CHAPTER 34

THE RIGHTS OF PRETRIAL DETAINEES*

A. Introduction

"Pretrial detention" refers to the time period during which you are incarcerated after being arrested but before your trial. Pretrial detention is only supposed to be used to make sure that you will not flee before trial. It is not supposed to be used to punish or rehabilitate you because, under the U.S. Constitution, a person accused of a crime is presumed innocent until proven guilty. As a pretrial detainee, you have not been convicted of a crime and cannot legally be punished.

This Chapter discusses what rights you have when interacting with police and prosecutors while your case is pending (before you are found guilty or not guilty, through a trial, plea, or dismissed case). Any time the government accuses you of a crime in court, they must provide you with a lawyer if you cannot afford one. This Chapter does not replace the advice of your lawyer. Instead, this Chapter can help you and your family understand your rights at different stages of the criminal process and figure out what questions you want to ask your lawyer. You should always discuss anything you do and any questions you have with your lawyer.

Part B of this Chapter talks about your rights under the Fifth and Sixth Amendments before you are formally charged with a crime but may be interacting with law enforcement, such as through an investigation. It also discusses your rights at the time of arrest. It explains what happens if you do make a statement to the police, how that statement may be used, and ways the police might try to get you to make a statement. Part C deals with your rights under the Sixth Amendment once you have been formally charged with a crime in court. These rights include your right to have a lawyer assigned to you if you cannot afford one and what happens if you make any statements to law enforcement after you have been charged. Part D discusses the different legal mechanisms that affect whether you stay in jail or not while your case is pending, focusing on bail and speedy trial. Part E talks about your rights with respect to the conditions of your pre-trial confinement. This Chapter mainly focuses on federal and New York State law. Be sure to check the footnotes for information on researching claims in other states.

If you are not a U.S. citizen, you also have a treaty right to communicate with consular officers from your home government.[1] Consular access means that you have the right to contact your local consulate or embassy, as well as the right to have regular communications with consular officers from your native country. If you have citizenship from another country, you should read Chapter II of the *JLM Immigration and Consular Access Supplement* ("*ICA*"). It explains your right to consular access as well as the reasons you may want to contact your consulate and reasons why you may not want to do so. Consular officers may be able to help you in criminal cases. For example, they can gather "mitigating evidence" (evidence showing that there are reasons why you should receive a less severe sentence) in death penalty cases. Your consular officers may also help you if your rights have been violated, and they may assist you in deportation proceedings. Chapter II of the *JLM Immigration and Consular Access Supplement* (*ICA*) will give you some practical advice on when and how to contact your consulate.

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1. *See JLM ICA Supplement,* Chapter II "The Right to Consular Access"; see also Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States of America Dec. 24, 1969) (stating that a national may inform his consulate of his arrest or pretrial detention, and consular officers have the right to visit the national in custody, to speak with him and arrange his legal representation).

This Chapter does not cover most "search and seizure" law under the Fourth Amendment, which determines when the police can legally arrest you or search you or your possessions. This area of law is complicated and beyond the scope of this Chapter.[2]

B. Your Rights Before You Are Charged

Even before you are officially charged with a crime in court, you have rights when interacting with law enforcement. Sometimes, people are arrested at the scene of the crime and charges are filed right away based on what the police know about a crime. For example, if the police see you shoot and kill someone, the police will arrest you on the spot and charge you with murder. Other times, the police will conduct an investigation before deciding who they want to arrest and charge for a crime. For example, if a person is found dead, the police may question a number of people they believe are connected to 3the crime before choosing who to arrest and charge. In either of these scenarios, you have rights under the Fifth Amendment if the police start asking you questions.[3]

1. Your rights if the police are investigating you for a crime[4]

If a crime takes places and the police are not immediately sure who did it or who they suspect did it, they will conduct an investigation to decide who to arrest and charge. As part of the investigation, the police will usually question people they believe may have been involved. You may become a suspect if, for example, someone else named you to the police as someone who was involved, if you look like someone caught on a security camera, if you knew the victim or if you were nearby when a crime took place. During this process, the police may also get copies of surveillance footage, phone records, photographs and medical records, depending on what type of crime they are investigating.

If you are approached by the police or other law enforcement officials who want to ask you about a crime that has taken place, you have rights. If you are not being detained, the police do not have to read you those rights.[5] However, just because the police have not read you your rights does not mean you do not have them. You always have the right to tell the police you do not want to talk to them or that you want to speak to a lawyer. You can ask police officers if you are free to leave. If they say yes, you may leave. If you are not free to leave, you are detained or arrested and the police must read you your rights before asking you any more questions.

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2. If you want to learn more about search and seizure law, a good overview is found in 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE (5th ed. 2010). You should also read the cases regarding search and seizure law in your own state. *See also* 2 Search & Seizure § 40.09 (LexisNexis), part of a compilation of sources on the topic on *Lexis.*

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

4. The term "police" here may include state agents such as jailhouse informants, i.e., fellow incarcerated people that are cooperating closely with and acting for the police. *See* United States v. Henry, 447 U.S. 264, 273–275, 100 S. Ct. 2183, 2188–2189, 65 L. Ed. 2d 115, 124–125 (1980) (finding that an incarcerated person's 6th Amendment right to counsel was violated when a court admitted statements made by the incarcerated person to a jailhouse informant deliberately trying to solicit damaging information). The term "police" also refers to federal agents from any of the different federal law enforcement agencies, and any other law enforcement or prosecution official. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 273–275, 113 S. Ct. 2606, 2616–2617, 125 L. Ed. 2d 209, 226–227 (1993) (holding that where prosecutors allegedly fabricated evidence during investigations, they performed "investigative functions normally performed by a detective or police officer," and were only entitled to the same amount of immunity from liability as a police officer would).

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

2. Your rights once you have been detained or arrested

If the police detain you anywhere, or arrest you, you still have rights if they try to ask you questions. You have likely heard about your *Miranda* rights. Your *Miranda* rights include the right to tell police you do not want to speak to them or that you want to speak to a lawyer before speaking with them. The Supreme Court decided that law enforcement has to tell you what your rights are before they interrogate you. This requirement exists because you have a right to counsel under the Fifth Amendment, which protects you from making statements that are self-incriminating (statements that could be used to show you are guilty in court).[6] Your *Miranda* rights are: (1) the right to remain silent, since anything you say may be used against you in court; (2) the right to counsel, both before and during interrogation; and (3) the right to a lawyer throughout your case, including a free lawyer if you cannot afford one.[7]

Most people have seen crime shows on TV where the police inform someone of their rights while they are arresting him. In reality, your *Miranda* rights apply specifically to custodial interrogations, so police are only required to give them to you before they ask you questions. *Miranda* does not apply to an arrest where you are not interrogated.[8] It also does not apply to non-custodial interactions.[9] The word "custodial" refers to either: (1) after you have been taken into police custody (so handcuffed, put into a police car, taken to the precinct, etc.),[10] or (2) when you have been deprived of your freedom of movement (if you ask the police if you can leave and they say no, you have been deprived of your freedom of movement even if you are not yet handcuffed).[11] "Interrogation" can mean either: (1) direct questioning by the police; or (2) the "functional equivalent" of direct questioning.[12] The functional equivalent of direct questioning usually means when the police the police say or do something to you that they should know is likely to cause you to confess or say something incriminating.[13] In summary, when you are approached by the police and they do not allow you to leave, they must read you your *Miranda* rights before asking you any questions. Even if you are not in custody, you can still choose not to answer any questions the police ask you.

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6. The right to counsel under the Fifth Amendment is different from the Sixth Amendment right to counsel discussed in Part C of this Chapter. The Sixth Amendment right ensures that you have good representation once formal criminal proceedings have been initiated against you. "Self-incriminating" describes statements that could make you legally responsible for a crime that has taken place. *Self-Incriminating*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706–707 (1966).

8. Rhode Island v. Innis, 446 U.S. 291, 300–302, 100 S. Ct. 1682, 1689–1690, 64 L. Ed. 2d 297, 307–308 (1980).

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

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

11. For example, in Berkemer v. McCarty, the Court held that an ordinary traffic stop, where the officer had decided that the suspect would be taken into custody as soon as he exited his car but did not tell the defendant of that decision, was not custody for *Miranda* purposes. In other words, the Court looked at whether or not a reasonable person in the suspect's position would have thought they were in custody. The only thing that mattered was what the suspect reasonably thought at the time he made the statement. Berkemer v. McCarty, 468 U.S. 420, 440, 441–442, 104 S. Ct. 3138, 3150–3151, 82 L. Ed. 2d 317, 334–336 (1984). The courts apply this reasoning because they are concerned about people being forced to make statements, and courts believe that people decide whether to speak based on how they perceive (or view) the situation they are in.

12. Rhode Island v. Innis, 446 U.S. 291, 300–301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307–308 (1980) ("[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

13. *See* Rhode Island v. Innis, 446 U.S. 291, 302–303, 100 S. Ct. 1682, 1690–1691, 64 L. Ed. 2d 297, 309 (1980) (holding that a short conversation between policemen in front of a suspect was not the "functional equivalent" of interrogation, as a reasonable police officer would not think that the conversation would lead to an incriminating statement from the suspect).

Once a police officer or law enforcement agent reads you your Miranda rights, you get to decide if you want to invoke **(use)** or waive **(give up)** those rights. If you invoke your rights, it means you want to use them and you will not speak to the officer without a lawyer present. If you waive your rights, you are telling the officer that you understand your right not to speak but wish to do so anyway. If you assert your right to remain silent after having your *Miranda* rights read to you, the interrogation must stop.[14]

Something that may be confusing is that to make the police stop asking you questions, you have to say out loud that you want to remain silent and that you want to speak with an attorney. Simply remaining silent will not be considered enough to demonstrate that you have chosen to exercise your rights, and officers may continue interrogating you despite your silence until you clearly communicate your choice to remain silent and stop cooperating with the interrogation.[15] Similarly, if you ask for a lawyer during the interrogation, the interrogation must stop until you have had time to talk to a lawyer or until you yourself restart the interrogation.[16] However, you must be clear that you are asking for an attorney to represent you in this circumstance.[17] In addition, you are entitled to an attorney whenever the interrogation begins again.[18] If you do not invoke your rights out loud, the police can keep asking questions (although you can still decide not to answer them). After a break in custody of at least two weeks, police can start questioning you again unless you reinvoke your right to counsel (ask for a lawyer again).[19]

3. What happens if you do make a statement to the police?

Let's say that the police do read you your rights, you say that you are waiving them and then make an incriminating statement to the police. Just because the police read you your *Miranda* rights does not mean that any statements you have made are automatically admissible (usable in court). In some

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14. Miranda v. Arizona, 384 U.S. 436, 473–474, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966). Note that the police can continue to question you about unrelated crimes. *See* Michigan v. Mosley, 423 U.S. 96, 104–106, 96 S. Ct. 321, 326–328, 46 L. Ed. 2d 313, 321–323 (1975) (holding that although the suspect invoked the right to remain silent on robbery charges, several hours later another police officer could permissibly question the suspect about an unrelated homicide upon providing the *Miranda* warnings and securing a waiver from the suspect). *But see* People v. Boyer, 768 P.2d 610, 623, 48 Cal. 3d 247, 273, 256 Cal. Rptr. 96, 109 (Cal. 1989) (finding that under California state law, police can no longer attempt to question a suspect in custody once the suspect has invoked both a right to remain silent and a right to an attorney, unless the suspect initiates further communication), *overruled on other grounds by* People v. Stansbury, 889 P.2d 588 (Cal. 1995).

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

16. *See* Edwards v. Arizona, 451 U.S. 477, 484–485, 101 S. Ct. 1880, 1884–1885, 68 L. Ed. 2d 378, 386 (1981) (holding that once the suspect asks for an attorney, interrogation cannot resume until counsel has been made available, or the accused himself initiates further conversations with the police). *But see* Berkemer v. McCarty, 468 U.S. 420, 437, 104 S. Ct. 3138, 3148–3149, 82 L. Ed. 2d 317, 333 (1984) (holding that *Miranda* must be enforced strictly, but only in those situations where "the concerns that powered the decision are implicated."). This has been interpreted by lower courts as allowing police to ask clarifying questions to suspects who have volunteered information after asserting their rights to remain silent and to counsel. *See, e.g.*, United States v. Rommy, 506 F.3d 108, 133 (2d Cir. 2007) (holding that "simple clarifying questions do not necessarily constitute interrogation").

17. *See* Davis v. United States, 512 U.S. 452, 462, 114 S. Ct. 2350, 2356–2357, 129 L. Ed. 2d 362, 373 (1994) (holding that a suspect must be clear in his desire for counsel; it is not enough for the suspect to state, "Maybe I should talk to a lawyer"). *But see* Downey v. State, 144 So. 3d 146, 151 (Miss. 2014) (holding Mississippi exceeds this minimum standard by its state constitution).

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

19. Maryland v. Shatzer, 559 U.S. 98, 110–111, 130 S. Ct. 1213, 1223, 175 L. Ed. 2d 1045, 1056–1057 (2010) (finding that the *Edwards* rule does not extend indefinitely, but rather expires after a suspect has been out of investigative custody for 14 days). After two weeks, police may again initiate an interrogation, unless the suspect reasserts his *Miranda* rights. Note that here "custody" means in the custody of police for the purpose of investigating this specific offense, not just in prison more generally.

cases, the police may try to force you to waive your *Miranda* rights or try to pressure you to say something self-incriminating after you have waived your *Miranda* rights. If they do that, your statement may not be admissible. Even if the police read you your *Miranda* rights (commonly referred to as "mirandizing" you), a statement or confession you make to the police must still be voluntary if the prosecution wants to use it at your trial to show you are guilty of your charges.[20] The word "voluntary" may be confusing, however, because it means something like "not coerced" in this context.[21] To coerce someone means to pressure that person into doing something by the use of force or threats. For example, if the police mirandize you and then threaten to hurt you if you do not confess, your confession is not voluntary and the prosecution cannot use it in court to convince a jury you committed the crime.

Several things can make a court decide that your confession was not voluntary. The police cannot use or threaten to use physical violence in order to get you to confess.[22] If the police threaten to administer a painful medical procedure in an attempt to get you to confess, even though they may be legally entitled to order this procedure, the court may consider the statements you make after this threat to be involuntary.[23] In addition, the use of deception or promises of leniency in sentencing can sometimes make the confession involuntary.[24] Your confession is not likely to be considered involuntary simply because it occurred after the police interrogated you for a long period of time, but if you were subject to a long interrogation and were deprived of food or sleep, your confession may be deemed involuntary.[25] Likewise, if you were held in very bad conditions for your interrogation, courts may find your confession to be involuntary.[26] If your confession is involuntary (that is, if it has been improperly compelled), it cannot be used at trial for *any* purpose.[27]

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

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

22. *See* Brown v. Mississippi, 297 U.S. 278, 287, 56 S. Ct. 461, 465–466, 80 L. Ed. 682, 687–688 (1936) (holding that the defendant could not be convicted on the basis of a confession obtained during a physical beating by a police officer); United States v. Abu Ali, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005), *aff'd*, 528 F.3d 210 (4th Cir. 2008) (holding that evidence obtained by extreme physical coercion "ha[s] no place in the American system of justice"); *see also* Arizona v. Fulminante, 499 U.S. 279, 287, 111 S. Ct. 1246, 1252–1253, 113 L. Ed. 2d 302, 316 (1991) (noting that "a finding of coercion need not depend upon actual violence by a government agent," and a "credible threat of physical violence" is enough to find coercion); Colorado v. Connelly, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473, 486 (1986) ("The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching....").

23. *See, e.g.*, State v. Phelps, 456 N.W.2d 290, 294, 235 Neb. 569, 574–575 (1990) (holding that a rape suspect's confession, made after police described a painful penile swab procedure that would be unnecessary if suspect confessed, was involuntary).

24. *See* Lynumn v. Illinois, 372 U.S. 528, 531–534, 83 S. Ct. 917, 919–920, 9 L. Ed. 2d 922, 925–927 (1963) (finding confession to be involuntary where police told defendant that state financial aid to her child would be cut off and her children taken from her if she failed to cooperate); United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (holding that intentionally causing the suspect to fear that she would not see her children for a "long time" was "patently coercive").

25. *See* Spano v. New York, 360 U.S. 315, 322, 79 S. Ct. 1202, 1207, 3 L. Ed. 2d 1265, 1271 (1959) (finding a confession involuntary, in part, because the suspect was subjected to prolonged interrogation of almost eight hours); Ashcraft v. Tennessee, 322 U.S. 143, 154, 64 S. Ct. 921, 926, 88 L. Ed. 1192, 1199 (1944) (finding a confession to be coerced where suspect was questioned for 36 hours without sleep or rest); *see also* Mincey v. Arizona, 437 U.S. 385, 398–402, 98 S. Ct. 2408, 2416–2418, 57 L. Ed. 2d 290, 304–306 (1978) (holding that the statements of a suspect were involuntary where an interrogation lasted for four hours while the suspect was severely injured).

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

27. *See* Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290, 303 (1978) (noting that

If the police do not mirandize you but you make a *voluntary* statement, that statement *may* be used to impeach you if you testify at your own trial.[28] To "impeach" you means the prosecution can use the statement to say that you are not believable or that your testimony is inconsistent, even though they technically cannot use it to prove that you are guilty.[29] Again, a statement that a court decides was *involuntary* cannot be used for anything.[30]

If you waive your *Miranda* rights and make a statement to law enforcement that the prosecution wants to use at trial to show you are guilty, the prosecutor has the burden to first show that you waived your rights "voluntarily, knowingly, and intelligently."[31] They have to show that the officers who questioned you read you your *Miranda* rights and did not do anything to force you to speak to them.

4. A final note about police tactics

Sometimes police will try to get around the *Miranda* requirements. A common tactic is the use of two-step interrogations. In this scenario, the police would start questioning you without giving you the *Miranda* warnings until you confess to committing the crime (this statement cannot be admitted in court except for impeachment purposes, to challenge your credibility). After you confessed, the officer would then give you your *Miranda* warnings and the police would ask similar questions to try to get you to give up the same information.[32] People in this situation often confess again, believing that since they have already confessed once, there is no harm in doing so again.

In fact, whether or not that second statement can be used to prove you are guilty at trial depends on a few different things. One factor is simply what jurisdiction you are in. Another major factor is what exactly happened during the interrogation. Courts will ask whether or not the two-step interrogation process was done intentionally or accidentally, and if anything happened between the two interrogations that leads the court to believe the second statement was given voluntarily. If the police did this on purpose to get you to confess, the statement you made will probably be excluded (kept out of your trial) unless the police did anything to fix their mistake (took curative measures).[33] If the two-step interrogation was accidental (if, for example, the officer simply forgot to mirandize you before beginning questioning and then stopped to fix his mistake), the court will probably analyze your

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any use at trial of an involuntary statement violates the defendant's due process rights).

28. *See* Miranda v. Arizona, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966) ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."); United States v. Washington, 431 U.S. 181, 186–187, 97 S. Ct. 1814, 1818, 52 L. Ed. 2d 238, 244–245 (1977) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.").

29. Harris v. New York, 401 U.S. 222, 226, 91 S. Ct. 643, 646, 28 L. Ed. 2d 1, 5 (1971) (holding that *Miranda* does not prohibit the police from using a defendant's statement to challenge his credibility and consequently impeach him).

30. *See* Rogers v. Richmond, 365 U.S. 534, 540, 81 S. Ct. 735, 739, 5 L. Ed. 2d 760, 766 (1961) ("Our decisions under [the 14th] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand"). *But see* Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 1251, 113 L. Ed. 2d 302, 315 (1991) (extending the harmless-error rule adopted in Chapman v. California to the admission of involuntary confession). The admission of an involuntary confession may be permitted if the defendant fails to establish, beyond a reasonable doubt, that such admission was a harmless error. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S. Ct. 1246, 1257, 113 L. Ed. 2d 302, 322 (1991).

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

32. *See* Missouri v. Seibert, 542 U.S. 600, 604–606, 124 S. Ct. 2601, 2605–2606, 159 L. Ed. 2d 643, 650–651 (2004) (plurality opinion) for a full discussion of the two-step interrogation and an example of this technique.

33. Missouri v. Seibert, 542 U.S. 600, 621, 124 S. Ct. 2601, 2615, 159 L. Ed. 2d 643, 661 (2004).

statement to decide if it was voluntary or not. If it was not voluntary, it cannot be used against you at trial.[34]

C. Your Rights After You Are Charged

When the prosecution is ready to begin your case, they will file a charging document in court saying what they think you did and what laws they believe you broke.[35] At this point, the Sixth Amendment guarantees your right to the assistance of counsel, among other things.[36] The Sixth Amendment starts protecting you the moment formal criminal proceedings are started against you and continues through trial preparation, the trial itself, the sentencing phase, and beyond.[37]

1. Right to Assigned Counsel

You may have been assigned a public defender at your arraignment (your first court appearance where the judge reads your charges). If you cannot afford a lawyer, the government must provide one for you if: (1) you are being prosecuted in a federal court; or (2) you are prosecuted for any crime in state court for which you are sentenced to a term of imprisonment.[38] Let's say, for example, that you are charged with a misdemeanor for which you could be sentenced to a fine *or* a short term of imprisonment. The state does not have to provide you with a free lawyer, but if they do not then you cannot be sentenced to prison time. If they do provide you with a free lawyer, the judge may sentence you to prison time (although they do not have to).[39]

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34. *See* Rogers v. Richmond, 365 U.S. 534, 540–541, 81 S. Ct. 735, 739–740, 5 L. Ed. 2d 760, 766 (1961) (confirming that confessions must be voluntary to be admissible); Chambers v. Florida, 309 U.S. 227, 240, 60 S. Ct. 472, 479, 84 L. Ed. 716, 724 (1940) (same) ; Lisenba v. California, 314 U.S. 219, 236, 62 S. Ct. 280, 289–290, 86 L. Ed. 166, 179–180 (1941) (same); Rochin v. California, 342 U.S. 165, 172–174, 72 S. Ct. 205, 209–210, 96 L. Ed. 183, 190–191 (1952) (same); Spano v. New York, 360 U.S. 315, 320–321, 79 S. Ct. 1202, 1205–1206, 3 L. Ed. 2d 1265, 1270 (1959) (same); Blackburn v. Alabama, 361 U.S. 199, 206–207, 80 S. Ct. 274, 279–280, 4 L. Ed. 2d 242, 247–248 (1960) (same).

35. The prosecutor/prosecution is the lawyer for the government that is trying to prove the charges against you. In state court, the prosecutor is the Assistant District Attorney (ADA or DA). In federal court, the prosecutor is the Assistant U.S. Attorney (AUSA). Throughout this Chapter and in court, you may see or hear the prosecutor referred to as the ADA, DA, AUSA, state's attorney, and the government, depending on whether you are in state or federal court, and customs in your region. All these terms mean pretty much the same thing. You may hear the charging document referred to as an information, a complaint or an indictment. They have differences you can ask your attorney about, but all begin the process of charging you in court with a crime.

36. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defense."). Note that the 6th Amendment does not apply to civil proceedings. For example, if you were to bring a 42 U.S.C. § 1983 civil rights claim against the state, you would not have 6th Amendment protections during that case. The 6th Amendment also guarantees your right to a speedy trial. *See* Part D(2) of this Chapter for more information. Other rights under the 6th Amendment not covered in this Chapter include trial by jury and the right to cross-examine witnesses against you.

37. *See* Fellers v. United States, 540 U.S. 519, 523, 124 S. Ct. 1019, 1022, 157 L. Ed. 2d 1016, 1022 (2004) (holding that the right to counsel under the 6th Amendment "is triggered 'at or after the time that judicial proceedings have been initiated ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'" (quoting Brewer v. Williams, 430 U.S. 387, 398, 97 S. Ct. 1232, 1239, 51 L. Ed. 2d 424, 436 (1977))); Mempa v. Rhay, 389 U.S. 128, 134–137, 88 S. Ct. 254, 257–258, 19 L. Ed. 2d 336, 340–342 (1967) (holding that the right to counsel extends to every stage of criminal proceedings where the defendant's substantive rights might be affected).

38. *See* Gideon v. Wainwright, 372 U.S. 335, 339–343, 83 S. Ct. 792, 794–797, 9 L. Ed. 2d 799, 802–807 (1963) (holding that the 6th Amendment should be interpreted to mean that defendants in criminal cases must be provided with counsel in federal courts, unless the right is waived, and that this right is extended to state court matters through the 14th Amendment).

39. *See* Argersinger v. Hamlin, 407 U.S. 25, 40, 92 S. Ct. 2006, 2014, 32 L. Ed. 2d 530, 540 (1972) (holding that although local law may permit it, a judge may not impose prison time unless the defendant is represented by counsel); Scott v. Illinois, 440 U.S. 367, 373–374, 99 S. Ct. 1158, 1162, 59 L. Ed. 2d 383, 389 (1979) (limiting the constitutional right to appointed counsel, as adopted in *Argersinger*, to matters in which imprisonment upon conviction is actually imposed, not merely authorized).

In the beginning of this Chapter you learned that when you are being questioned by the police you have the right to a lawyer but you must ask for one. Once you are charged, you are supposed to get one automatically; you do not need to ask for one (although you should ask if you have not been given one).[40]

2. Post-charge interrogations

Once you have been charged in court, the prosecution and law enforcement can no longer try to talk to you about your case.[41] If anyone from the government (the ADA, AUSA, police officer, agent, or anyone working with them) tries to ask you about your case, you do not have to answer. If you do answer, the prosecutor cannot use what you say in court to prove you are guilty because they have violated your Sixth Amendment rights. If you do not have a lawyer or your lawyer is not present with you, the government still cannot ask you about your case. If they do, they cannot use what you say against you at trial.[42]

However, the Sixth Amendment is "offense-specific."[43] It only applies to crimes you have been officially accused of in court, and *not* things the police may think you have done. If law enforcement wants to question you formally, they must read you your *Miranda* rights and you can ask for your lawyer. But, if you choose to speak to law enforcement anyway, those statements can later be used against you to prove you are guilty of this new charge.

For example: let's say you are formally charged with murder and the police suspect (for reasons not related to the murder case) that you may have also committed an unsolved robbery that happened six months ago, unconnected to the murder. The police *can* ask you questions about the robbery. You do not have to answer and you can ask for an lawyer, but if you do not ask for a lawyer and instead answer the question, the government can use your statement to charge you with the robbery and to try to show you are guilty of it in court (as long as they do not violate the Fifth Amendment). In other words, the rules that apply to the police when they are questioning you about the un-charged robbery are the ones discussed in Part B of this Chapter.

If you are detained pretrial, your lawyer will probably have told you not to discuss your case with anyone in the jail or on any recorded phone calls. This advice is important because statements you casually make to other inmates or to your family over the phone can often be used against you in

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

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

42. *See* Fellers v. United States, 540 U.S. 519, 524–525, 124 S. Ct. 1019, 1023, 157 L. Ed. 2d 1016, 1023 (2004) (holding that evidence obtained from a discussion that took place after the defendant's indictment was inadmissible because it was obtained "outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights"); Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (holding that petitioner's 6th Amendment protections had been violated where evidence of his own incriminating words were used against him at his trial and agents had intentionally drawn out those words after he had been indicted without his counsel present).

43. *See* Texas v. Cobb, 532 U.S. 162, 174, 121 S. Ct. 1335, 1344, 149 L. Ed. 2d 321, 332 (2001) (holding that where a pretrial detainee had been indicted for one crime but had not yet been charged with a closely related crime, his "Sixth Amendment right to counsel did not bar police from interrogating" him regarding the related crime); McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991) ("The Sixth Amendment right… is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced…"); Rothgery v. Gillespie County, 554 U.S. 191, 213, 128 S. Ct. 2578, 2592, 171 L. Ed. 2d 366, 383 (2008) (holding that the 6th Amendment right to counsel attaches when a defendant first appears before a judicial officer and learns the charges against him). Some states treat the question of crime relatedness slightly differently, and depending on where you have been charged, this may be to your advantage. *See, e.g.*, People v. Bing, 76 N.Y.2d 331, 349–350, 558 N.E.2d 1011, 1022, 559 N.Y.S.2d 474, 485 (1990) ("[P]ermitting questioning on unrelated crimes violates neither the State Constitution nor…our prior right to counsel cases.").

court.[44] Because the Sixth Amendment only applies to crimes you have been charged with, the police could plant an informant in the jail to talk to you about crimes you have not yet been charged with. If you do not know the person is law enforcement, they do not have to read you your *Miranda* rights.[45] The same rule applies if you are on the street—the police may pay someone to pretend to be someone else and try to talk to you about a crime the suspect you of. If you have any questions about what your lawyer has told you and why, you should always ask them.

3. Right to Counsel in New York State

This Sixth Amendment right and the Supreme Court cases explaining it apply in both federal and state court trials.[46] If you are facing state court proceedings, that state where you are being tried may also have a similar "right to counsel" provision in its state constitution. This provision would provide you with additional protection. In New York, for example, the right to counsel is guaranteed under the New York State Constitution, Article 1 § 6.[47] If you are charged with a crime in the federal system or the state system, the Sixth Amendment right to counsel goes into effect automatically. However, the police may still ask you about crimes you have not been charged with yet without your lawyer being present. There are two exceptions to this rule in New York: if the uncharged and charged crimes are related to each other *or* the police know you are represented by a lawyer on the other crime they believe you committed, they are not allowed to question you about it.[48]

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44. Under the 6th Amendment, at trial, the state also may not use incriminating remarks that were "deliberately elicited" from you *after* you were charged with a crime. A remark is "deliberately elicited" if the government purposefully caused you to make statements against yourself. These incriminating remarks may not be used at trial if: (1) the statements are about the crime you are charged with, and (2) you have not waived your right to counsel. *See* Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964) (finding a 6th Amendment violation where prosecutors relied on remarks deliberately elicited from defendant after he was indicted and in the absence of his counsel); *see also* Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481, 492 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek [the assistance of counsel]."); Brewer v. Williams, 430 U.S. 387, 415, 97 S. Ct. 1232, 1248, 51 L. Ed. 2d 424, 447 (1977) ("[T]he lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the [suspect]. If…we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.") (Stevens, J., concurring). In practice, this means the government cannot plant an informant in the jail with you and have the informant ask you questions. They can, however, ask someone in the jail to report back to them if the person happens to overhear you say something incriminating. This is because then they have not forced or coerced you in any way to incriminate yourself. *See* Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985). This loophole is why your lawyer will probably tell you not to talk to anyone in the jail about your case or anything criminal you may have done. For further discussion of paid informants in the jail, see United States v. Henry, 447 U.S. 264, 265, 100 S. Ct. 2183, 2184, 65 L. Ed. 2d 115, 119 (1980). The same rules apply if you are out on bail pretrial. The government cannot set you up with a paid informant to ask you questions. *See* Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, 250 (1964).

45. *Compare* Illinois v. Perkins, 496 U.S. 292, 299–300, 110 S. Ct. 2394, 2399, 110 L. Ed. 2d 243, 253 (1990) (holding that an undercover agent, while in jail posing as a fellow incarcerated person, may question an incarcerated person about a crime without giving a *Miranda* warning if the incarcerated person has not yet been charged with that crime), *with* Mathis v. United States, 391 U.S. 1, 4–5, 88 S. Ct. 1503, 1505, 20 L. Ed. 2d 381, 384–385, (1968) (holding that questioning of an incarcerated person by a person known to be an Internal Revenue Service (IRS) official about tax violations, without the giving of a *Miranda* warning, violated the incarcerated person's 5th Amendment rights, when the incarcerated person was in prison for an entirely different offense). See Part B of this Chapter for more information on your 5th Amendment rights.

46. Gideon v. Wainwright, 372 U.S. 335, 342–345, 83 S. Ct. 792, 796–797, 9 L. Ed. 2d 799, 804–807 (1963) (holding that the right to counsel applies in state proceedings).

47. "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself.. . ." N.Y. CONST. art. I, § 6.

48. People v. Henry, 31 N.Y.3d 364, 368, 102 N.E.3d 1056, 1058–1059, 78 N.Y.S.3d 275, 277–278 (2018).

You also have the right to have your lawyer present during any swabbing for DNA.[49] Ask your lawyer about whether or not you will be required to give a DNA sample.

D. What Determines Whether You Stay in Jail or Are Released Pretrial

Two important court mechanisms determine whether or not you stay in jail while your case is going on: bail and speedy trial rights. While reading this Part, it is important to remember that these particular areas of law are currently undergoing major changes in New York State and also vary greatly between states and between the state and federal systems. The words used or the law may be different in your state. This Part is meant to give you a broad overview of how these two mechanisms work. You should ask your lawyer to explain the specific laws in your jurisdiction.

1. Bail

At your arraignment (your first court appearance after you are arrested), your lawyer will probably ask the judge to release you while your case is pending. There are a few different options for conditions under which you might be released. One is Release on your Own Recognizance (ROR). ROR means you are released without having to pay any money. In other situations, the judge may require you to wear an ankle monitor, enroll in programs, or report to supervision, similar to probation. The judge may also require that someone pay money or post bond (a debt you promise to the court) in an amount set by the judge to have you released.[50]

The purpose of bail is to make sure you appear before the court at the assigned time.[51] The judge is supposed to set the combination of money and other conditions that they believe will make sure you come back to court. If the judge believes that the risk you will run away to avoid prosecution is too high, they may "remand" you, meaning they will order that you stay in jail while your case is in progress. If the judge does set bail but no one can pay it, then you will also stay in jail unless someone comes up with the money. In some cases, the court may allow someone to sign a bond saying that *if* you do not come back to court, the signer will have to pay a lot of money. The next two Sections discuss the bail/bond process in the federal system and some recent changes to the New York bail law.

(a) Bail in the federal system

If you are charged in federal court, the judge deciding if you stay in jail or not during your case will follow the rules set in the Federal Bail Reform Act. This Act explains the federal government's authority to detain or release you before trial, rules for appeals of a release or detention order, what happens if you fail to appear or get rearrested while on release, and what factors the judge should consider when ruling on your request for bond.[52] The two main questions the judge will consider are:

(1) Whether you are likely to return to court as required;
(2) Whether you will be a danger to the community if you are released.[53]

To answer these two questions, the court will consider a number of factors, including:

(1) The offense you are charged with.
(2) The weight of the evidence against you (the likelihood that you will actually be convicted of the thing you are charged with).

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49. People v. Smith, 30 N.Y.3d 626, 629 92 N.E.3d 789, 790, 69 N.Y.S.3d 566, 567 (2017) (holding that a DNA test counts as a "critical stage of the proceedings" for which defendants have a constitutional right to counsel).

50. A cash bail is an amount of money that someone pays to get you released from jail. There are a few different kinds of bonds, but a bond is generally an enforceable promise to pay *if* the defendant does not show up to court. *Bond*, BLACK'S LAW DICTIONARY (11th ed. 2019).

51. *Bail*, BLACK'S LAW DICTIONARY (11th ed. 2019).

52. Bail Reform Act, 18 U.S.C. §§ 3141–3156, *available at* https://www.justice.gov/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et (last visited Aug. 26, 2020).

53. Bail Reform Act, 18 U.S.C. §§ 3142(f)–(g); *see also* United States v. Salerno, 481 U.S. 739, 747–748, 107 S. Ct. 2095, 2101–2102, 95 L. Ed. 2d 697, 708–709 (1987) (holding that prevention of danger to the community is a legitimate goal of pretrial detention).

(3) Your history and characteristics, such as your character, health, family and community ties, employment, any substance abuse history, any criminal history, and any record of returning or not returning to court.
(4) Whether you were on probation or parole when you were charged with the current offense.
(5) Anything that the judge thinks would make you a danger to other people if you were released.[54]

In theory, the judge is supposed to consider your ability to pay bond,[55] but what the judge *thinks* you can pay and what you can *actually* pay might be different. If the judge finds that no condition or combination of conditions will make you likely to return to court, and keep you from being a danger to your community when you are released, the judge must order detention before trial (remand).[56]

(b) Bail in New York State

In New York, whether you are detained pre-trial is governed by Articles 510 and 530 of the New York Criminal Procedure Law. If you were charged in a state other than New York, you should check the bail statutes of the state you were charged in.

Under Section 510.10, at your first court appearance, the judge will issue what is called a "securing order" that either releases you on your own recognizance, fixes bail or other non-monetary conditions, or sends you back to jail.[57] Under Section 510.20, you can then apply for bail or recognizance, as opposed to waiting in jail, and present arguments and evidence in support of your application in court. Technically, your request for bail can be made at the time of the original securing order or any time afterward.[58] In practice, bail applications usually happen at either your post-arrest arraignment or the arraignment on your indictment unless there is a later change in the circumstances of your detention. You are entitled to have a lawyer during this part of your case, and if you cannot afford one, the court must appoint one for you.[59]

(i) How does New York's new bail statute apply to you?

The decision on your bail application is not left entirely up to the judge's discretion. As of January 1, 2020, New York is operating under a revised bail statute with some important changes. Because the law is so new, there are not a lot of cases explaining how it should be applied. You will have to do a bit of research to see if there are any new cases by the time you are reading this, and you should speak with your lawyer.

The new statute says that for less serious charges, called "non-qualifying offenses," the judge must release you on your own recognizance (ROR) unless they find that you are a flight risk. If they find that you are a flight risk, they must explain why they believe so. If you are charged with a non-qualifying offense and are not a flight risk, the judge is required to set the least restrictive non-monetary conditions that will ensure that you return to court to be prosecuted for the crime you are charged with (meaning they may not set cash bail).[60] If the court releases you on your own

54. Bail Reform Act, 18 U.S.C. § 3142(g).

55. *See* Bail Reform Act, 18 U.S.C. § 3142(g) (mentioning both financial resources and possible inquiries into property designated as collateral for bond as factors to be considered).

56. Bail Reform Act, 18 U.S.C. § 3142(e)(1).

57. N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2009). In the statute, you will see that it says "commit…to the custody of the sheriff," which means send you back to jail. In court, the judge may say you are being remanded or you are remaining in pretrial detention/custody, all of which also mean being sent back to jail.

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

59. N.Y. CRIM. PROC. LAW § 510.10(2) (McKinney 2009).

60. N.Y. CRIM. PROC. LAW § 510.10(3) (McKinney 2009).

recognizance, you will be released from custody with the understanding that you will later appear in court.[61]

If you are charged with a more serious charge, called a "qualifying offense," the judge can put monetary conditions on your release, but he is not required to so. If the judge finds that no combination of money bail and conditions will ensure your return to court, the judge may remand you.[62] The following is a list of the qualifying offenses the bail statute says allow the judge to set money bail. You can look up each statute in the New York Penal Law:

(1) most violent felonies (§ 70.02) except burglary in the second degree (§ 140.25) or robbery in the second degree (§160.10 of the penal law);
(2) witness intimidation (§ 215.15);
(3) witness tampering (§§ 215.11, 215.12 or 215.13);
(4) any class A felony (except controlled substance offense (art. 220) unless you are a major trafficker (§ 220.77));
(5) a felony sex offense (§ 70.80) or incest (§§ 255.25, 255.26 or 255.27), or a misdemeanor sex offense (parts of art. 130);
(6) conspiracy in the second degree (§ 105.15 of the penal law) where the underlying allegation is that you conspired to commit a class A felony related to homicide (art. 125)
(7) money laundering in support of terrorism in the first degree (§ 470.24); money laundering in support of terrorism in the second degree (§ 470.23); or a felony crime of terrorism (art. 490 with exception of § 490.20);
(8) criminal contempt in the second degree (§ 215.50(3)), criminal contempt in the first degree (§ 215.51(b), (c), or (d)) or aggravated criminal contempt (§ 215.52), where the underlying allegation of the contempt charge is that the you violated an order of protection that had been served on you where the protected party is a member of your family or household (§ 530.11); or
(9) facilitating a sexual performance by a child with a controlled substance or alcohol (§ 263.30), use of a child in a sexual performance (§ 263.05) or luring a child (§ 120.70(1).[63]

To decide if you are a flight risk, the judge will consider a few different factors about you. The prosecutor may tell the judge they consent to your release, or they may say that they think you should have a high bail or be remanded. Your defense lawyer will make arguments about why you should be released. Your lawyer, the prosecutor and the judge will discuss the factors that are listed as subsections (a) through (h) of Section 510.30(1). These factors include:

(a) Your "activities and history" (such as community involvement and family ties to New York);
(b) The charges you are facing;
(c) Any past criminal convictions you may have;
(d) Certain cases you had as a juvenile;
(e) Whether or not you have failed to show up to court in the past when required;
(f) If the judge is allowed to set monetary bail, they must consider your ability pay and the hardship that paying will impose on you, as well as your ability to get a secured, unsecured, or partially secured bond;
(g) If you are charged with a crime against a member of your family or household, the court will also consider:
    i. If you have every violated a protective order towards anyone in your family or household;
    ii. If you have ever used or possessed a firearm.

61. N.Y. CRIM. PROC. LAW § 500.10(2) (McKinney 2009). Most of the terms used in this Section, including different kinds of bail, bond, and conditions of release, are defined in N.Y. CRIM. PROC. LAW § 500.10 (McKinney 2020).

62. N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2009).

63. N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2009).

(h) If you are requesting a securing order while you have a pending appeal, the court will consider the likelihood that your appeal will actually be successful.[64]

Subsection (h) only applies if you have already been convicted but have appealed your conviction and want to request that you be released on bail while your appeal is pending. If the judge believes that there is only a small chance you will win your appeal, the judge can deny your request for bail even if you are not a flight risk.[65]

If you are charged with a felony and are released on bail or RORed, the court must explain to you that your release is conditional. If you commit another felony while released on bail or your own recognizance, you can be remanded while your case is pending.[66]

(c) Procedure for Bail Decisions Made in Local Criminal and Town Courts

If you are in New York State but outside of New York City, you may be charged in a local justice court (sometimes referred to as a village or town court). These local courts can hear low-level criminal cases that occur within the borders of the town or village. They can also handle arraignments and preliminary hearings for felony cases.[67]

For most charges, the same bail rules apply as the ones described above.[68] However, these lower courts cannot release you on recognizance or bail if you are charged with certain types of felonies (class A felonies) or if you have been convicted of two prior felonies.[69] A town court also may not order recognizance or bail if you are charged with a felony until the district attorney has had an opportunity to express their opinion in court and both the court and your lawyer have received a report of your prior criminal record. However, if a report on your past criminal behavior is unavailable, the district attorney may consent to recognizance or bail without it.[70]

If you are denied bail or recognizance in a town court because of your prior felonies or current felony charge, you can still ask a superior court judge to grant recognizance or bail anyway.[71] You can also appeal to a higher court when the town court has 1) denied your application for recognizance or bail, 2) ordered excessive bail, or 3) released you under non-monetary conditions that are more restrictive than necessary to make sure you come back to court.[72] The court must apply the least restrictive conditions rule and explain its reasoning. The reasoning can be explained either on the record (verbally at the hearing) or in writing.[73] If you have been charged with a felony, the district attorney must have the opportunity to be heard in court before a decision is made and the higher court judge must be provided with a copy of your criminal record.[74] You may appeal your bail to the higher court only once.[75]

The higher court will review your bail determination from the lower court *de novo*, meaning they will review it as though they were seeing it for the first time and will not take the decision of the lower court into account when making their own decision.[76] Even though only one application to a higher court is allowed, you can still apply for *habeas corpus* to appeal the denial of bail from the higher court.[77] In that case, however, the court will review the custody determination for error – this means they will only look for violations of law or the constitution, or abuse of discretion of the court. Unlike

64. N.Y. CRIM. PROC. LAW § 510.30(1)(a)–(h) (McKinney 2009).
65. N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 2009).
66. N.Y. CRIM. PROC. LAW § 510.30(3) (McKinney 2009).
67. *City, Town & Village Courts*, NYCOURTS.GOV, *available at* https://www.nycourts.gov/courts/townandvillage/introduction.shtml (last visited Aug. 27, 2020).
68. N.Y. CRIM. PROC. LAW § 530.20(1) (McKinney 2009).
69. N.Y. CRIM. PROC. LAW § 530.20(2)(a) (McKinney 2009).
70. N.Y. CRIM. PROC. LAW § 530.20(2)(b)(i)–(ii) (McKinney 2009).
71. N.Y. CRIM. PROC. LAW § 530.30(1)(a) (McKinney 2009).
72. N.Y. CRIM. PROC. LAW § 530.30(1)(b)–(d) (McKinney 2009).
73. N.Y. CRIM. PROC. LAW § 530.30(1) (McKinney 2009).
74. N.Y. CRIM. PROC. LAW § 530.30(2) (McKinney 2009).
75. N.Y. CRIM. PROC. LAW § 530.30(3) (McKinney 2009).
76. Preiser, Practice Commentaries, Book 11A, N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2009).
77. Preiser, Practice Commentaries, Book 11A, N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2009).

in *de novo* review, they will not start from scratch and review all the evidence that was originally presented to the court.

2. Speedy Trial

Once you are arrested and brought to court for the first time, the government has deadlines for completing certain tasks that move your case forward. Your right to have your case proceed without too much delay is called your right to a speedy trial. The right is guaranteed by the Sixth Amendment of the U.S. Constitution. It applies to trials in both federal and state courts.[78] You have a right to a speedy trial even if you are released on bail.[79] This right does not apply until you have been formally charged or are arrested.[80] The remedy, or solution, for a violation of the right to a speedy trial is release from detention if you are in jail and eventually the dismissal of the case if the government does not meet the deadline.[81]

Because the Constitution does not give a specific number of days, the federal government and many states have speedy trial statutes that say how much time the government gets for different parts of your case. Even if your state does not have a speedy trial statute, your right is still protected by the Sixth Amendment. You will just have to read cases about speedy trial in your state to see how much time the government has typically gotten.

However, the government is only responsible for the time the government uses up. Delays that you cause or request do not count toward your speedy trial time. The days that do count are often referred to as days that are "chargeable to the prosecution." There are a few different situations in which certain amounts of time will not count towards the government's deadline. The parts of the speedy trial statutes that explain this are generally called "Stop-the-Clock" Provisions and are explained below.

Even if your state does have a speedy trial statute, you still have a constitutional speedy trial right. So, if you are in a situation where a small number of days have been charged to the prosecution but your case has dragged on for a long time, you may be able to make a constitutional speedy trial claim even though the prosecution has not violated the state's speedy trial statute. Success on this type of claim is difficult but not impossible.

The following sections give a brief overview of these mechanisms in federal court and New York State court as well as the constitutional standards underlying these laws. You can look up your own state's speedy trial statute using Appendix A to this Chapter.

(a) Federal Constitutional Right to a Speedy Trial

Outside of the speedy trial statutes explained below, your right to a speedy trial is protected by the Sixth Amendment. This right may apply even if the state's speedy trial statute has not been violated or if you are in a state that doesn't have a speedy trial statute.

The Supreme Court has created a balancing test for courts to use in speedy trial cases. When the court uses a balancing test, it considers a few specific factors and then weighs them against each other to decide if the delay in your trial reached the level of a constitutional violation.

The four factors the court will consider in determining whether there has been a violation of your constitutional right to a speedy trial are:

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78. U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; *see* Klopfer v. North Carolina, 386 U.S. 213, 222–223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7–8 (1967) (holding that the 6th Amendment is enforceable in state as well as federal actions).

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

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

81. *See* Strunk v. United States, 412 U.S. 434, 440, 93 S. Ct. 2260, 2264, 37 L. Ed. 2d 56, 62 (1973) (holding that the only remedy available for a violation of the right to a speedy trial is reversing the conviction, vacating the sentence, and dismissing the indictment); *see also* United States v. Ray, 578 F.3d 184, 191, 198–199 (2d Cir. 2009) (holding that, although the remedy for a 6th Amendment violation is dismissal, the 6th Amendment does not apply to sentencing proceedings).

(1) the length of the delay;
(2) the reason for the delay (for example, whose fault was it? What happened?);
(3) the defendant's assertion of his right (did you make a claim in court that your speedy trial right was being violated?); and
(4) prejudice to the defendant (were you hurt by this delay? Did it actually affect your case?).[82]

The first factor the court will consider is prejudice. Unless there is some delay that is "presumptively prejudicial"—meaning, a delay that most likely damaged your case—the court will not consider the three other factors (length, reason, and your assertion).[83] In considering the reason the government gives for the delay (factor 2) the court is more likely to decide that there was a constitutional violation when the government did something the court thinks is bad, like try to delay your trial on purpose. The court will probably be more lenient when the delay is caused by an accident on the part of the government, or just by overcrowding of the court system. The court will still consider these reasons since they are not your fault, but they weigh less heavily in favor of dismissal than something the government did on purpose with bad intentions.[84]

In some cases, if the delay is long enough, the court will automatically look at all four factors to see if your constitutional rights have been violated.[85] This full inquiry happens because the court may find that a very long delay is "presumptively prejudicial." As a general guideline, note that the Supreme Court has previously decided that delays of about one year or longer usually require a full, four-part analysis.[86]

Finally, if you believe your speedy trial rights are being violated, you must file a complaint in court saying so. Otherwise, it will be hard to prove that your rights were actually violated.[87]

(b) The Federal Speedy Trial Act[88]

If you are charged with a crime in federal court, your right to a speedy trial is protected by the Federal Speedy Trial Act. Congress passed this Act to provide some guidelines for how courts can comply with the Sixth Amendment speedy trial right. The Act gives specific numbers of days the government has to complete different parts of your case.

The different time limits are:

(1) The prosecution has thirty days to file an indictment against you, starting from the date you were arrested or served with a summons for the charges.[89]

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82. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–117 (1972) (holding that courts must conduct a balancing test when considering speedy trial cases and listing some of the factors that courts should weigh).

83. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116–117 (1972) ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.").

84. *See* Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972) (stating that a "deliberate attempt to delay the trial" should be weighed more heavily than a more neutral reason).

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

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

87. *See* Barker v. Wingo, 407 U.S. 514, 531–532, 92 S. Ct. 2182, 2192–2193, 33 L. Ed. 2d 101, 117–118 (1972) ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.").

88. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174. The most important sections are § 3161, which deals with time limits, and § 3162, which specifies the sanctions imposed when the time limits are violated.

89. 18 U.S.C. § 3161(b). However, the section also states that if you are charged with a felony in a district where no grand jury has been in session during this 30-day period, the period of time for filing the indictment will be extended by an additional 30 days.

a. If the prosecution misses this deadline, the charges in your complaint that they were going to indict must be dismissed. [90]

(2) The prosecution has seventy days to start your trial, starting from *either* the date you first appeared in court *or* the date they filed an indictment against you, whichever date is later.[91]

a. If the prosecution fails to bring your case to trial within seventy days of filing an indictment,[92] the indictment will be dismissed if you make a motion, meaning formally ask the court, to have it dismissed for a violation of your speedy trial rights.[93] If you *don't* file a motion for dismissal *before* going to trial or entering a plea of guilty or *nolo contendere* (no contest), you will lose the right to have the charges dismissed under the statute.[94]

(3) Your trial can't begin *less* than thirty days from when you first get a lawyer in court (or from when you specifically waive your right to counsel and decide to represent yourself *pro se*).[95]

(c) Federal "Stop the Clock" Provisions

The time periods in the speedy trial statutes are not as straightforward as they seem because not every single day counts towards the number of days listed in the statute. For example, if you request a delay to allow your attorney to do additional investigation, those days will not count towards your speedy trial time. Otherwise, defendants would all just delay their cases until they were dismissed. Instead, the speedy trial rules look at unexplained and unjustified delay, mainly caused by the government. To know whether or not your right to a speedy trial has been violated, you would have to add up all the days of unjustified delay and compare the number of unjustified days to the statutory deadlines.

The parts of the speedy trial statute that explain which days do and do not count are called "stop the clock" provisions because they tell you when the speedy trial "clock" starts and stops. Subsection 3161(h) of the Speedy Trial Act allows the clock to stop in certain circumstances.[96] When the clock stops, the days between when it stops and starts again are **excluded** from the speedy trial calculation (do not count towards the deadlines explained above). Delay because of general business of the court,

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90. 18 U.S.C. § 3162(a)(1). *See* United States v. Cortinas, 785 F. Supp. 357, 362 (E.D.N.Y. 1992), *aff'd mem.*, 999 F.2d 537 (2d Cir. 1993) (holding that a violation of the Speedy Trial Act requires dismissal only of charges alleged in the complaint; prosecution for other conduct arising out of the same criminal incident, even though it was known or reasonably should have been known at the time of the complaint, is not barred).

91. 18 U.S.C. § 3161(c)(1).

92. 18 U.S.C. § 3161(c)(1).

93. 18 U.S.C. § 3162(a)(2).

94. *No Contest*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that a plea of no contest means that the defendant, "while not admitting guilt…will not dispute the charge" and that "[t]his plea is often preferable to a guilty plea, which can be used against the defendant in a later civil lawsuit"). As for losing your right to dismiss the charges, *see* 18 U.S.C. § 3162(a)(2); *see also* United States v. Brown, 498 F.3d 523, 532 (6th Cir. 2007) (observing that the defendant had not asserted his right to a speedy trial before this appeal and stating that this fact "weighs heavily toward a conclusion that no Sixth Amendment violation occurred"); United States v. Morgan, 384 F.3d 439, 442–443 (7th Cir. 2004) (dismissing defendant's appeal based on speedy trial grounds because he did not file a pretrial motion on the issue); United States v. Jackson, 30 F.3d 572, 575 (5th Cir. 1994) (holding that defendant waived right to dismissal by conditionally pleading guilty to one count before moving for dismissal).

95. 18 U.S.C. § 3161(c)(2).

96. 18 U.S.C. § 3161(h)(1)–(8). The following are some examples of the periods of delay that are included in this subsection: (1) delay resulting from "other proceedings," including, but not limited to, from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant, from a trial with respect to other charges against the defendant, from any pretrial motion, or from the removal of the case to another district, 18 U.S.C. §§ 3161(h)(1)(A)–(B), 3161(h)(1)(D)–(E); (2) any period of delay during which the prosecution is deferred pursuant to written agreement with the defendant, for the purpose of allowing the defendant to demonstrate his good conduct, 18 U.S.C. § 3161(h)(2); (3) any period of delay resulting from the absence or unavailability of the defendant or an essential witness, 18 U.S.C. § 3161(h)(3)(A).

lack of preparation, or the prosecution's failure to obtain witnesses will not be excluded.[97] Still, there are a lot of different provisions that "stop the clock" and your case will often take a long time without violating your statutory right to a speedy trial.

The Supreme Court has previously decided that, when scheduling the trial, the prosecutor may not rely on the defendant's promise not to raise a speedy trial claim.[98] In other words, even if you believe that you intentionally opted out of your speedy trial rights before the trial, you are not prevented from raising these rights during trial.[99]

(d) Constitutional Speedy Trial In New York

If you are in state court in New York, you can still make a constitutional speedy trial claim even if the speedy trial statue has not been violated. Although the New York Constitution does not have a clause specifically about your right to a speedy trial, you still have a state constitutional right to a speedy trial under the guarantee of due process clause in article 6 of the New York Constitution.[100] When the court is deciding if your right to a speedy trial has been violated according to the state constitution, they will apply a test similar to the one used in federal court. This means they will ask a series of questions about the case and then weigh the answers against each other to decide if your case should be dismissed for a speedy trial violation. The questions, or factors, that the court will consider are:

(1) the extent of the delay;
(2) the reason for the delay;
(3) the nature of the underlying charge;
(4) whether there has been an extended period of pretrial incarceration;
(5) whether there is any indication that your defense has been hurt by the delay (prejudice, as described in the federal section).[101]

To bring a constitutional speedy trial claim in state court, you would apply the above test and also cite to New York Criminal Procedure Law § 30.20.[102]

(e) The New York Speedy Trial Statute

The New York State speedy trial statute is usually better for defendants. Your right to a speedy trial under New York law is governed by Section 30.30 of the New York Criminal Procedure Law.[103] If you are making a claim in court that your speedy trial rights have been violated, you should talk about both the statute and the state constitution in order to keep your right to a speedy trial.

Under the New York speedy trial statute, you can be released or your charges can get dismissed, depending on the amount of time the government is taking to be ready for trial. How much time the government gets depends on your charges.

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97. 18 U.S.C. § 3161(h)(7)(C).

98. Zedner v. United States, 547 U.S. 489, 503, 126 S. Ct. 1976, 1986–1987, 164 L. Ed. 2d 749, 765 (2006).

99. Zedner v. United States, 547 U.S. 489, 501, 126 S. Ct. 1976, 1985, 164 L. Ed. 2d 749, 764 (2006) (holding that the "public interest cannot be served … if defendants may opt out of the Act").

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

101. People v. Taranovich, 37 N.Y.2d 442, 445, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 81–82 (1975) (explaining that the court must balance these factors to determine if the defendant was deprived of his constitutional right to a speedy trial); People v. Vernace, 96 N.Y.2d 886, 887–888, 756 N.E.2d 66, 67, 730 N.Y.S.2d 778, 779 (2001) (weighing the factors and deciding that defendant's speedy trial rights were not violated by 14 year delay, when there was virtually no harm to defendant and his case).

102 N.Y. CRIM. PROC. LAW § 30.20(1) (McKinney 2018) ("After a criminal action is commenced, the defendant is entitled to a speedy trial.").

103. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018).

The chart below shows the amount of time for the two speedy trial deadlines for the four different categories of charges.

Type of Offense	Deadline 1 (Release)[104]	Deadline 2 (Dismissal)[105]
Felony	Ninety days	Six months
Misdemeanor punishable by more than three months	Thirty days	Ninety days
Misdemeanor punishable by three months or less	Fifteen days	Sixty days
Violation	Five days	Thirty days

If you are released at your arraignment, the first deadline does not apply to you, since all that happens if the prosecution violates it is that you are released.[106] If you are in custody, the clock starts running when you are put into custody.[107] If you reach the second deadline and the prosecution is still not ready for trial, your charges must be dismissed.[108] The clock for the second deadline begins to run on the day following the commencement of the criminal action, meaning the day the prosecution files a document in court accusing you of a crime.[109] If new accusations have been filed to replace the original charges, the amount of time the state has to be ready for trial will be determined by the new offense. The state's time will start from the time the new charges are filed. However, if the government takes too long to file the new charging document, a new clock will not start. Your case and any motion to dismiss for speedy trial violations that you make will be judged under the old speedy trial clock from your first charging document, subtracting any time that cannot count under section 30.30(4), discussed below.

(f) New York "Stop-the-Clock" Provisions

Just like under the federal statute, there are certain event that can stop the speedy trial clock, meaning the days between that event and when the clock starts again do not count towards the two deadlines. The list of things that stop the clock can be found in section 30.30(4). They include a delay that you request or consent to,[110] delay resulting from the unavailability of the defendant,[111] and certain delays requested by the district attorney for purposes of preparing the case.[112] Importantly, if are released and you do not show up to court as required, the clock will stop.[113]

If you believe that you have been denied access to a speedy trial, you must raise this issue before the trial begins or before you plead guilty.[114] The claim will not be preserved for appeal if it is not properly raised in the trial court, meaning you will not be able to bring it up later.[115] Unlike statutory

104. N.Y. CRIM. PROC. LAW §§ 30.30(2)(a)–(d) (McKinney 2018).
105. N.Y. CRIM. PROC. LAW §§ 30.30(1)(a)–(d) (McKinney 2018).
106. N.Y. CRIM. PROC. LAW § 30.30(2) (McKinney 2018).
107. N.Y. CRIM. PROC. LAW § 30.30(2) (McKinney 2018).
108. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2018). You may hear this dismissal date referred to as a "30.30 date" and the amount of time the government has used up as "30.30 time."
109. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2018).
110. N.Y. CRIM. PROC. LAW § 30.30(4)(b) (McKinney 2018).
111. N.Y. CRIM. PROC. LAW § 30.30(4)(c) (McKinney 2018).
112. N.Y. CRIM. PROC. LAW § 30.30(4)(g) (McKinney 2018).
113. N.Y. CRIM. PROC. LAW § 30.30(4)(c)(i) (McKinney 2018).
114. N.Y. CRIM. PROC. LAW §§ 170.30(2), 210.20(2) (McKinney 2007); *see* People v. Cintron, 7 A.D.3d 827, 828, 776 N.Y.S.2d 919, 919 (3d Dept. 2004) (holding defendant's guilty plea waived appellate review of his statutory right to speedy trial).
115. *See* People v. Bancroft, 23 A.D.3d 850, 850–851, 803 N.Y.S.2d 824, 825–826 (3d Dept. 2005) (holding that the right to a speedy trial may be waived where a defendant fails to raise the claim in either a pretrial motion "or otherwise register an appropriate objection on this ground throughout the course of his prosecution").

speedy trial claims, properly asserted constitutional speedy trial claims are not waived by a guilty plea or by making a plea bargain agreement.[116] Most speedy trial claims are raised in pretrial motions (such as a motion to dismiss) or state habeas corpus petitions.[117] If you are represented by a lawyer, ask them which procedure best fits your case.

E. Conditions of Confinement

If you stay in jail while your case is pending, you will likely have some concerns about the living conditions at the jail. In theory, the jail has legal obligations to not subject you to certain conditions. In practice, it can be difficult to get a jail to make improvements. This Part will explain why that is and give some examples of conditions you may be able to challenge because they violate the constitution. This Part will also give you a basic overview of the laws that may help you if you have issues with the conditions of your pretrial detention.[118]

Your rights as a pretrial detainee are protected under the Fifth and Fourteenth Amendment due process clauses. Because you have not been convicted of anything and are simply being held to assure your return to court, you cannot be punished. So, if a guard does something to you that is intended as punishment and was unnecessary to maintain security at the jail, your rights have been violated because you are being punished without due process. Your rights have also been violated if a measure taken by the jail is excessive in relation to the jail's legitimate security concerns. Finally, as a pretrial detainee you have the right to communicate privately with your defense attorney and you have the right to vote.

If you do want to file a claim, refer to Chapter 16 of the *JLM* to learn about the procedure for filing a § 1983 civil rights claim, including who specifically you should name as a defendant. You must also read Chapter 14 of the *JLM* to learn about the Prison Litigation Reform Act and how to make sure you are properly preserving your claim. If you do not follow these procedures, the court will not consider your claim. The rest of this Part will explain the substantive law you would cite in your claim: the constitutional status of pretrial detainees and how that status applies to a series of different jail conditions.[119] This Part will begin with a bit of background history on the law about conditions of

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116. *See* People v. Savage, 54 N.Y.2d 697, 698, 426 N.E.2d 468, 468, 442 N.Y.S.2d 974, 975 (1981) (noting that a guilty plea does not waive the constitutional speedy trial right, just the statutory right under § 30.30); People v. Blakley, 34 N.Y.2d 311, 313, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 460–461 (1974) (dismissing defendant's indictment because plea bargain should not have been made in exchange for withdrawal of claim of speedy trial violation); People v. Thorpe, 160 Misc. 2d 558, 559, 613 N.Y.S. 2d 795, 796 (App. Term 2d Dept. 1994) (holding that "a constitutional speedy trial claim is not waived by a guilty plea").

117. For more information on state habeas corpus petitions, see *JLM*, Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan." Note that the New York Court of Appeals has held that habeas corpus petitions asserting a denial of the defendant's right to speedy trial cannot be brought during a pending criminal proceeding. People *ex rel.* McDonald v. Warden, 34 N.Y.2d 554, 555, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974).

118. This area of law can be very confusing because courts have said different things about what exactly your rights are when you are a pretrial detainee. The law may be very different depending on whether you are in state or federal custody and your jurisdiction. So, while you always have the right not to be punished, courts in different places may have very different ideas about what counts as punishment. This Chapter gives a basic overview of your rights as a pretrial detainee. You must research how courts in the jurisdiction where you are incarcerated have handled these questions. Refer to Chapter 2 of the *JLM* for information on how to conduct legal research.

119. You may have heard of the 8th Amendment rule against cruel and unusual punishment. The reason pretrial cases are analyzed under the 5th and 14th Amendment and not the 8th Amendment is because the 8th Amendment applies to your sentence, or punishment, for a crime. In the pretrial stage, you have not been convicted of anything and are not being punished for a crime. However, because a lot of the same jail problems affect people incarcerated both pre- and post-trial, courts are often influenced by cases that talk about conditions that violate the 8th Amendment. Generally, if a jail condition is too harsh for someone who *has* been convicted of a crime (as in, the condition violates the 8th Amendment) it is almost definitely too harsh for someone who has not been convicted of anything. So, you can use cases that talk about the 8th Amendment and say that they still apply to you because you are being punished without *due process*, which you are entitled to under the 14th Amendment.

pretrial confinement so that when you come across these cases in your research, you know how to use them correctly.

1. The Reasoning of Pretrial Conditions of Confinement Law: Right Not to be Punished

As a pretrial detainee, you must be presumed innocent because you have not been convicted of a crime. Without a conviction, you cannot be punished. When courts are deciding if a condition of pretrial confinement is unconstitutional, one major question they will ask is if the condition is so bad that it amounts to punishment. At the same times, the court will also consider the need of the jail to maintain security. So, to decide if a particular condition is equal to punishment the court will ask two questions:

(1) is the goal of the jail's action legitimate and non-punitive. In other words, is the goal of the jail something it makes sense for the jail to want to do, like maintain order, and is the goal something besides punishment. If the jail passes this first test, the court will turn to the second question:

(2) are the conditions an excessive way to achieve that goal? In other words, could the jail have reached the same goal without doing something so extreme?[120]

This test was established in *Bell v. Wolfish.* If the goal of the conditions is to punish or otherwise not legitimate, then the conditions amount to punishment. Likewise, if the goal is legitimate but the conditions are an excessive way to achieve that goal, then the conditions amount to punishment. Keeping order and security in the jail is usually treated by courts as a legitimate, non-punitive government goal.[121] Jail officials will generally claim that whatever they did to you was for legitimate purposes of maintaining order and security—not for punishment. But a court can still decide that the conditions you were subjected to were not justified or lawful despite what the officer says.[122]

120. Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873–1874, 60 L. Ed. 2d 447, 468 (1979) (holding that without a showing of an expressed intent to punish, whether conditions or restrictions amount to punishment "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]'" (alterations in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–169, 83 S. Ct. 554, 567–568, 9 L. Ed. 2d 644, 661 (1963))).

121. Bell v. Wolfish, 441 U.S. 520, 540, 99 S. Ct. 1861, 1875, 60 L. Ed. 2d 447, 469 (1979) ("The effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.").

122. *See* Bell v. Wolfish, 441 U.S. 520, 538–539, 99 S. Ct. 1861, 1873–1874, 60 L. Ed. 2d 447, 468–469 (1979) (allowing courts to decide on their own whether jail conditions amount to "punishment" under the Constitution); *see, e.g.*, Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001) (upholding the lower court's ruling that restraints that were characterized as non-punitive by the city's corrections department caused so much pain to detainees that they had the same effect as punishment).

How to apply the *Bell v. Wolfish* steps

To give an extreme example, let's say that at a certain jail the inmates keep having food fights which cause chaos and mess. The jail wants to stop this from happening, so they stop serving food.

1) Is the goal of the jail's actions legitimate and non-punitive?
    a. Yes. The jail understandably does not want constant food fights in their facility because it is messy, wasteful and chaotic. The jail's desire not to have constant food fights has nothing to do with punishing you for the thing you are charged with in court.
2) But, are the conditions an excessive way to achieve that goal?
    a. Yes. The jail cannot deprive you of food to prevent food fights or for any other reason.

So, even though the goal of the jail in not serving food is legitimate and non-punitive, the condition they imposed is excessive and not proportional to the problem. Because they cannot satisfy both parts of the test, they violated the constitution when they imposed the no-food condition.

(Note: If there was no food fight problem in the jail and the jail started severely restricting your meals anyway, they would probably fail the first step. There would be no legitimate reason to restrict your food and they might just be trying to punish you. In that case, the court would not have to ask the second question.)

(a) The Legal Standard for Conditions of Pretrial Confinement Claims: Deliberate Indifference

In your research, you will read a case called *Farmer v. Brennan*. *Farmer* dealt with a failure to protect claim. In the case, an incarcerated person said that the jail officials were responsible for an attack he suffered at the hands of other incarcerated people. Because the incarcerated person in this case was already convicted of a crime, the claim was evaluated under the Eighth Amendment ban on cruel and unusual punishment. The court said that a "prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."[123] In *Farmer*, the court decided that in order to show that a prison official was intentionally indifferent to a risk of harm, the prison had to show that the official *knew* about the harm or possibility of harm. In other words, that they were "subjectively aware of the risk."[124] "Subjective" in this context means the court will look into the mind of the actual jail officials in the case to ask if they knew what was going on.

For a long time, claims about conditions of pretrial confinement were treated the same way. If a pretrial detainee wanted to make a claim about a condition of their confinement, they had to show not just that the condition amounted to punishment (the first question under *Bell v. Wolfish*, explained above) but that the jail officials responsible for the condition knew it was happening and *meant* for it to be a punishment.

A recent Supreme Court case changed this standard for claims of excessive force against a pretrial detainee by a prison or law enforcement official. In *Kingsley v. Hendrickson,*[125] the Court decided that the appropriate legal standard to use in considering a claim of violence against a pretrial detainee was an *objective* standard of deliberate indifference. "Objective" means that if the court is deciding if the force used against you was constitutional or not, the court will not go inside the mind of the jail official to ask if the official meant to punish you or hurt you. They will only ask if the official meant to commit the action that hurt you and if they did, was it reasonable for them to do it given the circumstances.

123. Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994).
124. Farmer v. Brennan, 511 U.S. 825, 829, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811, 820 (1994).
125. Kingsley v. Hendrickson, 576 U.S. 389, 396–397, 135 S. Ct. 2466, 2472–2473, 192 L.Ed.2d 416, 426 (2015).

If you are bringing an excessive force claim against a jail or police official as a pretrial detainee *anywhere in the country*, you would cite to *Kingsley* and answer the following two questions in your complaint:

(1) Was the officer's action deliberate, i.e. on purpose? (So, accidentally tripping and falling on an inmate, for example, will not count. Neither will behavior that was only negligent.)

(2) Was the condition objectively unreasonable? In other words, would a reasonable person in the same position as the officer have acted in the same way?

Depending on where you are, you may be able to use the reasoning from *Kingsley* for other pretrial conditions of confinement claims. Some circuits have applied the logic of *Kingsley* to any conditions of pretrial confinement questions and some have applied it to specific categories of claims, such as medical neglect and failure to protect claims.[126] If you are filing your claim in a circuit that has extended *Kingsley*, you would first argue that the condition you were subjected to was sufficiently bad under *Bell* to violate your constitutional rights and then you would argue under *Kingsley* that the prison officials responsible for this condition meant to act the way they did and that their actions were objectively unreasonable. If you are in a circuit that has not extended *Kingsley* and are bringing a claim besides excessive force, you will cite to *Farmer* and try to show that the prison officials *knew* that you were in unreasonable conditions. You can also try to argue that the objective standard in *Kingsley* should apply to your case, but you should make sure you have read the cases from your jurisdiction that have already considered *Kingsley.*

The next few Sections discuss some common problems that come up in pretrial detention and what the law says about them. You would use these cases or similar ones from your own jurisdiction when you are applying the tests in *Bell, Farmer* and *Kingsley.* The cases discuss conditions that are unreasonable and what officers can and cannot do. But first, there is one important exception to the right not to be punished.

(b) Exception to the Right Not to be Punished: Disciplinary Measures for Infractions of Prison Rules

One exception to your right not to be punished while you are detained before trial is the process you go through if you break one of the jail rules. Unfortunately, there is little guidance to distinguish "discipline" from "punishment."[127] Jails can discipline you for breaking one of their internal rules as long as they are not punishing you for your charges.

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126. Because this case is not very old, you should look into whether or not your circuit has extended *Kingsley* after this Chapter was last updated (February 2020). In the **First Circuit**, *Kingsley* still only applies to excessive force claims. Miranda-Rivera v. Toledo-Davila, 813 F.3d 64, 74 (1st Cir. 2016). **Second Circuit**: Applies to all pretrial conditions of confinement claims. Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017). **Third Circuit**: Undecided, so *Kingsley is* still used only for excessive force claims. Moore v. Luffey, 767 F. App'x 335, 340 (3d Cir. 2019). **Fourth Circuit**: Undecided. **Fifth Circuit:** Undecided. **Sixth Circuit:** Undecided. Just excessive force but has considered the decision of the Second Circuit to extend it. Powell v. Med. Dept. Cuyahoga Cnty. Corr. Ctr., No. 18-3783, 2019 U.S. App. LEXIS 10461, at *5 n.1 (6th Cir. Apr. 8, 2019) (*unpublished*), *cert. denied*, 140 S. Ct. 150, 205 L. Ed. 2d 183 (2019). **Seventh Circuit:** Extended to all pretrial conditions of confinement claims. Hardeman v. Curran, 933 F.3d 816, 823 (7th Cir. 2019). **Eighth Circuit:** Declined to extend. Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018). **Ninth Circuit:** Extended specifically to failure to protect cases, Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016), and medical care cases. Gordon v. County of Orange, 888 F.3d 1118, 1120 (9th Cir. 2018), *cert. denied sub nom.* County of Orange v. Gordon, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019). **Tenth Circuit:** Undecided but has considered extending. *See* Perry v. Durborow, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018); Estate of Duke *ex rel.* Duke v. Gunnison Cnty. Sheriff's Office, 752 F. App'x 669, 673 n.1 (10th Cir. 2018); Extended beyond excessive force to cases involving public exposure of the incarcerated person's nude body. Colbruno v. Kessler, 928 F.3d 1155, 1163–1164 (10th Cir. 2019). **Eleventh Circuit:** Declined to extend. Nam Dang *ex rel.*Vina Dang v. Sheriff, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); Johnson v. Bessemer, 741 F. App'x 694, 699 n.5 (11th Cir. 2018).

127. *See* Fuentes v. Wagner, 206 F.3d 335, 343 (3d Cir. 2000) (holding that eight hours in restraint chair after disruptive behavior would be unconstitutional if it were found to have been imposed as punishment,

When you break prison rules, you can be subjected to additional restraints on your liberty. These restraints include being placed in administrative detention or isolation,[128] having privileges taken away,[129] and being held in handcuffs or other restraining devices.[130]

Jails are required to follow certain procedures when they want to punish you for an action they say you committed in jail.[131] *Wolff v. McDonnell* describes the due process rights of convicted incarcerated people at a prison disciplinary hearing.[132] These rights would generally apply to pretrial detainees as well.[133] You are entitled, for example, to be given written notice of the charges against you, to be given a hearing on the charges before an impartial officer, and to call witnesses and present evidence at that hearing.[134] Courts do not agree about the exact procedure you should get. Some courts have said you have the right to a full trial-like process before additional restrictions on your liberty are imposed.[135] Other courts have allowed the restrictions first, as long as they were followed up with a procedure that satisfies due process.[136] The punishment you get cannot be too extreme. For a more

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although there was also evidence that defendant was put in the restraint chair "to stop his disruptive behavior and maintain prison order and security"); McFadden v. Solfaro, No. 95 Civ. 1148, 1998 U.S. Dist. LEXIS 5765, at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (finding the disciplinary segregation of pretrial detainee for breaking prison regulations acceptable because it was not punitive and instead was "tied to the legitimate objective of maintaining order and impressing the need for discipline").

128. *See* McFadden v. Solfaro, No. 95 Civ. 1148, 1998 U.S. Dist. Lexis 5765, at *31 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding constitutionality of pretrial detainee's administrative segregation for acting against prison regulations by "committing . . . unhygienic acts" and threatening guards). *But see* Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (ruling that a due process hearing is required in order to subject pretrial detainees to discipline for breaking prison rules).

129. *See* McFadden v. Solfaro, No. 95 Civ. 1148, 1998 U.S. Dist. LEXIS 5765, at *32 (S.D.N.Y. Apr. 23, 1998) (*unpublished*) (upholding loss of privileges including "commissary, walkman, phone").

130. *See* Fuentes v. Wagner, 206 F.3d 335, 343 (3rd Cir. 2000) (holding that a jury could resonably conclude that the use of a restraint chair by prison officials for eight hours is not punitive but a method to "quell a disturbance and restore the order and security of the institution"). On the other hand, prison officials are not allowed to go too far with their disciplinary actions. When they do, you may have a valid constitutional claim under the 14th Amendment. *See* Danley v. Allen, 540 F.3d 1298, 1309 (11th Cir. 2008) (holding that when jailers continue using "substantial force against a incarcerated person who has clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force is excessive").

131. *See* Benjamin v. Fraser, 264 F.3d 175, 188 (2d Cir. 2001) (holding that imposition of non-punitive restrictions which nonetheless were significant restraints on detainees' liberty required subsequent due process protections); Rapier v. Harris, 172 F.3d 999, 1004–1005 (7th Cir. 1999) (holding that pretrial detainees, unlike convicted incarcerated people, are entitled to procedural protection before the imposition of punishment for misconduct); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (holding that a due process hearing is required before imposing disciplinary segregation on a pretrial detainee). *But see* Wilson v. Blankenship, 163 F.3d 1284, 1295 (11th Cir. 1998) (finding temporary placement of pretrial detainee in isolation, without bedding, for causing a disturbance was permissible without a hearing). The rule that punishments must be "atypical and significant" to require due process protections applies only to convicted incarcerated people, not to pre-trial detainees. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995). If you are a convicted incarcerated person and want a more complete explanation on this topic, see *JLM*, Chapter 18, Your Rights at Prison Disciplinary Proceedings.

132. Wolff v. McDonnell, 418 U.S. 539, 556–572, 94 S. Ct. 2963, 2975–2982, 41 L. Ed. 2d 935, 951–960 (1974).

133. Benjamin v. Fraser, 264 F.3d 175, 190 n.12 (2d Cir. 2001) (noting that although *Wolff* involved a convicted incarcerated person, the same standard applied to pretrial detainees).

134. Benjamin v. Fraser, 264 F.3d 175, 190 (2d Cir. 2001); s*ee* Wolff v. McDonnell, 418 U.S. 539, 564–566, 570–571, 94 S. Ct. 2963, 2979, 2982, 41 L. Ed. 2d 935, 956, 959 (1974) (requiring that incarcerated person disciplinary hearings observe due process requirements related to notice, presentation of evidence, and impartiality).

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

136. *See* Benjamin v. Fraser, 264 F.3d 175, 189–190 (2d Cir. 2001). (upholding the district court holding that detainees placed in high security or restraint status should "reasonably promptly" receive due process hearings after being placed on that status).

detailed discussion of due process rights in prison disciplinary hearings, see *JLM*, Chapter 17, "Your Rights at Disciplinary Proceedings."

Finally, jail officials cannot charge you with jail actions you did not commit just to punish you for your charges or some other reason. For example, if one prison official makes up a false charge against you to punish you for your charges and then other guards act on that accusation, causing you harm, you may be able to establish unconstitutional pretrial punishment if you can trace back the harmful treatment to the accusing prison official.[137]

2. Your Right to be Free from Violence

You may experience violence or force from jail guards or other inmates. Jail guards are not allowed to use excessive force on you. Guards can only use force for a legitimate reason, as explained above. In some circumstances, jail officials also have an obligation to protect you from violence by other inmates. Because violence from guards and violence from other inmates are treated differently under the law, they are explained separately below.

(a) Violence and Use of Force by Jail Guards

If a jail guard uses force against you and you challenge it in court, the court will apply the *Kingsley* test mentioned above and ask:

(1) Was the officer's action deliberate (meaning done on purpose)? Note that accidents, like if a guard trips and falls on you, will not count.[138] Neither will behavior that was only negligent.[139]

(2) Was the amount of force used objectively unreasonable? In other words, would a reasonable person in the same position as the officer have acted in the same way?[140]

To answer these questions, the court will look at the facts from each individual incident. The court may consider other things, such as alternative actions the officer could have taken, whether you were resisting, and the security threat the officer faced.[141]

In the *Kingsley* case for example, the Court considered a claim from a pretrial detainee who said that guards used excessive force when they removed him from his cell, restrained him in another room, tased him, and kneed him in the back while handcuffed.[142] Kingsley, the detainee, filed a § 1983 action saying the jail guards violated his due process rights under the Fourteenth Amendment.[143]

These concepts also apply to physical force used as punishment. In one case, incarcerated people were chained and handcuffed for over twelve hours and deprived of access to toilets after a failed escape attempt. The court held that a reasonable jury could conclude that such restraints violate the Fourteenth Amendment. In that case, there would be a violation if there was evidence that guards did this with the intent to punish, if the punishment was not a reasonable way to prevent another prison break, or if there were "alternative and less harsh methods" of preserving security and order at the jail.[144] In another case, the court decided that severely cutting the amount of time a pretrial detainee could spend out of their cell might count as punishment,[145] even when dealing with incarcerated people who were "prone to: escape; assault staff or other inmates ... or likely to need protection from other

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

138. Kingsley v. Hendrickson, 576 U.S. 389, 396, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416, 425–426 (2015).

139. Kingsley v. Hendrickson, 576 U.S. 389, 396, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416, 425 (2015).

140. Kingsley v. Hendrickson, 576 U.S. 389, 396–397, 135 S. Ct. 2466, 2472–73, 192 L. Ed. 2d 416, 426 (2015).

141. Kingsley v. Hendrickson, 576 U.S. 389, 397 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015).

142. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470, 192 L.Ed.2d 416, 423–424 (2015)

143. Kingsley v. Hendrickson, 576 U.S. 389, 393, 135 S. Ct. 2466, 2470–2471, 192 L. Ed. 2d 416, 424 (2015).

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

145. Pierce v. County of Orange, 526 F.3d 1190, 1208 (9th Cir. 2008) (holding that pretrial detainees must be given adequate time out of their cells to observe their religions and conduct physical exercise, and that less than ninety minutes of physical exercise per week violated the detainees' constitutional rights).

inmates [sic]."[146] Another time, a pretrial detainee was assaulted by an officer who caught him while he was trying to escape. In that case, the court held that if the officer's purpose was to "injure, punish, or discipline" the person (not just stop the escape), then the assault was illegal punishment.[147]

Ultimately, not all violence you experience from jail guards is a violation of your rights. But, if jail officials purposefully use an objectively unreasonable amount of force against you, your rights have been violated.

(b) Violence from Other Incarcerated People

If you are being attacked by other incarcerated people, the jail must protect you as long as they know what is going on (or, in the Second, Seventh, and Ninth Circuits, as long as they *knew or should have known* what was going on). The issue of violence between incarcerated people was addressed by the Supreme Court in *Farmer v. Brennan.*[148] In that case, prison officials ignored information that someone was being assaulted by other incarcerated people and failed to take protective measures.[149] *Farmer* applies a "subjective standard" (meaning the court only asks if the prison guards *actually knew* that Farmer was in danger). The court then asks if the guards responded reasonably to that knowledge.[150]

By contrast, if you are in the Ninth Circuit, you would only have to show that the guards *should have known* about the danger (the "objective standard") and that the guards acted unreasonably in not knowing it and not doing more to protect you.[151] See *JLM* Chapter 23 for more information on your right to be free from assault.

3. Medical Care[152]

As a pretrial detainee, you have the right to access medical care (both physical and psychiatric) that is adequate. In *City of Revere v. Mass. Gen. Hosp.,* a man was shot by the police during arrest and taken to the hospital. The Court held that the city had an obligation to bring the man to the hospital, but the city did not automatically have to pay for his care. However, if someone in pretrial detention can only get medical care if the government pays for it, then the government must provide the care and pay for it.[153]

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146. Pierce v. County of Orange, 526 F.3d 1190, 1196 n.3 (9th Cir. 2008) (quoting CAL. PENAL CODE § 1053).

147. Putman v. Gerloff, 639 F.2d 415, 420–422 (8th Cir. 1981); *see also* Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (noting that an otherwise legitimate restriction or condition may be viewed as punitive and therefore violate the detainee's constitutional rights if the condition is "excessive in light of the seriousness of the [detainee's] violation [of the prison rules]").

148. Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

149. Farmer v. Brennan, 511 U.S. 825, 829–831, 114 S. Ct. 1970, 1974–1976, 128 L. Ed. 2d 811, 820–821 (1994).

150. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994).

151. *See, e.g.*, Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (*en banc*). In *Castro,* the court said that a detainee making a failure to protect claim would have to show that: "(1) The defendant [the defendant in this case is the jail] made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff's injuries. With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn[ ] on the facts and circumstances of each particular case.'" Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (*en banc*) (quoting Kingsley v. Hendrickson, 576 U.S. 389, 396, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416, 426 (2015) (alteration in original)).

152. There are some big differences in how abortion and reproductive healthcare are treated in the state and federal systems. For more information about issues affecting women, see Chapter 41 of the *JLM*, including Part C(2), "Abortion."

153. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–245, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605, 611 (1983); *see also* Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996) ("The rights of one who has not been convicted are protected by the Due Process Clause; and while the Supreme Court has not precisely limned the duties of a custodial official under the Due Process Clause to provide needed medical treatment to a pretrial detainee, it is

If you are in a jurisdiction that applies a subjective standard (see above) to medical care cases, you must show that prison officials knew you had medical conditions that were not being treated and decided not to treat them. If you are in a jurisdiction that uses an objective standard, you must show that the jail official knew *or should have known* you needed treatment, and also that by not providing the treatment, they made your condition worse.[154]

To learn more about your right to medical care while incarcerated, see *JLM* Chapter 23, Your Right to Adequate Medical Care. Remember, you can cite Eighth Amendment cases about denial of medical care that seem to involve conditions similar to yours and then say that the case applies because you are being punished without due process.

4. Access to your Lawyer

Under the Sixth Amendment, you have a right to counsel in the preparation of your defense. (See Parts B and C of this Chapter for a broader discussion of your right to counsel.) This right includes the right to meet with and communicate with your attorney while you are detained awaiting trial. If the conditions of your detention interfere with your ability to meet with your attorney or to communicate in private to discuss your case, then those conditions may violate your Sixth Amendment right to counsel.[155] When pretrial detainees are kept from effectively communicating with their attorneys, "the ultimate fairness of their eventual trial can be compromised."[156]

As an incarcerated person, you also have the right to have access to the courts, which includes access to members of your legal team.[157] Regulations and conditions that unlawfully interfere with this right include limits on detainees' telephone conversations with attorneys,[158] inadequate privacy during such telephone discussions,[159] inadequate or inadequately private space in which to meet with your attorneys,[160] and prison regulations that create substantial and unpredictable delays when your

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plain that an unconvicted detainee's rights are at least as great as those of a convicted prisoner."); Bryant v. Maffucci, 923 F.2d 979, 983 (2d Cir. 1991) (finding that it is unclear whether pretrial detainees must meet the "deliberate indifference" standard under *Estelle* or a lower standard, but plaintiff must show something more than simple negligence). The question remaining after *Bryant* is whether there is some standard of care for pretrial detainees that falls between the negligence standard (which is not sufficient to establish a due process violation) and the deliberate indifference standard applicable to convicted people. Pretrial detainees are, at a very minimum, entitled to not be treated with deliberate indifference.

154. *See* Gordon v. County of Orange, 888 F.3d 1118, 1124–1125 (9th Cir. 2018), *cert. denied sub nom.* County of Orange v. Gordon, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019).

155. You should also look at the chapters of the *JLM* describing the rights of access to counsel of convicted people because these rights certainly apply to pretrial detainees as well. See *JLM*, Chapter 3, "Your Right to Learn the Law and Go to Court," on your right of access to a law library, and Chapter 19, "Your Right to Communicate with the Outside World," on your right to correspond with and visit with your attorney.

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

157. *See* Procunier v. Martinez, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L.Ed.2d 224, 243 (1974). For additional information about the right of access to counsel while incarcerated, see also Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U. CAL. IRVINE L. REV. 101 (2018).

158. *See* Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–1052 (8th Cir. 1989) (noting that, if proven, restrictions on access to counsel were "inadequately justified" where detainees were effectively permitted one attempt at a 20-minute phone call with attorneys during office hours every other week).

159. *See* Johnson-El v. Schoemehl, 878 F.2d 1043, 1051–1053 (8th Cir. 1989) (finding inadequate privacy where phones were brought to a noisy public space and conversations with counsel could be overheard by guards and other incarcerated people).

160. *See, e.g.*, Benjamin v. Fraser, 264 F.3d 175, 187–188 (2d Cir. 2001) (holding that detention facility must provide attorneys with an adequate number of visitation rooms in which to meet with their clients prior to and during trial, and these rooms must provide adequate privacy).

attorneys come to meet with you.[161] A transfer from one detention facility to another may also violate your right to counsel, if the transfer is to a place so distant that your access to counsel is impaired.[162]

However, certain conditions that make it difficult (but not impossible) to communicate with your attorney are sometimes allowed. The Supreme Court has held that an incarcerated person must demonstrate the "actual injury" caused by the alleged rights violation.[163] Some examples of things courts have decided were not enough to be constitutional violations by themselves include: attorney visiting rooms where incarcerated people had to speak to their attorneys through telephones, making it very easy for other incarcerated people and law enforcement officers to eavesdrop;[164] mail screening policies allowing prison officials to read attorney mail before giving it to their clients;[165] and sometimes, even monitoring phone calls with attorneys.[166] Importantly, in all of these cases, the plaintiff was unable to "show an injury" and so the incarcerated person lost the lawsuit.[167] Jails may not, however, have a policy of monitoring all attorney visits with incarcerated people,[168] nor can they withhold mail between attorneys and detainees.[169] If the facilities are so bad that you actually cannot communicate with your legal team at all, your rights have been violated.

The Sixth Amendment right to counsel may also protect your right to access a law library while detained.[170] In particular, under *Faretta v. California*, incarcerated people who wish to proceed "*pro*

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161. *See* Benjamin v. Fraser, 264 F.3d 175, 179, 188 (2d Cir. 2001) (affirming that the 6th Amendment was violated when attorneys "routinely face[d] unpredictable, substantial delays in meeting with clients" after their arrival at the facility—from 45 minutes to two hours or more—because of various factors including a limited number of counsel rooms, a rule requiring that certain detainees not be moved to counsel rooms without escorts, and a rule prohibiting incarcerated people from being brought to counsel rooms during counts of incarcerated people).

162. *See* Covino v. Vt. Dept. of Corr., 933 F.2d 128, 130 (2d Cir. 1991) (*per curiam*) (requiring trial court to determine whether detainee's transfer to a facility 56 miles away from his prior facility impaired his 6th Amendment right to counsel); s*ee also* Cobb v. Aytch, 643 F.2d 946, 960 (3d Cir. 1981) (affirming an order limiting future transfers of detainees to distant facilities "without consent of pretrial detainees, unless and until [prison officials] can present a change in circumstances" justifying the transfers, because such transfers substantially interfere with detainees' right to counsel).

163. *See* Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606, 616 (1996) (holding that an incarcerated person must show "actual injury" to file a lawsuit).

164. *See* United States v. Roper, 874 F.2d 782, 790 (11th Cir. 1989).

165. *See* Oliver v. Fauver, 118 F.3d 175, 178 (3d Cir. 1997); McCain v. Reno, 98 F. Supp. 2d 5, 7–8 (D.D.C. 2000); Morgan v. Montanye, 516 F.2d 1367, 1370 (2d Cir. 1975).

166. United States v. Brooks, 66 M.J. 221, 225 (C.A.A.F. 2008).

167. *See* United States v. Irwin, 612 F.2d 1182, 1186–1187 (9th Cir. 1980) ("[M]ere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel.).

168. *See* Case v. Andrews, 603 P.2d 623, 627 (Kan. 1979) (holding that visual surveillance of a detainee's meetings with his attorney violated the 6th Amendment where the jail "made no showing that the [surveillance] furthers any substantial governmental interest in security, order, or rehabilitation").

169. *See* Lamar v. Kern, 349 F. Supp. 222, 224 (S.D. Tex. 1972).

170. *See, e.g.,* Walton v. Toney, 44 Fed. App'x. 49, 51 (8th Cir. 2002) (*per curiam*) ("To prevail on an access-to-courts claim, an inmate must…demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim….") (internal quotation marks and citation omitted). *But see* United States v. Smith, 907 F.2d 42, 45 (6th Cir. 1990) (finding that "by knowingly and intelligently waiving his right to counsel, [a pretrial detainee] also relinquished his access to a law library"); United States v. Wilson, 690 F.2d 1267, 1271–1272 (9th Cir. 1982) (asserting that where a defendant chooses not to represent himself and where adequate legal assistance is offered, such as a free attorney, no constitutional right to access a law library exists, and noting that "[t]he Supreme Court, in requiring meaningful access to the courts, has been careful to note that providing access to law libraries is but one of a number of constitutionally permissible means of achieving that objective…. When such adequate access is provided, as was here, an inmate may not reject the method provided and insist on an avenue of his or her choosing"). To learn more about your right to access a law library, see *JLM*, Chapter 3, "Your Right To Learn The Law And Go To Court."

se" (advocating for yourself without a lawyer) may have a right to a law library.[171] However, not every circuit recognizes that right.[172]

5. Voting Rights

You still have the right to vote as a pretrial detainee.[173] Denying your right to vote violates your rights under the Equal Protection Clause of the Fourteenth Amendment. The jail cannot make it impossible for you to vote. However, you do not have the right to a specific mechanism for voting. For example, there is no guaranteed right to vote through an absentee ballot (a ballot that allows you to vote through the mail).[174] But, if the state officials (or the jail) do not let you access absentee ballots *and* there is no other way to vote, then your Fourteenth Amendment Equal Protection rights have been violated.[175]

6. Other jail practices

Not every problem that comes up in pretrial detention is unconstitutional. *Bell v. Wolfish* itself involved a wide range of prison practices, all of which were found constitutional. For example, permissible actions include double-bunking of pretrial detainees,[176] random shakedown searches of detainees' cells,[177] a "publishers-only" rule that blocks detainees from receiving hardcover books unless they are mailed directly from the publisher,[178] and routine body cavity searches after contact visits.[179] The court decided these are reasonable security measures that do not violate the due process rights of pretrial detainees.

F. Conclusion

171. Faretta v. California, 422 U.S. 806, 819–820, 95 S. Ct. 2525, 2533–2534, 45 L. Ed. 2d 562, 572–573 (1975) (upholding one's right to self-representation and stating that "other defense tools" besides an attorney are guaranteed by the 6th Amendment).

172. *Compare* Taylor v. List, 880 F.2d 1040, 1047 (9th Cir. 1989) ("[T]he Sixth Amendment right to self-representation…includes a right of access to law books, witnesses, and other tools necessary to prepare a defense." (citing Milton v. Morris, 767 F.2d 1443, 1446 (9th Cir. 1985))), *with* United States v. Cooper, 375 F.3d 1041, 1051–1052 (10th Cir. 2004) ("[P]retrial detainees are not entitled to law library usage if other available means of access to court exist…. When a prisoner voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding, he is not entitled to access to a law library or other legal materials.") (citations omitted).

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

174. *See* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809–810, 89 S. Ct. 1404, 1409, 22 L. Ed. 2d 739, 746 (1969) ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants.") (citations omitted).

175. O'Brien v. Skinner, 414 U.S. 524, 530, 94 S. Ct. 740, 743, 38 L. Ed. 2d 702, 707–708 (1974) (holding it unconstitutional for the state to deny detainees "any alternative means of casting their vote although they are legally qualified to vote").

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

177. Bell v. Wolfish, 441 U.S. 520, 556–562, 99 S. Ct. 1861, 1883–1886, 60 L. Ed. 2d 447, 480–483 (1979) (finding that the searches did not violate the 4th Amendment and did not constitute punishment under the Due Process Clause).

178. Bell v. Wolfish, 441 U.S. 520, 550–552, 99 S. Ct. 1861, 1879–1881, 60 L. Ed. 2d 447, 475–477 (1979) (finding no 1st Amendment violation or punishment in violation of the Due Process Clause).

179. Bell v. Wolfish, 441 U.S. 520, 558–561, 99 S. Ct. 1861, 1884–1885, 60 L. Ed. 2d 447, 482–484 (1979) (finding no 4th Amendment violation or punishment in violation of the Due Process Clause). *But see* United States v. Calhoun, No. 02-10120-01-WEB, 2002 U.S. Dist. Lexis 23277, at *14 (D. Kan. Nov. 13, 2002) (stating that strip searches of people arrested on non-violent misdemeanors must be justified by a reasonable suspicion outside the confinement context).

As a pretrial detainee, you have rights that are protected under the Constitution, and national and state laws. These rights protect you when you are being investigated for a crime, and they continue to protect you once you have been arrested and charged. You have the right to an attorney and you should request one as soon as you are detained or taken into custody. An attorney can help you from the pretrial stage, including bail hearings, through the resolution of your case. Finally, you have rights regarding the jail conditions if you are not released before your trial. As always, remember to check the law in your own state and make sure the cases and statutes you are citing are current.

APPENDIX A

STATE SPEEDY TRIAL STATUTES

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

Alabama
None

Alaska
Alaska R. Crim. P. 45 (West 2019).

Arizona
ARIZ. REV. STAT. ANN. § 13-114 (2010).

Arkansas
Ark. R. Crim. P. 27.1–30.2 (West 2020).

California
CAL. PENAL CODE § 1381-82 (West 2000).

Colorado
COLO. REV. STAT. ANN. § 18-1-405 (West 2004 & Supp. 2011).

Connecticut
CONN. GEN. STAT. ANN. § 54-82m (West 2009).

Delaware
None. However, there is a state constitutional guarantee for a speedy trial.[180]

District of Columbia
D.C. CODE ANN. § 23-1322 (West 2012).

Florida
Fla. R. Crim. P. 3.191 (West 2019).

Georgia
Ga. Code § 17-7-170 (West 2011).

Hawaii
Haw. R. Penal. P. 48(b) (West 2020).

Idaho
IDAHO CODE ANN. § 19-3501 (West 2020).

Illinois
725 ILL. COMP. STAT. ANN. 5/103-5 (West 2014).

180. DEL.C.ANN. CONST., Art. 1, § 7.

Indiana
Ind. R. Crim. P. 4 (West 2020).

Iowa
Iowa R. Crim. P. 2.33(2) (West 2002).

Kansas
KAN. STAT. ANN. § 22-3402 (West 2017).

Kentucky
KY. REV. STAT. ANN. § 500.110 (West 2019).

Louisiana
LA. CODE CRIM. PROC. ANN. ART. 701 (2020).

Maine
Maine Rules U. Crim. P. 48(b) (West 2020).

Maryland
MD. CODE ANN., CRIM. PROC. § 6-103 (West 2011).

Massachusetts
MASS. GEN. LAWS ANN. ch. 41, R. 36(b) (West 2006).

Michigan
MICH. COMP. LAWS ANN. § 768.1 (West 2000).

Minnesota
Minn. R. Crim. P. 11.09(b) (West 2020).

Mississippi
MISS. CODE ANN. § 99-17-1 (West 2020).

Missouri
MO. ANN. STAT. § 545.780 (West 2002).

Montana
MONT. CODE ANN. § 46-1-506 (West 2009.).

Nebraska
REV. STAT. OF NEB. ANN. § 29-1207 (West 2009).

Nevada
NEV. REV. STAT. ANN. § 178.556 (West 2015).

New Hampshire
None. However, in New Hampshire, courts have recognized a state constitutional right to a speedy trial.[181]

New Jersey
N.J. STAT. ANN. § 2A:162-22 (West 2015)

181. N.H. CONST. PT. 1, art. XIV; State v. Allen, 150 N.H. 290, 292, 837 A.2d 324, 326 (2003).

New Mexico
None.

New York[182]
N.Y. CRIM. PROC. LAW §§ 30.20–30 (McKinney2020).

North Carolina
GEN. STAT. N.C. ANN. § 15-10 (West 2009).

North Dakota
N.D. CENT. CODE ANN. § 29-19-02 (West 2008).

Ohio
OHIO REV. CODE ANN. § 2945.71 (West 2006).

Oklahoma
OKLA. STAT. ANN. Tit. 22, § 812.1 (West 2008).

Oregon
OR. REV. STAT. ANN. § 135.746 (West 2003).

Pennsylvania
Pa. R. Crim. P. 600 (West 2017).

Rhode Island
R.I. GEN. LAWS § 12–13–7 (West 2020).

South Carolina
None.

South Dakota
S.D. CODIFIED LAWS § 23A–44–5.1 (2018).

Tennessee
TENN. CODE ANN. § 40–14–101 (West 2017).

Texas
TEX. CRIM. PROC. CODE ANN. art. 32.01 (West 2006).

Utah
UTAH CODE ANN. § 77–1–6 (West 2017).

Vermont
VT. STAT. ANN. tit. 13, § 7553b (West 2007).

Virginia
VA. CODE ANN. § 19.2-243 (West 2007).

Washington
WASH. REV. CODE ANN. § 10, CrRLJ Rule 3.3 (West 2002).

182. See Part D(2)(e) of this Chapter for in-depth information about New York's statute.

West Virginia
W. VA. CODE ANN. § 62–3–21 (West 2020).

Wisconsin
WIS. STAT. ANN. § 971.10(2007).

Wyoming
Wyo. R. Cr. P. Rule 48 (West 2020).