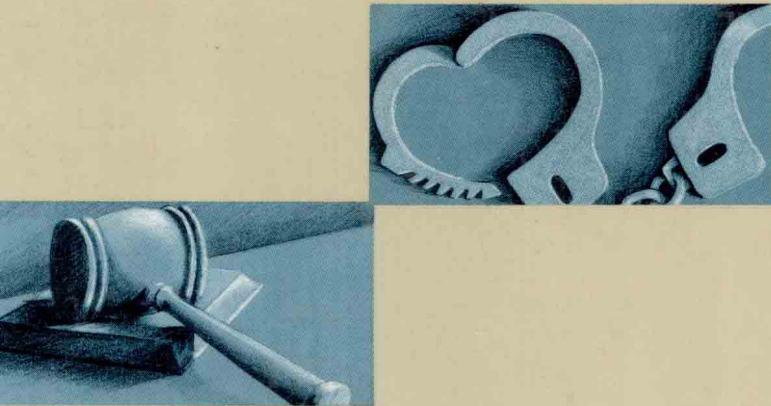


Crimin Justice Procedure

Fourth Edition



Ronald L. Carlson

Criminal Justice Procedure

Fourth Edition



anderson publishing co.
2035 reading road
cincinnati, ohio 45202
(513) 421-4142

Ronald L. Carlson, J.D., LL.M.
John Byrd Martin Professor of Law
The University of Georgia School of Law

Criminal Justice Procedure, Fourth Edition

Copyright © 1970 by The W.H. Anderson Company

Copyright © 1978, 1985, 1991 by Anderson Publishing Co./Cincinnati, OH

All rights reserved. No part of this book may be used or reproduced in any manner without written permission from Anderson Publishing Co.

ISBN 0-87084-131-9

Library of Congress Catalog Number 91-70611

Kelly Humble *Managing Editor*

Project Editor **Elisabeth Roszmann**

Cover Design by John H. Walker

ACKNOWLEDGEMENTS

Specific acknowledgement is given the following works on criminal law and procedure which research references and textual ideas facilitated the preparation of this book.

Kamisar, LaFave and Israel, *Modern Criminal Procedure* (1990); Model Penal Code (1962), The American Law Institute; Note, 50 Harvard Law Review 677 (1937), Harvard Law Review Association; Symposium on Criminal Discovery, 68 Washington University Law Quarterly No. 1 (1990); Inbau and Reid, *Criminal Interrogations and Confessions* (2d Ed. 1967), The Williams and Wilkins Co., Baltimore, Maryland, 21202; Handbook on Criminal Procedure in the United States District Court (West 1967); Ladd and Carlson, *Cases and Materials on Evidence*, Callaghan & Co., 3201 Old Glenview Road, Wilmette, Illinois 60091; ABA Standards, ABA Circulation Dept., 1155 E. 60th Street, Chicago, Illinois 60637.

PREFACE

The fourth edition of this text comes to the reader at a time when the drug crisis dominates public debate over criminal law and procedure. Medellin drug barons intensified the war against the Colombian government in late 1989, and explosions rocked Bogotá. As Colombian elections approached in mid-1990, a presidential candidate was slain and police blamed drug traffickers. A bloody war waged between the government and the narcotics lords.

The drug war had reverberations in the United States. President Bush unveiled the administration's plan for battling narcotics. New penalties were proposed for drug traffickers and drug users. Matters took an international turn when U.S. troops moved into Panama, and General Manuel Noriega was taken into custody to face drug trafficking charges in a federal court in Miami.

The American public, antagonized by the violent acts of drug czars in Colombia as well as drive-by killings over drug disputes on America's streets, seemed ready to support stiff law enforcement measures. Opinion polls demonstrated that vast numbers of people considered the drug problem the nation's most difficult challenge. While many favored stern measures to oppose drugs, some have urged decriminalization or legalization.

The debate over the solution to America's crime and drug problem is complicated by the fact that most states with large urban areas suffer from heavy backlogs in their court systems. In addition, there is a severe shortage of jail and prison space. Jailings for crimes of many kinds have overloaded our correctional facilities. This text will deal with prosecution of a wide range of offenses, from charges of murder to mail fraud. It details the explosion in jail populations as the criminal justice system endeavors to deal with the modern crime challenge while retaining civil rights and liberties for our citizens.

These liberties are the product of checks and balances which operate when one is accused of a crime. Their value in a system of criminal justice cannot be overstated. As the world entered the 1990s, authoritarian regimes in Eastern Europe were overthrown in favor of democratic models. One commentator summarized an essential attraction of the most prominent Western democracy: "More important than our military or economic prowess is the

American ideal of freedom, respect for the dignity and rights of individuals and a democratic system." A notable component of our democratic system is the right to trial by jury. Another is the right to be presumed innocent until the government establishes an individual's guilt beyond a reasonable doubt.

Effective processing of criminal cases through the varied and sometimes intricate stages of this system requires a clear understanding of its parts. A case is far from over once the arrest is made, no matter how careful the preliminary investigation nor how meticulous the officer's seizure of evidence. Many prosecution witnesses can testify to the rigors of a scorching defense cross-examination once the case reaches the courtroom. Intensive cross-examination of this kind is a characteristic feature of American criminal trials which proceed under an adversary (or contest) theory of justice to arrive at the truth in a given case. Defense witnesses are also exposed to potentially searching questions by the prosecutor. It is for the jury, which observes these witnesses, to weigh the evidence and make the final decision in every case — guilty or not guilty.

This volume explores our adversary system of criminal justice, tracing the various steps which precede trial, as well as the trial process itself. Positive suggestions for citizens who appear as witnesses are set forth. Rules controlling post-trial proceedings, including appeals, habeas corpus hearings, and the probation and parole process are clarified.

The latest available United States Supreme Court cases are referred to at appropriate points to enhance this volume's impact and relevance. Court decisions from 1988-1990 are featured, including the Supreme Court's approval of the federal sentencing guidelines which basically eliminate parole in connection with federal crimes.

Responsible administration of the criminal laws, as well as constructive revision of the criminal justice system, require an effective knowledge of the subject. To that end this work is aimed and dedicated.

RONALD L. CARLSON
Professor of Law

Athens, Georgia
November, 1990

CONTENTS

ANALYSIS OF THE CRIMINAL CASE PROCESS

CHAPTER 1: AN OVERVIEW OF CRIMINAL JUSTICE IN AMERICA

Section

- 1.1 Preliminary considerations: crime, police and courts 1
- 1.2 Adversary system of justice 1
- 1.3 Constitutional right to jury trial 2
- 1.4 Steps in a criminal prosecution 2
 - 1. Arrest 2
 - 2. Prosecution or diversion 4
 - 3. First appearance on the charge 6
 - 4. Preliminary hearing 6
 - 5. Indictment or information 7
 - 6. Arraignment in the court of trial 7
 - 7. Suppression hearings 7
 - 8. Trial 9
 - 9. Hearings after trial 11
 - 10. Appeals and habeas corpus 12
- 1.5 Diagram of the felony case process 13

CHAPTER 2: ARREST, APPEARANCE AND PRELIMINARY HEARING

Section

- 2.1 Arrest 15
 - 1. Arrest without warrant 16
 - 2. Arrest warrants 21
 - 3. Citation and summons 24
 - 4. Stops which do not amount to arrest 25
 - 5. Private arrests 30
- 2.2 Search 31
 - 1. Searches incident to arrest 34
 - 2. Consent searches 47
 - 3. Searches under warrant 52
 - 4. Execution of warrants 56
- 2.3 Booking 59
- 2.4 Initial appearance 60
- 2.5 Preliminary hearing: basic purpose 62

Section

- 2.6 Discovery 63
- 2.7 Detailing government testimony 64
- 2.8 Waiver of hearing 65
- 2.9 Does the defendant have a constitutional right to a hearing? 65
- 2.10 Does the prosecution have a right to a hearing? 67
- 2.11 Time of hearing 68
- 2.12 Public or private hearing 69
- 2.13 Evidence and objections 70
- 2.14 Witnesses for the defense 72
- 2.15 Effect of dismissal of complaint 73
- 2.16 Defendant's right to appointed counsel 74

CHAPTER 3: BAIL

Section

- 3.1 Why a bail system? 77
- 3.2 Cases subject to bail 81
- 3.3 When bail is set 83
- 3.4 Types of bail 87
- 3.5 Factors in setting bail 90
 - 1. Nature of the charge 90
 - 2. Employment history and family ties 90
 - 3. Prior criminal record 90
 - 4. Mental condition 90
- 3.6 Penalties for non-appearance: revoking bail 91
- 3.7 Reform of the bail system 92
- 3.8 Preventive detention 94
- 3.9 Detention hearings 98
- 3.10 Bail for witnesses 101
- 3.11 Form of surety bond 105

**CHAPTER 4: THE CHARGING INSTRUMENT:
INDICTMENT OR INFORMATION**

Section

- 4.1 Constitutional considerations 107
- 4.2 Information 109
- 4.3 Grand jury procedure 111
- 4.4 Indictment 117
- 4.5 Joinder and severance 120
- 4.6 Bypassing the indictment stage 122
- 4.7 Presentation to the accused: arraignment 122

CHAPTER 5: GUILTY PLEAS

Section

- 5.1 Federal cases 125
- 5.2 State cases 127
- 5.3 Underlying principles 131
- 5.4 Plea bargaining 133
- 5.5 Unsuccessful pleas and bargains 138

CHAPTER 6: CRIMINAL TRIAL

Section

- 6.1 Significance 142
- 6.2 The litigation process 143
- 6.3 Pretrial motions and hearings 144
 - 1. Discovery of evidence 144
 - 2. Suppression of evidence 158
 - 3. The exclusionary rule 173
 - 4. Other pretrial proceedings 175
- 6.4 Jury selection and trial 176
- 6.5 Opening statement 180
- 6.6 Government proof and witness 180
- 6.7 Government case in chief: rules of evidence 181
- 6.8 Relevancy 181
- 6.9 Competency 181
- 6.10 Demonstrative evidence 185
- 6.11 Police reports: refreshing recollection or introduction into evidence 188
- 6.12 Opinion testimony: lay or expert witnesses 188
 - 1. Ordinary witnesses 188
 - 2. Expert witnesses 189
- 6.13 Hearsay 191
- 6.14 Exceptions to the hearsay rule 192
 - 1. Confessions and admissions 192
 - 2. Dying declarations 193
 - 3. Reported testimony 194
 - 4. Official statements 196
 - 5. Miscellaneous exceptions 196
 - 6. Child abuse cases 197
- 6.15 Defense evidence 200
- 6.16 Defendant as a witness 202
- 6.17 Constitutional privilege 202
 - 1. When the defendant does not testify 202
 - 2. When the defendant testifies 202
- 6.18 Privileges generally 204
- 6.19 Character testimony 205
- 6.20 Cross-examination: purpose 207

Section

- 6.21 Scope of examination 207
- 6.22 Impeachment 208
- 6.23 Evidence of other crimes 212
- 6.24 Securing witnesses at trial 214
- 6.25 Burden of proof and rule of reasonable doubt 215
- 6.26 Motion for judgment of acquittal 217
- 6.27 Rebuttal proof by the government 218
- 6.28 Final argument 218
- 6.29 Instructions and verdict 219
- 6.30 Motions attacking verdict 221
- 6.31 Motions attacking sentence 223
- 6.32 Discovery of new evidence 223
- 6.33 Disruptions in the courtroom 224
- 6.34 Constitutional considerations 226
 - 1. Publicity 226
 - 2. Counsel 228
 - 3. Speedy trial 229
- 6.35 Ethics of advocacy: counsel as witness 232
- 6.36 The police witness in court 233
 - 1. Witness duty 233
 - 2. Method of securing facts through testimony 234
 - 3. How to act when a witness 234

CHAPTER 7: SENTENCING, CRIME AND CORRECTIONS

Section

- 7.1 Mechanics of sentencing 237
- 7.2 Sentencing and corrections: meeting the crime challenge 240
 - 1. Theories of sentencing 240
 - 2. Modern trends 246
- 7.3 Expungement of records and sentences 252
- 7.4 Factors shaping the sentence 254
- 7.5 Capital punishment 258
- 7.6 Reform of the sentencing system 263
 - 1. Jury sentencing 263
 - 2. Disparity in sentences 264
- 7.7 Restitution and compensation of victims 265
 - 1. Restitution 265
 - 2. Compensation 267
- 7.8 Rights of the accused 268
- 7.9 Probation 272
 - 1. Probation 272
 - 2. Parole 274

Section

- 7.10 Revoking conditional freedom 275
 - 1. Probation 276
 - 2. Parole 277
- 7.11 Detainers 278
- 7.12 Conditions of confinement 279
- 7.13 Special institutionalization of the offender: sexual psychopath laws 280
- 7.14 Drugs and the law 281

CHAPTER 8: APPEALS AND HABEAS CORPUS

Section

- 8.1 Appellate court structure 283
- 8.2 Supreme Court of the United States 284
- 8.3 Appellate decision-making 291
- 8.4 Counsel and transcript 294
- 8.5 Appeal by state 296
- 8.6 Habeas corpus: historical background 298
- 8.7 Grounds for habeas relief 299
- 8.8 Constitutional rights 300
 - 1. Transcript 300
 - 2. Counsel 301
 - 3. Preparation assistance 301
- 8.9 Special writs and remedies 302
 - 1. Mandamus 303
 - 2. Stay of execution 304
 - 3. Injunction 304

**CHAPTER 9: SPECIAL PROBLEMS:
LOCATION OF TRIAL AND DOUBLE JEOPARDY**

Section

- 9.1 Location of trial: Constitutional basis 305
- 9.2 Commission of an offense 307
- 9.3 Change of venue 309
- 9.4 Extradition and transfer of custody for trial 310
- 9.5 Double jeopardy: application to states 317
- 9.6 Retrial of the accused: when permitted 319
- 9.7 Heavier sentence upon retrial 324
- 9.8 Different victims or sovereigns 327

**CHAPTER 10: MISCELLANEOUS PROCEEDINGS:
JUVENILE JUSTICE, MISDEMEANOR TRIALS,
DAMAGE SUITS AGAINST POLICE,
PRISONER RIGHTS**

Section

A. JUVENILE JUSTICE

- 10.1 Juvenile proceedings: historical setting 332
- 10.2 Age limits on juvenile prosecution 333
- 10.3 Power of disposition 336
- 10.4 Trial and hearings 338
 - 1. Counsel 339
 - 2. Notice 340
 - 3. Privilege to refrain from testifying 340
 - 4. Confrontation 341
 - 5. Jury trial 341
 - 6. *Miranda* warnings 341
 - 7. Confidentiality of records 341
 - 8. Burden of proof 343
 - 9. Double jeopardy 343
- 10.5 Beyond *Gault* 344

B. MISDEMEANOR TRIALS

- 10.6 Misdemeanors: classification of offenses 346
- 10.7 Misdemeanor and felony procedure compared 348
- 10.8 Misdemeanor practice and procedure 349
- 10.9 —Rules of practice 352
- 10.10 —Rules of practice: forfeiture of collateral 353
- 10.11 —Counsel 355
- 10.12 Constitutional considerations: jury trials, transcripts,
and fines 357
 - 1. Jury trials 357
 - 2. Transcripts 360
 - 3. Fines 360
- 10.13 Justices of the peace: ability to try misdemeanor cases 362

C. DAMAGE SUITS AGAINST POLICE

- 10.14 Police tort liability generally 363
- 10.15 Misuse of weapons, suits concerning arrest and search, operation
of vehicles 365
 - 1. Weapons 365
 - 2. Suits concerning arrest and search 367
 - 3. Operation of vehicles 370
- 10.16 Wrongful death 371
- 10.17 Constitutional tort 372
- 10.18 Damage suits: alternative to the exclusionary rule? 375

Section:

D. PRISONER RIGHTS

- 10.19 Suits against penitentiary personnel 378
10.20 Prisoner rights 380

CHAPTER 11: THE ADVERSARY SYSTEM

Section:

- 11.1 Defense of the system 387
11.2 Responsibility of advocates 388
11.3 Responsibility of police officers 388
11.4 Responsibility of judges 389
11.5 Need for support and reform of system 391

APPENDIX A 393

Selected provisions of the United States Constitution: Bill of Rights
and criminal procedure amendments

INDEX 397

CHAPTER 1

AN OVERVIEW OF CRIMINAL JUSTICE IN AMERICA

Section

- 1.1 Preliminary considerations: crime, police and courts
- 1.2 Adversary system of justice
- 1.3 Constitutional right to jury trial
- 1.4 Steps in a criminal prosecution
 - 1. Arrest
 - 2. Prosecution or diversion
 - 3. First appearance on the charge
 - 4. Preliminary hearing
 - 5. Indictment or information
 - 6. Arraignment in the court of trial
 - 7. Suppression hearings
 - 8. Trial
 - 9. Hearings after trial
 - 10. Appeals and habeas corpus
- 1.5 Diagram of the felony case process

§ 1.1 Preliminary considerations: crime, police and courts

The issues of crime and its control are urgent concerns for Americans today. The public often registers these concerns when voting, and the impact of crime on public consciousness is seen in recurring opinion polls which rate it at or near the top of “major unresolved problems in America.” Crime comes into most American living rooms every night via television’s police and lawyer shows. The courts are the places where society’s criminal laws are enforced, and the popular view focuses on courtroom proceedings. While the processing of criminal cases entails significantly more than a trial in criminal court,¹ the trial stage presents an apt opportunity to open discussion of the American justice system.

§ 1.2 Adversary system of justice

American criminal trials proceed under the adversary (or contest) theory of justice to arrive at the truth in a given case.² One charac-

¹ This point is discussed in § 1.4 of this chapter and in succeeding chapters of the text, *infra*.

² The strengths and weaknesses of this method for resolving such ques-

tions are reviewed in depth in the concluding chapter of this text. See Chapter 11, The Adversary System, *infra*.

teristic feature of this system is intensive cross-examination of both defense and prosecution witnesses. In a jury trial it is for the jury, which observes these witnesses, to weigh the evidence and make the ultimate decision in every case—guilty or not guilty.

For this reason an experienced police officer recognizes that a case is far from over once he makes an arrest, no matter how careful his preliminary investigation or how meticulous his seizure of evidence.

§ 1.3 Constitutional right to jury trial

Whether the adversary trial of a criminal case will be heard by a jury or a judge frequently depends upon the seriousness of the crime which is involved. The United States Constitution gives every person accused of a serious criminal offense (carrying a punishment in excess of six months) the right to be tried in front of a jury. This right belongs to an accused person whether the trial is in a state or federal court.³ Of course, even in serious cases many courts give the defendant the option of waiving a jury trial, and a major case is sometimes tried before a single judge, if the defendant so desires.

§ 1.4 Steps in a criminal prosecution

While the right to have a jury trial is guaranteed under our Constitution, numerous pretrial court procedures have evolved over the years as a result of practice and statute, as opposed to constitutional development. Beginning with the arrest and presentment of the defendant before a magistrate, various pretrial steps will be sketched to provide a summary overview of the criminal justice system preliminary to in-depth treatment of various phases later in this text.

In prosecutions for the more serious criminal offenses (felonies and high misdemeanors), the following stages mark the process.⁴

1. Arrest

It has been estimated that approximately 20 to 30 percent of all arrests are made on felony charges.⁵ Some of these arrests are based

³ *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d. 491 (1968).

⁴ Ordinary or petty misdemeanors are tried differently than the descrip-

tion provided here. For the separate method of disposing of these inferior grade offenses, see Chapter 10 of this text, which treats misdemeanor trials.

upon arrest warrants signed by a judge or magistrate. The warrant is a written order directing a peace officer (frequently any officer in the state) to take a person into custody on a designated charge. The warrant is issued in the name of the state, and prior to issuance the magistrate must decide if the facts known to the police reasonably support a conclusion that the person sought to be arrested committed the crime.

Many arrests are made without a warrant. While a few of these arrests are made by private citizens, almost all are initiated by police. To make a warrantless felony arrest, a law enforcement officer must have reasonable grounds to believe that a crime has been committed and that the defendant committed it.⁶ This constitutes probable cause.

Following arrest, the suspect will usually be booked, a procedure which takes place shortly after his arrival at police headquarters. The suspect's name is entered on the police blotter or arrest book, as well as the time of arrest and the criminal charge. The suspect may be fingerprinted and photographed.⁷

When police officers approach a person on the street and ask him questions, does this process constitute a formal arrest? Unless the encounter involves more intrusive police conduct, such actions are not tantamount to arrest. The constitutional liberties of the target of the inquiries are not infringed upon. A 1983 decision by the United States Supreme Court enumerates the rights of the parties in this situation. In *Florida v. Royer*,⁸ the Court discussed stopping of persons on the street:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . The person approached, however, need not answer any

⁵ Kamisar, LaFave & Israel, MODERN CRIMINAL PROCEDURE 10 (1990). A felony is typically defined in state law as an offense punishable by death or imprisonment for a term exceeding one year.

⁶ Searches for weapons and evidence-gathering procedures, including

interrogations, frequently follow arrest. The constitutional guidelines controlling these procedures are discussed in § 2.2 (searches) and § 6.3(2) (confessions, lineups) *infra*.

⁷ Kamisar, LaFave & Israel, MODERN CRIMINAL PROCEDURE 11 (1990).

⁸ 103 S. Ct. 1319 (1983).

question put to him; indeed, he may decline to listen to the questions at all and may go on his way.

The Court further observed that where a person answers police questions and the answers given by the individual or other circumstances arouse a reasonable suspicion of criminal activity, the case of *Terry v. Ohio*⁹ authorizes a limited search of the individual: “[C]ertain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. In that case [*Terry*], a stop and frisk for weapons were found unexceptional.” The stop and frisk process is dealt with in more detail in § 2.1 of this text. The right of police to stop persons on the street is discussed in the context of a case from California, which jurisdiction had passed a statute requiring persons who wander on the streets to provide a “credible and reliable” identification when stopped by police.¹⁰

2. Prosecution or diversion

Not all arrested persons are fully prosecuted. A suspect may be released without the lodging of a formal charge, perhaps because the police feel there is insufficient evidence to hold him. In addition, a defendant may be released to a diversion program. Diversion characteristically involves a discretionary decision on the part of an official that there is a better way to deal with a defendant than to prosecute him. Thus, police or prosecutors may decline to proceed with criminal prosecution in the first instance, or they may exercise discretion to terminate an ongoing case if they conclude that prosecution is inappropriate.

Usually the decision to divert is accompanied by an accused person's promise to take certain rehabilitative steps in his own behalf.¹¹ The authorities may discontinue prosecution of a person arrested for public drunkenness, for example, if the accused complies with certain conditions, such as treatment in a detoxification center or participation in some similar program. Juveniles may be diverted from the

⁹ 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

¹⁰ *Kolender v. Lawson*, 103 S. Ct. 1855 (1983). The *Kolender* decision is discussed in § 2.1(4) of this book.

¹¹ In *Nimmer*, *DIVERSION* (1974), diversion, or “early diversion” as it is

often called, is defined as the disposition of a criminal complaint without a conviction, the noncriminal disposition being conditioned on the performance of specified obligations by the defendant, or his participation in treatment.