (2013) holding that the warrantless dog sniff at the front door of a home constituted a search in violation of the Fourth Amendment.
- Noting the Supreme Court's decision in *Maryland v. King* (previously noted in chapter 6), extended the suspicionless search doctrine to the state taking DNA samples from suspects arrested for a serious offense.

eTextbooks for *Criminal Evidence*

This text is available as an eTextbook at www.coursesmart.com. At CourseSmart you can save up to 50% off the cost of a print textbook, reduce your impact on the environment, and gain access to powerful web tools for learning. CourseSmart has the largest selection of eTextbooks available anywhere, offering thousands of the most commonly adopted textbooks from a wide variety of higher education publishers. CourseSmart eTextbooks are available in one standard online reader with full text search, notes and highlighting, and email tools for sharing notes between classmates. For further details contact your sales representative or go to www.coursesmart.com.

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CRIMINAL EVIDENCE


NEC

1 INTRODUCTION TO THE LAW OF EVIDENCE AND THE PRETRIAL PROCESS

CHAPTER OUTLINE

CHAPTER OBJECTIVES

This chapter is an introduction to the law of evidence, the court process, personnel, and pretrial process from the law enforcement professional's viewpoint. After reading this chapter you will be able to:

- Explain what constitutes evidence.
- State the objectives of the rules of evidence.
- Name the most common version of evidence law in the United States.
- Describe the three basic police functions.
- Contrast the jobs of the prosecuting attorney and the defense attorney.
- Describe the dual court system in the United States.
- Define probable cause to arrest.
- State the two alternative ways that a defendant can be formally charged with a serious crime in the United States.

INTRODUCTION TO THE RULES OF EVIDENCE: DEFINITION OF EVIDENCE

LAW OF EVIDENCE
The rules that govern what a jury can hear and see during the trial of a case in an American courtroom.

Most Americans are aware that there are rules that govern what a jury can hear and see during the trial of a case in an American courtroom. These rules are defined in what is called the **law of evidence.** In this text, we will explore why there is a law that restricts what a jury may hear, the details of the law, and its importance to the effective performance of the law enforcement professional. Before exploring those questions, the reader should know what constitutes evidence.

EVIDENCE
Information that people base decisions on. In a legal sense, evidence is the information presented in court during a trial that enables the judge and jury to decide a particular case.

Most simply stated, **evidence** is information that people base decisions on. In a legal sense, evidence is the information presented in court during a trial that enables the judge and jury to decide a particular case. Technically, evidence consists of testimony or physical items presented to the judge and jury that they use to decide the truth of an assertion, the existence of a fact, and ultimately the guilt or innocence of the accused in a criminal case.

In the American judicial system, a criminal defendant is entitled to have a jury decide his or her guilt or innocence. The jury in all trials makes its final decision based on what it believes the facts are that are involved in the case. Evidence is the means by which those facts are proved or disproved. If this definition were taken literally, then anything that sheds some light on the truth of a fact in question should be revealed during the trial. Perhaps, if the creators of the law trusted juries completely, that would be the way the law of evidence worked. However, the creators of the law believed that juries need some guidance and protection from undue manipulation by competing attorneys during a trial. Therefore, the law limits what constitutes admissible evidence.

Most law enforcement professionals use the term "evidence" with special meaning, since so much of their efforts are concerned with ensuring that physical evidence is usable at trial. So, although law enforcement professionals know that testimony is important, they often refer to evidence as the articles collected at a crime scene, on a suspect, or in the suspect's car or home that are connected to the crime, such as weapons, fruits of a crime, or **contraband** (an object or material that is illegal to possess). Additionally, evidence may mean those things discovered during investigation, such as bloodstains, latent fingerprints, or plaster casts of shoe impressions in the earth.

CONTRABAND
An object or material that is illegal to possess.

These items of evidence, once found, are transported to the station and taken to the evidence room, where items are logged in and tagged. On the evidence tag are the date of the booking, the incident report number, the offense, the number of items (pieces), cash, from whom the evidence was taken, the location, the owner, and the signature of the officer who booked in the evidence. The property room officer signs in the evidence and the date received and then deposits the evidence in a secure location known as the **evidence locker.**

EVIDENCE LOCKER
A place, usually in a police station, where evidence gathered by law enforcement officers is deposited and kept safe from tampering pending its use in court.

Evidence can be checked out (or released) from the evidence locker to the defense attorney, or the prosecutor, or be sent to a laboratory as long as the chain of custody remains intact and each piece of evidence is logged in and out each time it is examined. The last entry in the log is usually the release for the purpose of taking it to court. Some items, such as drugs, blood, or other substances, must be carefully weighed or counted on the initial booking date, weighed or counted

again before being checked out, and finally again when returned. Laboratory technicians must also weigh the amount of any substance or material they use for testing purposes.

Unless released for the purposes just described, items remain in the evidence locker, free from illegal tampering, until they can be utilized as exhibits and admitted into evidence during trial proceedings. Legally, these articles found and retained do not become "evidence" until they are introduced in court proceedings and become exhibits. However, if the law enforcement officer does not take the proper precautions with these articles, they cannot be introduced into evidence. This is so because, generally, no item of physical evidence can be introduced at trial unless the law enforcement officer has maintained the proper "chain of custody" of the item. **Chain of custody** refers to how evidence is handled, and by whom, accounting for its whereabouts and condition from the moment it is found until the moment it is offered in evidence. It is the maintenance of custody and control over an object to such a degree that the custodian can prove the object is in the same condition as it originally was when custody was obtained.

CHAIN OF CUSTODY
The maintenance of custody and control over an object to such a degree that the custodian can prove the object is in the same condition as it originally was when custody was obtained.

The testimony of anyone with personal knowledge pertaining to the case is simply another form of evidence. A good definition of what constitutes evidence is as follows: Evidence is any information about the facts of a case, including tangible items, testimony, documents, photographs, or recordings, which, when presented to the jury at trial, tends to prove or disprove these facts.

Evidence may be classified in many different ways. There is a classification of evidence as real or demonstrative. There are direct evidence and circumstantial evidence. Evidence may be physical or intangible. Testimony of experts often relates to scientific evidence. The differences between these classifications of evidence is fully discussed in Chapter 3.

THE RULES OF EVIDENCE

"Rules of evidence," or the "law of evidence," as they are also known, are a set of regulations that act as guidelines for judges, attorneys, and law enforcement professionals who are involved in the trials of cases. These guidelines determine how the trial is to be conducted, what persons may be witnesses, the matters about which they can testify, the method by which articles at a crime scene (physical evidence) are collected and preserved, what is admissible, and what is inadmissible. These rules make for the orderly conduct of the trial, promote efficiency, enhance the quality of evidence, and ensure a fair trial. They are the product of many years of judicial evolution and, more recently, legislative study. They were developed by trial and error, through logic and sound judgment, following the basic needs

FYI

There was a rather famous white Bronco involved in the 1994 O.J. Simpson trial. One of the big problems for the prosecution was the "chain of custody" of the Bronco. It was towed to a privately maintained storage lot and was not properly secured. During the time the Bronco was there, an employee broke into the vehicle and took some papers. Judge Ito, presiding at the trial of O.J. Simpson, ruled that the bloodstains later discovered on the Bronco's front console were admissible, but the defense, in its attack on the bloodstain evidence, made much of the fact that the Bronco was not properly stored. A proper "chain of custody" would have reduced or eliminated the impact of the defense's argument.

of society. They make for the orderly conduct of the trial and ensure that evidence is properly presented at the trial. For example, the rules prevent one spouse from testifying against another, except in certain instances. The rules also generally forbid the use of hearsay as evidence and prohibit the admission of illegally obtained evidence. Law enforcement professionals should not look upon these rules as roadblocks in their efforts to secure convictions. Instead, they must realize that the objective of these rules is to ensure the integrity of all evidence, protect a defendant's rights, and ensure a fair trial.

History of Trial by Jury

In the days before jury trials, proof of guilt or innocence was decided by ordeal, battle, or compurgation. For the most part, trial by ordeal was an appeal to the supernatural. An example of an ordeal used to determine guilt or innocence consisted of forcing an accused person to remove a rock from the bottom of a boiling pot of water. Any accused whose hands became blistered was found guilty. If the hands did not blister, the accused was acquitted. Acquittals under this system were, not surprisingly, rare.

Another kind of trial was introduced in England as a result of the Norman Conquest in 1066. This was trial by battle or combat, also known as "wager of battle." In this system the victim of a crime and the accused were forced into hands-on combat. Even litigants in civil matters were often required to ascertain who was right and who was wrong by this method of proof, with the one who was right being the winner. It was assumed that God would give victory to the one who was right. In criminal matters, if the accused won, the accused was acquitted. Judicial combat became a prevalent way to establish justice and continued to hold sway for a period of time, but eventually it died out as a means of establishing right and wrong.

A more humane method of ascertaining guilt or innocence utilized from time to time was trial by compurgation, also known as "wager of law." In this system the accused would testify in his or her own behalf, pleading innocence. The accused would be supported by helpers known as "compurgators," or oath helpers, often twelve in number. These supporters or helpers would testify to the good character of the accused and particularly his or her reputation for veracity. These persons would not necessarily know anything about the facts of the case, but merely came forth to tell how good the accused was. This system provided fertile grounds for perjury and proved to be as ineffective at determining the truth as the ordeal and combat methods. But it is considered to be the forerunner of our use of character witnesses.

Later, a trial by jury system began to make its appearance. It was in no way like the trial by jury as we know it. The first juries functioned by charging the accused with a crime, acting in much the same capacity as a grand jury of today. They served to substantiate an accusation, leaving the test of innocence or guilt to be decided by some other means, such as trial by ordeal, battle, or wager of law. As time passed and these methods lost favor, the accusatory jury was given a dual function. Jury members would gather information from the countryside, mostly hearsay (unsworn, out-of-court statements), concerning the alleged crime and, later, would decide whether the accused should be held for trial. If

a trial were ultimately held, the same jury would try the accused and render a verdict.

INTRODUCTION TO THE LAW OF EVIDENCE AND THE PRETRIAL PROCESS

Later it was decided that the accusatory jury, known by then as the grand jury, should not also try the accused. Therefore, a separate jury, known as the petit jury, was selected for that function. This jury, like the accusatory jury, relied upon evidence from the countryside. Later this petit jury was composed of individuals with personal knowledge about the case. As time passed, witnesses who had information about the case were called to testify before the jury. However, much of the testimony of the witnesses was based upon hearsay information. Finally, around 1700 the trial by jury as we know it today was becoming a reality, characterized by the swearing in of witnesses and the right to cross-examine those witnesses. Additionally, hearsay evidence began to disappear from jury trials. It was then that our rules of evidence began to develop into what they are today.

Development of the Rules of Evidence

Rules of evidence in jury trials are designed to keep some information from the jury even though it may be relevant. This is because sometimes relevant information cannot be received by the jury without violating some principle or policy that the law seeks to promote. For example, hearsay evidence (a statement made by a person out of court) may be very relevant but is often unreliable and untrustworthy. Hence, the hearsay rule bans the admission of hearsay at a trial, except in specific, defined situations. Likewise, evidence that has been obtained by a law enforcement officer in violation of a suspect's constitutional rights may be declared by the law to be inadmissible in order to deter future misconduct by officers. (The rules governing illegally seized evidence are discussed in detail in Chapter 9.)

Today, the rules of evidence in most jurisdictions are in the form of a statute or code, meaning that they are laws enacted by a legislative body. These evidence laws have supplanted the rules made by judges that evolved over the centuries during the development of the jury system, though many may be traced back to the judge-made rules. By far, the most common codification of evidence law is the **Federal Rules of Evidence (FRE).** The FRE apply in all federal courts throughout the United States and in the 43 states that have relied upon them as a model in adopting their own evidence codes.

FEDERAL RULES OF EVIDENCE (FRE)
The most common codification of evidence law—the rules that apply in all federal courts throughout the United States and in the 42 states that have relied upon them as a model in adopting their own evidence codes.

The evolution of the FRE began in 1942 when the American Law Institute adopted the Model Code of Evidence. The drafting and advisory committees for the Model Code included all the great figures in the field of evidence. The Model Code was considered to be reformist and controversial. So, although the Model Code stimulated debate and development of the law, it was not adopted by any jurisdiction. In 1954, the Uniform Rules of Evidence, authorized by the Commissioners on Uniform State Laws, were produced. While these rules were less radical, they were adopted by only two states. Finally, in 1961, the United States Supreme Court Chief Justice Earl Warren appointed a special committee to determine the feasibility and desirability of a federal evidence code. The committee came back

with an affirmative response. An Advisory Committee on Rules of Evidence was appointed to draft proposed rules and, in 1972, a revised draft of proposed rules was promulgated by the Supreme Court as the Federal Rules of Evidence, to be effective July 1, 1973. The rules were referred to Congress, which enacted the rules into law, effective July 1, 1975. The rules have been subsequently amended by Congress but have remained, for the most part, the same since enactment. Effective December 1, 2011, the entire FRE were "restyled," meaning that the language of the rules was simplified to render them more understandable. No substantive changes were made by this amendment to the FRE.

Forty-three state legislatures have adopted evidence codes patterned after the FRE as of January 2013. Those states that have not adopted the Rules, however, are some with heavy population centers that account for a substantial number of the state criminal cases generated in the United States. States that have not yet adopted the Rules include California, Connecticut, Kansas, Massachusetts, Missouri, New York, and Virginia. Although these states follow rules of evidence based on the same general principles that exist in all of Anglo-American evidence law, their rules differ substantially in many respects from the FRE. Therefore, the rules of evidence of each state must be consulted to learn these differences. Moreover, even those states that have patterned their evidence codes on the FRE may have some substantial variances from the FRE.

The FRE, and their state counterparts, cover the entire field of judicial procedure. These rules apply equally in civil and criminal matters. Because the rules are complex, the line between what is admissible and what is inadmissible is very fine. Therefore, these rules may create much confusion for all who deal with them, including the law enforcement professional. Further, it is sometimes difficult to abide by some of the rules, primarily because an appellate court may invalidate or modify what was once perfectly legal and proper. The rules themselves, much like judges' interpretations of the rules, are constantly changing, many times becoming more restrictive on the officer and his or her work.

Despite such problems, the rules of evidence enable officers to know during the investigation what evidence will be admissible at a trial. It is the purpose of this book to concentrate on those rules of evidence most applicable to the work of the law enforcement professional and to help in understanding them.

OVERVIEW OF THE COURT PROCESS: THE PRETRIAL PROCESS

Figure 1–1 is a flow chart of the criminal justice system. It covers the entire process from the observation or report of a crime through investigation, arrest, prosecution, trial, sentencing, appeal, service of sentence, and release. The court process from pretrial to appeal will be briefly described in this section. Later in this chapter, the pretrial process will be described in greater detail. The trial process will be described in greater detail in Chapter 2.

BOOKING
A formal processing of the arrested person by the police that involves recording the arrest, fingerprinting, photographing, and inventorying all the personal items taken from the suspect.

The process begins with an arrest based upon detection, investigation, and/or the filing of a criminal complaint against a person. After arrest, the suspect is booked. **Booking** is a formal processing of the arrested person by the police that involves recording the arrest, fingerprinting, photographing, and inventorying all

the personal items taken from the suspect. The prosecutor will decide whether to proceed with the charges against the defendant. If so, the accused will then make an initial appearance in court, at which time the judge will review the charges to determine the following:

1. that the crime is properly charged (i.e., that all required elements are alleged);
2. that the right person has been named as the defendant;
3. that there is a reasonable basis for the charges;
4. whether the accused has or needs counsel; and
5. what bail or other conditions for release pending trial will be set.

The next step is a preliminary hearing, at which the judge considers the prosecution's case to decide whether there is probable cause to believe the defendant committed the crimes charged. If so, the defendant is held to answer to formal charges in the form of a grand jury indictment or an information.

After the grand jury indicts or the prosecutor files an information formally charging the defendant, the accused appears in the trial court for arraignment and plea. At the arraignment, the defendant can enter a plea of guilty, not guilty, *nolo contendere* (no contest), or stand mute. If the defendant pleads guilty (or *nolo contendere*), he or she enters the plea and the judge imposes the judgment of guilt upon the plea. At that time, or shortly after, the judge will impose sentence upon the defendant.

If the defendant pleads not guilty or stands mute at the arraignment, the case will be set for trial. Immediately after this, the lawyers will begin to file papers (pretrial motions) to test legal issues (such as the legality of any searches or seizures or change of venue) before trial, and they will exchange information about the merits of the case. This exchange of information is called **discovery** and is designed to lessen the element of surprise at trial. In most jurisdictions, there are time limits within which such pretrial motions must be filed, often within ten days to two weeks of arraignment. During this post-arraignment, pretrial period, the law enforcement officer will continue to investigate the case, maintain the evidence gathered, prepare further evidence when necessary, and assist the prosecution in any other way appropriate to ensure that the trial proceeds in a timely and effective manner.

DISCOVERY
The right afforded to the adversary in a trial to examine, inspect, and copy the evidence in the hands of the other side.

At the trial, the chief law enforcement officer assigned to the case may be called upon to assist the prosecutor by sitting at the counsel table in the courtroom.

At the very least, all officers who have personal knowledge of significant facts may be called upon to testify on behalf of the prosecution. At the conclusion of the trial, the jury or the judge will render a decision. If the judge or jury convicts the defendant, the judge will set a date for sentencing.

Usually, the probation department will prepare a pre-sentence investigation report (PSI), which recommends a sentence to the judge. The PSI is prepared by a probation officer who investigates all aspects of the defendant's life, seeking to verify all information by public and private records. The recommendation for sentencing contained in the PSI reflects the results of the PSI writer's evaluation of the defendant based upon the information gathered and reference to the sentencing guidelines, if any, that apply in the jurisdiction. If the defendant objects to the PSI, he or she can file an objection to the report, but there is no right of appeal.