

Ohio Felony Defense Guide

If you have been charged with
a felony in the state of Ohio
this indispensable guide will help
you to understand the criminal
justice process you face.

Provided by



5354 N. High Street
Columbus, Ohio 43214

614/454.5010

Online at www.columbuscriminaldefenseattorney.com

OHIO FELONY DEFENSE GUIDE

Table of Contents

Introduction	Page 4
Criminal (Law Enforcement) Investigations	Page 6
Felony Criminal Charges in Ohio	Page 7
Ohio Felony Offenses	Page 7
Stages of an Ohio Felony Criminal Case (chart)	Page 11
The Requirement of a Grand Jury Indictment	Page 12
The Use of a Felony Criminal Complaint	Page 12
Service of Complaint by Arrest or Summons	Page 13
Bail and Bond	Page 13
Preliminary Hearing	Page 14
Arraignment upon Indictment	Page 15
Pretrial Discovery and Access to Evidence	Page 15
Rule 7(E) of the Ohio Rules of Criminal Procedure — Request for a Bill of Particulars	Page 15
Rule 12(E) of the Ohio Rules of Criminal Procedure — Request for Notice of Intent to Use Evidence	Page 16
Rule 16(B), (I), and (K) of the Ohio Rules of Criminal Procedure — Demand for Discovery	Page 17
Section 2925.51(E) of the Ohio Revised Code — Request for Untainted Representative Sample	Page 19
The Prosecutor’s Constitutional Discovery Duties	Page 19
The Defense Pretrial investigation	Page 23

Pretrial Motions	Page 24
Common Defenses	Page 27
Pretrial Conferences	Page 28
Intervention In Lieu of Conviction	Page 28
Plea Bargain or Trial	Page 29
Plea Bargain	Page 29
Trial	Page 30
Sentencing	Page 36
Purposes and Principles	Page 36
Factors to Consider in Every Case	Page 36
Length of Possible Prison Terms	Page 38
Mandatory vs. Optional Prison Terms.	Page 38
Consecutive vs. Concurrent Sentences	Page 40
Community Control (Probation)	Page 40
Financial Sanctions (Fines and Court Costs).....	Page 41
Pre-Sentence Investigation and Sentencing Hearing	Page 41
Conclusion	Page 42
Contact Koenig & Long	Page 44

Introduction

The purpose of this Ohio Felony Defense Guide is twofold. The first is to outline and summarize the system through which felony criminal offenses are investigated, charged, and prosecuted in Ohio. The second is to share insights gained over the past 30 years defending both guilty and innocent people caught up in Ohio's criminal justice system. It is written to give our clients facing felony criminal charges a more clear understanding about what is involved in defending their rights and their case.

When facing felony criminal charges, remember you have a number of fundamental constitutional safeguards designed to protect you at trial.

The first safeguard is the presumption of innocence. When you face a jury, you are presumed to be innocent of the charges. This means the jury is directed to assume you are no more guilty than the prosecutor, the judge, or any one those jurors sitting in the jury box.

A second safeguard deals with the burden of proof. In a criminal case, the prosecution bears the burden of proof on each and every element of each offense charged. This burden never shifts. You do not have the burden to disprove anything. The reason for this is because an innocent person is often not in a position to disprove anything. For example, if I accused one of the jurors of stealing my watch, that juror could not prove they didn't do it. The juror could say: "I'm a good person," or "I go to Church every Sunday," but he or she could not disprove the allegation. Because of this, the burden of proving each and every element of every criminal offense always rests with the prosecution, and never shifts to the accused.

A third safeguard deals with the standard of proof. In a criminal case, the standard of proof that a prosecutor must meet is "proof beyond a reasonable doubt." This is the highest legal standard of proof in the world. In Ohio, proof beyond a reasonable doubt is defined, in part, to mean "proof of such character that an ordinary person would be willing to rely and act on it" in a decision involving "the most important of his or her own affairs." This high standard of proof beyond a reasonable doubt was established to ensure that if there is any reasonable possibility of innocence, then the accused must be found not guilty. A not guilty verdict does not mean the jury found the accused to

be innocent of the charge; rather, it means they found a “reasonable possibility” that the accused may be innocent. The standard of “proof beyond a reasonable doubt” was adopted on our founding fathers’ belief that it is better for a 100 guilty people to go free than for 1 innocent person to be wrongly convicted.

There are other safeguards designed to protect those accused of a crime, including: (1) the right to counsel; (2) the right to a jury trial; (3) the right to confront and cross-examine the State’s witnesses; (4) the right to compel witnesses to testify; and (5) the right of an accused not to be required to testify - and for the jury to be instructed that since the prosecutor bears the burden of proof (a) it is not necessary for an accused person to testify, (b) there is a constitutional right not to testify, and (c) the fact that an accused did not testify cannot be considered for any purpose.

The bottom line is that there are fundamental safeguards that a defense attorney will consider when making decisions about how to best handle your case, and in advising you about your chances of prevailing at trial. They constitute part of the framework through which evidence is sifted at trial.

This Guide refers to selected portions of the United States Constitution, the Ohio Constitution, the Ohio Rules of Criminal Procedure, the Ohio Rules of Evidence, and the Ohio Revised Code. These can all be found in Anderson’s Ohio Criminal Law Handbook. This book is paperbound, comes with a CD, typically costs about \$55.00, and can be obtained from LexisNexis Publishing at 1-800-223-1940.

It is dedicated to our client and close friend, Gary James, an innocent man wrongfully accused, convicted, and sentenced to death in 1977 for a murder and bank robbery he did not commit. With the help of a host of people, including attorneys from this firm, Gary was proven innocent, released from prison (after living 26 years in hell), and received a substantial settlement for his wrongful imprisonment. Lawyers from our firm have continued to represent Gary ever since. He experienced Ohio’s criminal justice system at its worst. May God (and good lawyering) prevent others from repeating Gary’s nightmare.

Criminal (Law Enforcement) Investigations

When a felony crime is reported, law enforcement is given the job of identifying who committed it so that right person is charged and prosecuted for it. In Columbus, the two major law enforcement agencies charged with investigating felony offenses are the Columbus Police Department (CPD) and the Franklin County, Ohio Sheriff's Department. Each is similarly organized.

Both CPD and the Sheriff's Department, for example, have a Patrol Division which responds to crimes in progress. As soon as the police receive a 911 or other call that a crime is in progress, they send patrol officers to the scene. Sometimes the patrol officers are able to apprehend a suspect right on the scene. The officers will then make an arrest, and escort the person to the police station or county jail for booking. Sometimes, however, no suspect is apprehended. In either case, before leaving the scene the patrol officers (often with help from a crime scene search unit and investigating detectives) will photograph the scene and collect evidence believed to be connected to the crime. Almost everyone at the scene will write a report. Those reports will include what each officer says they saw or heard; the names, addresses, and phone numbers of potential witnesses; written or summaries of witness statements; and an inventory of all items taken. All these are items that are discoverable by the attorney for the accused pursuant to Rule 16 of the Ohio Rules of Criminal Procedure.

Also, both agencies have an Investigative Division, each containing Detective Bureaus, which are assigned to investigate serious crimes as well as unsolved crimes. The Detective Bureaus have sections assigned to investigate Crimes against Persons (Homicides, Assaults, and Robberies); Property Crimes (Burglaries, Auto Thefts, and Economic Crimes); Special Victim Crimes (Sexual Assaults and Domestic Crimes); and a Narcotics Bureau (this usually includes both drugs and vice). A major focus of the Detective Bureau is to investigate both serious and unsolved crimes. This occurs when crimes were not observed in progress, when a suspect was able to avoid apprehension, or when an investigation is complicated. In this case, the law enforcement agency will assign the crime to one or more detectives to interview witnesses and analyze evidence in an attempt to identify a suspect.

The CPD also has a Strategic Response Bureau (SRB) which investigates persons as

well as crimes. This can be dangerous practice because SRB spends much of its time investigating persons for crimes that have not yet been identified. The risk for unjust prosecutions resulting from this type of investigation is, in this author's opinion, unnecessarily high.

If any law enforcement agent attempts to interview you in connection with the investigation of a crime, it is best not to say anything without first consulting with an experienced criminal defense attorney. Reasons why you should not talk to the police are set forth in the following blog posts entitled:

1. "What if the Columbus Police Want to Question Me? Here's why the Answer Should be 'No,'" located on the web at: <http://www.columbuscriminaldefenseattorney.com/2014/01/26/what-if-the-columbus-police-want-to-question-me-here-is-an-example-why-the-answer-should-be-a-clear-and-unequivocal-no/>;
2. "When do you Need to Answer Questions Posed by the Police," located on the web at: <http://www.columbuscriminaldefenseattorney.com/2011/10/23/when-do-you-need-to-answer-questions-posed-by-the-police-police-interaction-part-ii/>; and
3. "Do you have to identify yourself to the Police?" This is located on the web at: <http://www.columbuscriminaldefenseattorney.com/2011/11/02/do-you-have-to-identify-yourself-to-the-police-police-interaction-part-iii/>.

If you would like to hear from a law professor (and former criminal defense attorney) why nothing good ever comes from talking to the police, please take a look at a YouTube video of one of his lectures entitled "Don't Talk to Police" located at: <http://www.youtube.com/watch?v=6wXkI4t7nuc> . I can almost guarantee you that no good can ever come from talking to a police officer involved in a felony criminal investigation - at least not without first consulting with an experienced criminal defense attorney.

Felony Criminal Charges in Ohio

OHIO FELONY OFFENSES

Felony offenses are defined in Section 2901.02 of the Ohio Revised Code to include (1)

aggravated murder, (2) murder, (3) any offenses specifically classified as first, second, third, fourth, or fifth degree felonies – these carry potential sentences from 6 months to 11 years imprisonment, and (4) any unclassified offense with a potential penalty of more than 1 year imprisonment. Aggravated Murder is an unclassified felony with a potential penalty that ranges from death to life, with the possibility of parole in some cases after 20 years. Murder is also an unclassified felony, with a penalty of an indefinite prison sentence of 15 years to life. Ohio also imposes mandatory prison sentences in some cases. The Ohio Sentencing Commission has published a 6-page Felony Sentencing Reference Guide which identifies those offenses that carry mandatory prison terms, together with the lengths of the mandatory sentences. This Sentencing Guide contains a sentencing table listing sentencing ranges for crimes carrying either mandatory or non-mandatory prison terms. This Guide can be found online at: <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/summaries/felonyQuickRef.pdf>.

The name of each Ohio felony offense is set forth in the Ohio Revised Code. Most of these are listed below:

Chapter 2903 of the Ohio Revised Code, for example, lists all felony homicide and assault offenses in Ohio, including offenses such as Aggravated Murder; Murder; Voluntary Manslaughter; Involuntary Manslaughter; Reckless Homicide; Aggravated and Vehicular Homicide, Aggravated and Vehicular Manslaughter; Aggravated and Vehicular Assault; Felonious Assault; Aggravated Assault; and simple Assault.

Chapter 2925 of the Ohio Revised Code identifies and defines Ohio drug crimes. Felony drug offenses in Ohio include Aggravated Trafficking and Trafficking in Drugs; Illegal Manufacture of Drugs; Illegal Cultivation of Marijuana; Possession of Drugs; Permitting Drug Abuse; Illegal Processing of Drug Documents; Deception to Obtain a Dangerous Drug; Tampering with Drugs; Sale of Counterfeit Controlled Substances; and Possession and/or Sale of Controlled Substance Analogs. The Ohio Sentencing Commission has published a 2-page Drug Offense Sentencing Guide, which is very helpful in determining potential sentences for each offense. The Sentencing Guide can be found online at: <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/summaries/>

[drugQuickRef.pdf](#). The potential penalties for both Drug Trafficking and Drug Possession are listed based on the quantities of narcotics that are charged in the indictment.

Chapter 2905 of the Ohio Revised Code identifies other Ohio felony crimes against persons, such as Kidnapping, Abduction, Child Enticement, and Extortion.

Chapter 2907 of the Ohio Revised Code identifies and defines all Ohio felony sex crimes, including Rape, Sexual Battery, Unlawful Sexual Contact with a Minor, Gross Sexual Imposition, and Importuning.

Chapter 2909 of the Ohio Revised Code identifies Ohio felony offenses against property, such as Aggravated Arson and Arson; Criminal Damaging; and Vandalism, including vehicular, railroad, and aircraft endangering offenses.

Chapter 2911 of the Ohio Revised Code identifies and defines robbery, burglary, trespass, and safecracking crimes, such as Aggravated Robbery and Robbery; Aggravated Burglary and Burglary; Breaking and Entering, Safecracking; and Tampering with Coin Machines.

Chapter 2913 of the Ohio Revised Code lists and defines felony theft and fraud crimes in Ohio. This includes offenses such as Theft; Receiving Stolen Property; the Unauthorized Use of a Vehicle; Unauthorized Use of Computer and Telecommunications Property; Possession or Sale of Unauthorized Cable Television Equipment; Telecommunications Fraud; Unlawful Use of a Telecommunications Device; Motion Picture Piracy; Passing Bad Checks; Misuse of Credit Cards; Forgery; Securing Writings by Deception; Criminal Simulation; Trademark Counterfeiting; Medicaid Fraud; Insurance Fraud; Identify Fraud; Tampering with Records; and the Illegal Use of E-mail (Spamming).

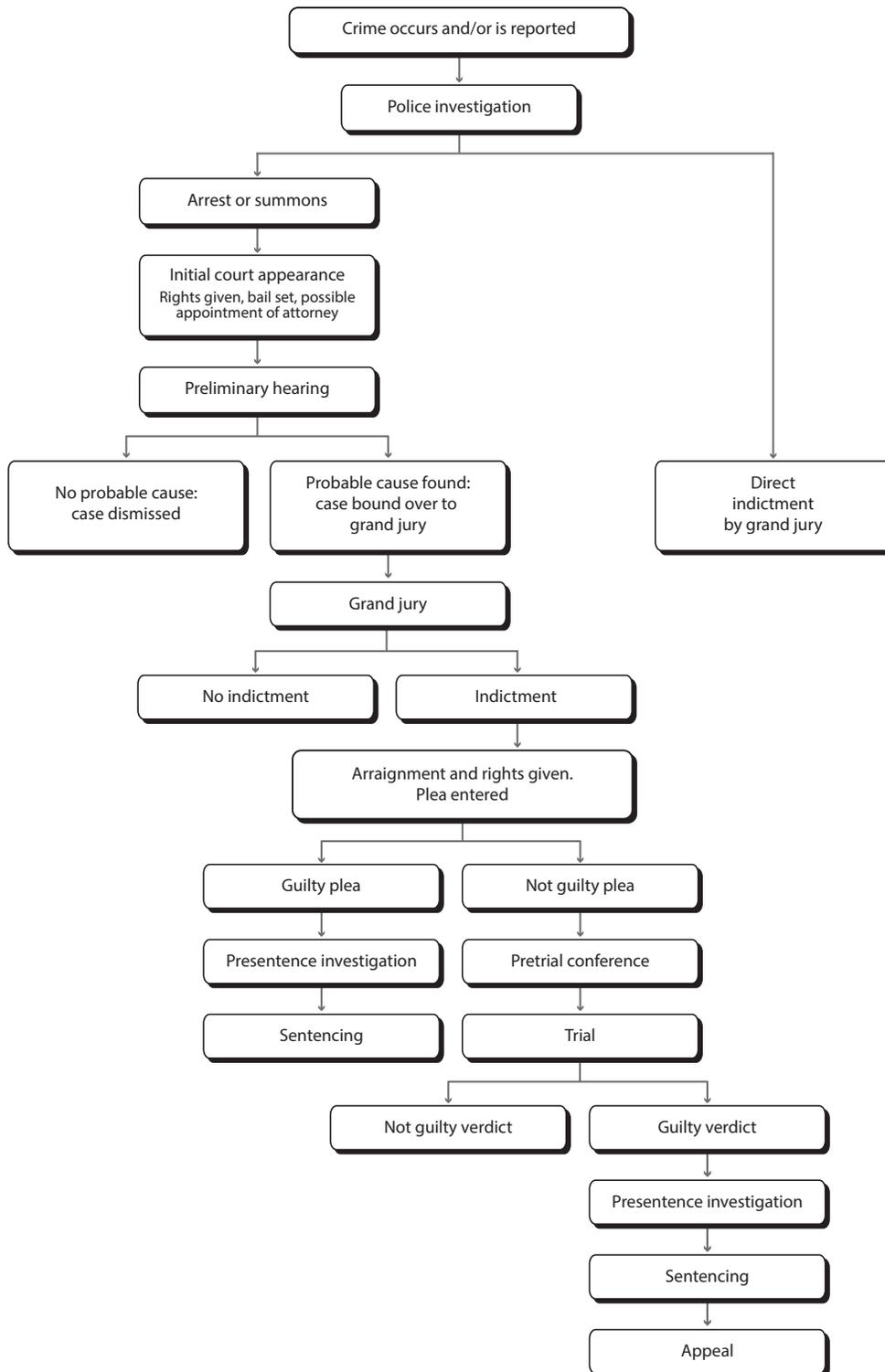
Chapter 2915 of the Ohio Revised Code identifies and defines Ohio gambling crimes. Felony gambling offenses in Ohio include Gambling; Operating a Gambling House; Cheating - Corrupting Sports; and Conducting Illegal Bingo.

Chapter 2917 of the Ohio Revised Code identifies “Offenses against the Public Peace.” These include crimes such as Inciting to Violence; Aggravated Riot; Inducing Panic; Making False Alarms; Telecommunications Harassment; and the Unlawful Possession or Use of a Hoax Weapon of Mass Destruction.

Chapter 2921 of the Ohio Revised Code identifies “Offenses against Justice and Public Administration, including: Tampering with Evidence; Obstructing Official Business; Resisting Arrest; Failure to Comply; Obstructing Justice; Falsification; Bribery; Intimidation; Retaliation; Perjury; and Escape.

Chapter 2923 of the Ohio Revised Code identifies Firearm and Weapon Crimes as well as other crimes such as Possession of Criminal Tools, Participating in a Criminal Gang, Hidden Compartments in Vehicles, Conspiracy, Attempt, and Racketeering (“Engaging in a Pattern of Corrupt Activity”). It also explains the law in Ohio about “complicity,” which is a legal concept that makes a person who aides, abets, encourages, or assists another in the commission of a crime just as guilty as though he or she were the principal offender. Chapter 2923 lists and defines felony firearm offenses such as: Carrying a Concealed Weapon; Improperly Handling Firearms in a Motor Vehicle; Having a Weapon while under Disability; Unlawful Possession of a Dangerous Ordinance; Discharging a Firearm at or into a Habitation; and Discharge of a Firearm on or near a Prohibited Premises.

STAGES OF AN OHIO FELONY CRIMINAL CASE



THE REQUIREMENT OF A GRAND JURY INDICTMENT

If law enforcement concludes that you have committed any one or more of the foregoing felony criminal offenses, they will ultimately seek an indictment against you from a grand jury sitting in the county where they believe the crime was committed.

Section 10 of the Ohio Constitution and Rule 7(A) of the Ohio Rules of Criminal Procedure require all felonies in Ohio to be prosecuted by indictment issued by a grand jury unless the accused waives the right to indictment and agrees to be tried on a bill of information. A grand jury consists of 9 members, including the foreman, and not more than 5 alternates, selected pursuant to Rule 6(A) of the Ohio Rules of Criminal Procedure. The theoretical purpose of the Grand Jury is to act as a screening device to protect innocent persons from malicious prosecution by the police. In practice, however, most observers agree that grand juries simply act as a tool of law enforcement. For one thing, grand jury proceedings are non adversarial. As one court stated, “(p)roceedings of a grand jury are not a trial, but are more in the nature of an inquest.” Suspects, arrestees and targets have no right to attend, offer evidence, or testify before the grand jury. The rules of evidence do not apply. In fact, it is not uncommon for a detective to simply offer a summary of what he or she believes the evidence is, and then asks for the issuance of an indictment on specified felony charges. The grand jury almost always does what a detective requests. A common saying among defense attorneys, and even judges, is that a grand jury lacks independence so much that a prosecutor can indict a “ham sandwich” any day of the week for any crime on the menu. Rule 6(E) of the Ohio Rules of Criminal Procedure requires grand jury deliberations and votes to be kept secret. Thus, with limited exception, an accused will never find out what evidence, if any, was presented to the grand jury in order to obtain an indictment against him.

THE USE OF A FELONY CRIMINAL COMPLAINT

Although a person cannot be tried for a felony in Ohio without first being indicted, a person can be charged and arrested for a felony prior to indictment. This occurs through the filing of a criminal Complaint. Because it takes time to present a case to a grand jury, the criminal Complaint is the basic charging document used to initially charge a suspect with a felony offense in Ohio. The purpose of a criminal Complaint is to inform the accused of the crime charged. It also forms the basis of the court’s jurisdiction over the accused. Rule 3 of the Ohio Rules of Criminal Procedure sets forth the

requirements for a criminal Complaint and requires it to (1) be made under oath; (2) identify the “applicable statute” alleged to be violated; and (3) state “the essential facts constituting the offense charged.” For a criminal Complaint to be valid, the “essential facts” set forth in the Complaint must be sufficient to “give the accused notice of all the elements of the offense in which he is charged.” In Columbus and Franklin County, Ohio, criminal Complaints are filed with the clerk of the Franklin County, Ohio Municipal Court.

Service of Complaint by Arrest Warrant or Summons

Upon the filing of a valid criminal Complaint, the Clerk of Courts is required to either issue a warrant for the arrest of the accused, or a summons in lieu of a warrant directing the accused to appear in Court to respond to the criminal Complaint. The decision of whether to serve the criminal Complaint by Summons or by Arrest Warrant is generally left to the discretion of the prosecuting attorney, and depends greatly on local rule or custom. Rule 4 of the Ohio Rules of Criminal Procedure sets forth the rules regarding the service of a criminal Complaint by either arrest warrant or summons. Pursuant to Rule 4(E), a person who is arrested on a criminal Complaint must be brought before a court “without unnecessary delay.” Generally, this should be accomplished within 48 hours after arrest. Rule 5 of the Ohio Rules of Criminal Procedure governs the rights of the accused during this initial appearance, which includes the right to address the issue of bail.

Bail and Bond

The term “Bail” refers to any method that permits an accused to obtain release from custody pending trial, or even appeal. The Eighth Amendment to the U.S. Constitution states that “excessive bail shall not be required.” Article I, Section 9 of the Ohio Constitution contains a similar provision. A 1998 Amendment to the Ohio Constitution provides a limited exception to the right of bail by preventative detention. Rule 46 of the Ohio Rules of Criminal Procedure sets forth the different types of bail bonds that may be required, conditions of bail that may be imposed, and factors and information to be considered in deciding issues of bail and bond. A good review of the different types of bond that can be set by a court at the initial appearance of the accused is contained at our website at the following link: <http://www.columbuscriminaldefenseattorney.com/bail-bonds>.

There are 3 common types of bonds a court can set. The first is a recognizance or “OR” bond, which simply requires the unsecured promise of the accused to appear when required. The second is an appearance, or “10%” bond, which requires the accused to deposit 10% of the face amount of the bond with the clerk of courts. If the accused appears as required, then 90% of the deposit is refunded at the conclusion of the case. The final, and most onerous type, is a surety bond. This bond is written by a bail bondsman through a surety company, which charges a premium or commission of 10% of the face amount of the bond. This amount is paid to the bail bondsman, and is nonrefundable, meaning the person paying it will never get any back.

Preliminary Hearing

The preliminary hearing is a screening device, similar to the requirement for a grand jury indictment. It is designed to insure that an accused is not held in custody (or under conditions of bond) on a felony criminal Complaint for any significant period of time unless there is “substantial credible evidence.” The right to a preliminary hearing is set forth in Rule 5(B) of the Ohio Rules of Criminal Procedure. Rule 5(B) provides that if a person accused of a felony does not waive preliminary hearing, then the court shall schedule one within 10 days after arrest (if the accused is in custody) and not later than 15 days after arrest (if the accused is not in custody). A preliminary hearing will not be held, however, if the accused is indicted before the date scheduled for the preliminary hearing.

In some Ohio counties it is common to hold a preliminary hearing in nearly every felony criminal case. This is because, in those counties, the grand jury only meets infrequently, such as once a month or even once every other month. In Franklin County, however, preliminary hearings are almost never held. That is because the grand jury meets at least two days every week. For that reason, if the prosecutor believes it is important to hold the accused in jail, then he will make every attempt to secure an indictment before the expiration of the 10-day period. For that reason, no preliminary hearing will be held. If the prosecutor concludes that it is not important to hold the accused in jail, then he or she will simply dismiss the criminal Complaint for future grand jury consideration and indictment.

Preliminary hearings can be a valuable discovery device. In my firm, we try to hold them every time we can. It gives us a chance to cross examine the detectives and witnesses about what they observed without giving them time to prepare. In many cases,

our ability to cross-examine witnesses at preliminary hearing has enabled our clients to escape indictment all together. In one particular case, in Richland County, Ohio, we were able to get an alleged eyewitness to admit under oath that he did not get a good look at the perpetrator at all, but was rather relying exclusively on what other people, including the investigating detective, told him. As the result of testimony adduced at preliminary hearing, our client, who was facing 11-years in prison for second and third degree felony charges, was able to escape indictment on any felony offense. Unfortunately, in Franklin County, Ohio, since preliminary hearings are not commonly held, we almost never get the opportunity to confront the evidence against our clients in a preliminary hearing.

Arraignment Upon Indictment

Rule 10 of the Ohio Rules of Criminal Procedure governs the procedure for the arraignment of an accused upon issuance of a grand jury indictment. Arraignments are held in open court, and consist of (1) a reading (or waiver of reading) of the indictment, and (2) a request to the accused to enter a plea of guilty, not guilty, not guilty by reason of insanity, or with the consent of the court, no contest, in response to each charge contained in the indictment. Rule 11 of the Ohio Rules of Criminal Procedure sets forth the procedures involved in entering of a plea in felony criminal cases. And if an accused refuses to enter a plea, then the court is required to enter a plea of “not guilty” on his or her behalf. The accused must also be given a copy of the indictment. The accused has the right to counsel at arraignment, as with every critical stage of the proceedings. An accused is not required to enter a plea until one full day has elapsed from the time the accused or his attorney received or had an opportunity to receive a copy of the indictment.

Pretrial Discovery and Access to Evidence

One of the most difficult problems facing a criminal defense attorney in defending a felony criminal case is obtaining adequate discovery. The Fifth and Fourteenth Amendments require the prosecuting attorney to disclose specific types of evidence to the accused in order to protect his or her right to a “fair trial.” In Ohio, the prosecuting attorney is also required by Rules 7(E), 12(E), and 16 of the Ohio Rules of Criminal Procedure to disclose, upon request, certain types of evidence.

RULE 7(E) OF THE OHIO RULES OF CRIMINAL PROCEDURE

– Request for a Bill of Particulars.

Rule 7(E) of the Ohio Rules of Criminal Procedure provides that upon written request by the accused the prosecuting attorney shall provide the accused with a bill of particulars setting forth the specifics of the conduct alleged to have occurred. The purpose of a bill of particulars is to disclose information material to a defendant's ability to "prepare and present a defense." This can be especially necessary, for example, for an accused to be able to prepare an alibi defense, when a specific time of day can be provided. Here is an example of information we sought through a bill of particulars in a shooting case:

1. The exact time of day or night when the acts charged, including the discharge of the handgun, were alleged to have been committed by the accused;
2. The specific place where the offense, including the alleged discharge of the handgun, was alleged to have been committed, including, (a) the street address and location within building or on property, and (b) the specific location where the handgun was alleged to have been discharged;
3. The specific location where the handgun was alleged to have been discovered, relative to both the location and the position of the accused; and
4. The names of all persons, not identified in the indictment, who were present when the offense was alleged to have been committed.

Importantly, a request for a bill of particulars must be made by the accused within 21 days after arraignment unless the court orders otherwise.

RULE 12(E) OF THE OHIO RULES OF CRIMINAL PROCEDURE

- Request for Notice of Intent to Use Evidence

Rule 12(E)(2) provides a method by which an accused may learn of the prosecutor's intention to use evidence that might be subject to a pretrial motion to suppress. An accused is permitted to file a Request for Notice of Intent to use evidence at trial. Importantly, this request must be made by the accused at "arraignment, or as soon thereafter as is practicable." Often this request may be a simple formality, but it may be necessary if defense counsel needs to file an otherwise tardy motion to suppress regarding evidence that was previously undisclosed. This can be important because

Rule 12(D) requires motions to suppress to be filed within 35 days after arraignment, unless otherwise ordered by the Court.

**RULE 16(B), (I), AND (K) OF THE OHIO RULES OF CRIMINAL PROCEDURE
- Demand for Discovery**

Rule 16 of the Ohio Rules of Criminal Procedure provides that upon written demand for discovery by counsel for the accused the prosecuting attorney shall provide the following:

1. Rule 16(B)(1). Statements of Defendant or Co-Defendant. This includes written or recorded statement or statements made by the Defendant or Co-Defendant, including police summaries of such statements, and including grand jury testimony by either the Defendant or Co-Defendant, or copies thereof; and any written summaries of any oral statements, or copies thereof, made by the Defendant or the Co-Defendant to a Prosecuting Attorney or a law enforcement officer which are available to or within the possession, custody, or control of the State, the existence of which are known or may by the exercise of due diligence become known, to the Prosecuting Attorney or are reasonably available to the State.
2. Rule 16(I). Witness List. This includes a written witness list, including names and addresses of any witness the State intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.
3. Rule 16(B)(7). Written or Recorded Statements. This includes any written or recorded statement by a witness in the State's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.
4. Rule 16(B)(6). Police Reports. This includes all reports from peace officers, the Ohio State Highway Patrol, and state and federal law enforcement agents involved in the investigation.
5. Rule 16(B)(3). Documents and Tangible Objects. This includes copies or photographs of all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody, or control of the State, which are

material to the preparation of the defense, or are intended for use by the Prosecuting Attorney as evidence at trial, or which were obtained from or belonged to Defendant, or are reasonably available to the State.

- 6. Rule 16(B)(4). Results of Examination and Tests.** This includes copies or photographs of any results or reports of physical or mental examinations and any scientific experiments or tests made in connection with this particular case which are available to or within the possession, custody or control of the State, the existence of which are known or may by the exercise of due diligence become known to the prosecuting attorney, or are reasonably available to the State. We also demand the State to include a written description of all testing methods of used.

We make specific inquiry about each type of scientific test we suspect may have been performed. Depending on the case, this may include: (1) alcohol testing; (2) drug testing, procedures, and results; (3) latent fingerprint identification and comparison; (4) handwriting identification examinations and results; (5) voice identification testing and comparisons; (6) eyewitness identification procedures and results from line-ups, photo-arrays, show-ups, and other procedures; (7) firearm and tool-mark tests or examinations; (8) DNA typing and analysis; (9) non-DNA testing of bodily fluids such as blood typing, or urine, sweat, and semen examinations; (10) chemical testing; (11) engineering testing; (12) clinical and forensic medical testing; (13) psychiatric testing; (14) hypnosis; (15) memory and suggestibility testing; (16) actuarial predictions; (17) pathology examinations and tests; (18) toxicology testing and reports; (19) computer analysis; (20) bullet lead analysis; (21) bitemark identification; (22) fire and arson investigation, examinations, and testing; and (23) polygraph (lie detector) examinations.

- 7. Rule 16(B)(2). Criminal Records.** This includes all criminal records of the Defendant, a Co-Defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.
- 8. Rule 16(K). Expert Witnesses; Reports.** This includes copies of any written reports summarizing the expert witness's testimony, findings, analysis, conclu-

sions, or opinion, including a summary of the expert's qualifications. This Rule applies to both the prosecution and the accused, and requires each expert witness for each side to prepare a written report "summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications." All expert witness reports are required to be disclosed to opposing counsel no later than 21 days prior to trial.

9. Rule 16(B)(5). Evidence Favorable to the Defendant. This includes all evidence known, or which may become known, to the Prosecuting Attorney favorable to Defendant, and material either to guilt or punishment.

SECTION 2925.51(E) OF THE OHIO REVISED CODE

- Request for Untainted Representative Sample

Section 2925.51(E) of the Ohio Revised Code requires the prosecution to preserve, upon written demand, a portion of the alleged controlled substance that is the basis of the criminal charge for independent analysis.

If the Request is timely filed, then the prosecuting attorney must provide the sample to an independent analyst employed by the accused not later than 14 days prior to trial. This can often cause difficulties for the prosecution that can give the accused some leverage in defending the case. In conjunction with this Request, our law firm regularly files - pursuant to R.C. Section 2925.51(C)- a companion Demand for Testimony Regarding Laboratory Report. Importantly, if this Demand for Lab Testimony is not made within 7 days of the receipt of the State's Laboratory Report of the alleged controlled substance, then the prosecutor's Report will be admissible at trial as "prima-facie evidence of the contents, identity, and weight, and the existence and number of unit dosages of the substance" tested. Practically speaking, if a Demand for Lab Testimony is not made, then the chemist conducting the testing will not be compelled to testify at the trial of the accused, and therefore not available for cross-examination. This makes it easier for the prosecutor to prove the State's case, thereby reducing potential bargaining leverage you might otherwise have.

THE PROSECUTOR'S CONSTITUTIONAL DISCOVERY DUTIES

The Fifth and Fourteenth Amendments to the United States Constitution also require the prosecution to disclose specific types of evidence and information to the accused.

The seminal case for this proposition is Brady v. Maryland, 373 U.S. 83 (1963), which held that the due process right to a fair trial requires the prosecution to disclose evidence favorable to the accused that is material either to guilt or punishment. Criminal defense attorneys commonly refer to this type of evidence or information as Brady material.

Disclosure by the State to the accused of all “favorable” evidence and information is constitutionally required by Brady even without a request by the accused. However, it is best for defense counsel to file a supplemental Brady demand detailing specific categories of favorable evidence defense counsel suspects may exist because “(w)hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” United States v. Agurs, 437 U.S. 97, 106 (1976).

Evidence or information is “favorable” to the accused if (1) it tends to support a reasonable doubt about the defendant’s guilt, or (2) if it tends to mitigate punishment. Our firm tends to classify Brady material in four categories:

(1) Evidence or information that tends to support a reasonable doubt about the actual guilt of the accused. We often focus on favorable eyewitness statements, or portions of otherwise incriminating eyewitness statements such as (a) an eyewitness statement that fails to name or identify the accused as a participant in the crime (see Jones v. Jago, 428 F. Supp. 405 (1977), aff’d 578 F.2d 1164 (6th Cir. 1978)); (b) an eyewitness statement containing a description inconsistent with how the accused appears; (c) statements from an eyewitness that conflict either internally or with another statement from the same witness (see Kyles v. Whitley, 514 U.S. 419, 428-30 and 444-45 (1995)); (d) statements from different eyewitnesses that are inconsistent with each other (see Kyles v. Whitley, 514 U.S. 419, 444-45 (1995)); (e) eyewitness statements that relate to an inability to obtain a good look of the crime or perpetrator; and (g) eyewitness statements containing statements or observations that later turned out to be untrue. Also important is forensic or scientific evidence that does not directly incriminate the accused;

(2) Evidence or information that tends to undermine the credibility of government witnesses [See Giglio v. United States, 405 U.S.150 (1972); Alderman v. Zant, 22 F.3d 1541, 1554 (11th Cir. 1994) (prosecution must disclose promises, understandings and agree-

ments with its witnesses as well as any “facts that might motivate a witness in giving testimony”); see generally Michael L. Piccarreta, Jefferson Keenan, “Impeaching a Cooperating Witness,” 49 Federal Lawyer 16 (2002) (collecting types of information that should be produced about a cooperating witness to include payments, any agreements and promises, criminal record, drug and alcohol use, psychiatric reports, reports about uncharged misconduct, prior inconsistent statements, tax returns showing failure to report earnings from cooperation or illegal sources, polygraph tests or the refusal to take them).];

(3) Evidence or information that tends to discredit the quality of the police investigation, such as its “thoroughness and even ... good faith,” or its failure to follow established investigative policies or procedures. See Kyles v. Whitley, 534 U.S. 419, 445-46 (1995) (declaring that “(a) common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation.”); Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir 1985)(awarding new trial of prisoner convicted because withheld Brady evidence “carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case”); and United States v. Howell, 231 F.3d 615 (9th Cir 2000) (information that may seem inculpatory on its face no way diminishes the government’s duty to disclose evidence of a flawed investigation that could be used to discredit the caliber of the investigation);and

(4) Evidence or information that tends to mitigate the punishment. [See United States v. Severson, 3 F.3d 1005, 1013 (7th Cir. 1993) (“Brady applies to sentencing”).]

Importantly, the prosecutor’s obligations under Brady extend beyond searching his or her own file. Prosecutors have an affirmative duty to learn about and disclose any favorable or impeachment evidence or information known to all law enforcement agents, including all police officers and detectives involved in the investigation. In other words, the prosecutor assigned to the case “has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” Kyles v. Whitley, 514 U.S. 419, 437 (1995). Also see Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006); and Crivens v. Roth, 172 F.3d 991, 997-98 (7th Cir. 1999).

When evaluating post-trial whether a Brady violation occurred, a violation will only be found if the favorable suppressed information or evidence was material to the outcome of the case. When making this determination about materiality, a court is required to assess the evidence and information “collectively, not item-by item.” Kyles v. Whitley, 534 U.S. 419, 436 (1995). However, it is critically important to realize that the Supreme Court introduced the standard of materiality in the context of appeals, where it is possible to evaluate the significance of the suppressed evidence against the totality of the trial evidence. No one can make this evaluation before trial. The prosecutor cannot predict with certainty how his own evidence will go in, much less the defense side of the case. As a result, there cannot be any reliable pre-trial assessment of what impact undisclosed evidence and information will have on the case as a whole. Thus, in the pretrial setting, Brady requires the government to disclose any information “‘favorable to the accused’ without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.” United States v. Safavian, 233 F.R.D. 12, 2005 U.S. Dist LEXIS 34982, at *15 (D.D.C. Dec 23, 2005) (citing United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198-990 (C.D. Cal. 1999)).

In other words, prosecutors cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. That is because prosecutors cannot be expected to be prescient, and any such judgment would necessarily be speculative on so many matters that simply are unknown and unknowable before a trial begins. The government, then, must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed with the benefit of hindsight, as affecting the outcome of the trial. Information is favorable to the accused if it relates to guilt or punishment and tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses. *Id.* at *15-*16. See also United States v. Acosta, 357 F. Supp. 2d 1228, 1239-40 (D. Nev. 2004); United States v. Price, 566 F.3d 900, at 913-14, (9th Cir. 2009).

Obtaining adequate discovery from the State is an arduous process. Seldom, if ever, does the simple filing of a routine (1) Request for Notice of Intent to Use Evidence, (2) Request for Bill of Particulars, and (3) Rule 16 Discovery Demand result in production by the State of the discovery it is required to produce. In contentious cases, there is an ongoing battle, requiring supplemental discovery demands, motions to compel, and often one or more pretrial conferences or hearings to resolve discovery issues.

The Defense Pretrial Investigation

Understand the Elements of each and every Criminal Charge

Prior to undertaking a pretrial investigation, it is important for the defense attorney to assemble, review, analyze, and fully understand the jury instructions that set forth the elements of each criminal charge contained in the indictment. These jury instructions, together with those governing potential defenses the accused may have, constitute the legal framework through which the evidence will be analyzed if the case goes to trial. And if the case is resolved short of trial, it is the legal framework that sets the stage for plea negotiations. A review of these jury instructions will give the defense attorney ideas of what to look for when conducting his pretrial investigation of the case.

Conduct a Comprehensive Factual Investigation

After reviewing and analyzing applicable jury instructions, the next step taken in pretrial investigation is to gather and review as much evidence that the State has available to it. Criminal cases are fact driven. What this means is that in order a client to win at trial, the jury must be provided a factual basis that supports a reasonable theory of innocence. In order to present those facts, the defense attorney needs to comb through the details of what every witness claims to have observed, what the physical evidence taken from the crime scene or the accused tells us, and what evidence needs to be challenged. This is accomplished initially in four ways: (1) through the discovery process outlined above; (2) by litigating pretrial motions; (3) by visiting the alleged crime scene and speaking with potential witnesses; and (4) through the use of expert witnesses.

You would be surprised how many times an expert witness has enabled us to uncover facts previously unknown by either the prosecution or the defense. A classic example occurred in a Portage County, Ohio case where a scientist from the Ohio Bureau of Criminal Investigation (BCI) removed and analyzed a plastic bed liner taken from our client's truck and concluded it contained large stains of "human blood." We had an independent laboratory re-analyze those stains with more conclusive testing and discovered that the stains at issue were not derived from human blood, but in fact human "sweat." DNA testing was unable to yield any conclusive results about the identity of the person who left the stains, but ultimately our client was acquitted of the attempted rape and murder charges that resulted from what was later determined to be an extremely flawed criminal investigation. Depending on what is discovered in pretrial discovery the defense attorney may want

to focus the defense investigation on targeting the credibility of a single witness most damaging to the defense. An example of this occurred in the defense of William Berry II, a Columbus man charged in a death penalty murder case. The primary witness against our client was a man located at the scene of the crime, who identified our client as the killer. At trial, we accused this witness of covering up for the real shooter. We targeted our defense investigation on this man's background, visited his neighbors at every place he ever lived, and found out that he had told several other versions about what happened on the evening of the murder to several others. Not one of those other versions implicated our client. We also discovered this witness had a reputation for dishonesty, and even "dated" one woman for 6 years without ever bothering to tell her he was married to another. We brought this out at trial, and as a result the jury acquitted our client of all charges. In other cases, we have won not guilty verdicts and even pretrial dismissals as the result of information discovered about prosecuting witnesses during our defense investigation.

Develop a Reasonable Theory of Innocence

After careful review of all the available evidence against his client, and while conducting a factual investigation of the witnesses and evidence associated with the case, the defense attorney must evaluate potential theories of innocence. To be successful at trial, a theory of innocence must meet two requirements: (1) it must be reasonable, and (2) it must be consistent with as much of the known evidence as possible. The defense theory must be reasonable in order to support a reasonable doubt; and it must be as consistent with as much known evidence as possible in order for it to be believable. As the defense attorney develops and refines his theory of innocence, he will be in a better position to target his investigation of the evidence and witnesses against his client in a more meaningful way – a way that supports a reasonable and believable doubt about his client's guilt.

Pretrial Motions

Generally

Rules 12 and 47 of the Ohio Rules of Criminal Procedure govern the filing of pretrial motions. The types of pretrial motions that can be filed include: motions to compel discovery; motions for grand jury transcripts; motions for a change of venue; motions to suppress evidence on the grounds it was unconstitutionally collected; motions to sever (meaning to grant separate trials); motions to challenge the reliability of ex-

pert opinion testimony (Daubert motions); motions to dismiss based on speedy trial, double jeopardy, defects in the indictment, or other grounds; motions in limine to challenge the admissibility of specific pieces of evidence; and a host of other grounds. Several of these types of motions are discussed below.

Time Requirements for Discovery Motions

Rule 7(E) of the Ohio Rules of Criminal Procedure require requests of a Bill of Particulars to be filed within 21 days after arraignment; Rule 12 (E) requires Requests for Notice of Intention to Use Evidence must be filed at arraignment, or “as soon thereafter as is practicable”; and Rule 16(M) requires Demands for Discovery to be filed within 21 days after arraignment. Motions to Compel Discovery can be made as late as 7 days prior to trial, unless otherwise ordered by the court.

Time Requirements for Motions to Suppress

Importantly, Rule 12(C) of the Ohio Rules of Criminal Procedure requires all other pre-trial motions, including Motions to Suppress, to be filed within 35 days after arraignment, unless otherwise ordered by the court. This 35-day deadline is often critical. Although most judges in the Franklin County Court of Common Pleas do not routinely enforce this deadline, some occasionally will. And common pleas judges in many surrounding counties routinely enforce this deadline and will overrule an otherwise meritorious motion to suppress on the basis that it was not timely filed. The bottom line is that in many criminal cases, meeting this 35 day deadline can be critical.

Time Requirements for Statutory Speedy Trial Motions

One exception to the 35-day requirement is the deadline to file a motion to dismiss based on a violation of the statutory speedy trial rights of the accused. This type of speedy trial motion need only be filed prior to trial.

Motions to Suppress

A motion to suppress evidence requests the trial court to issue a order excluding evidence from the trial, usually on the basis that it was collected in violation of the constitutional rights of the accused. For example, if an accused was arrested illegally (without warrant or probable cause), and searched by the police immediately after his arrest, then the evidence found during that search should be suppressed because it resulted from a violation of his Fourth and Fourteenth Amendment rights. There

are many types of motions to suppress that can be filed. Motions to Suppress can be based, for example, on illegal stops, illegal detentions, illegal arrests, illegal searches, or improper questioning. An attorney for an accused may want to ask the Court, for instance, to exclude a statement or confession that he made to the police. This can be based on a number of reasons such as resulting from an illegal stop or arrest, or that it was involuntarily given, or made while in custody in violation of his Miranda rights.

Daubert Motions

Defense attorneys can also file motions to challenge the admissibility of scientific, technical, and specialized expert testimony on the grounds that it does not meet the reliability requirements set forth in both Rule 702(C) of the Ohio Rules of Evidence, and Daubert v. Merrell Dow Pharms., Inc., 509, U.S. 579, 589 (1993). In Daubert, the Supreme Court held that the trial court “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” The Ohio Supreme Court has applied the Daubert reliability standards to an analysis under Rule 702(C) of the Ohio Rules of evidence. Miller v. Bike Ath. Co., 80 Ohio St. 3d 607, 611-12 (1998).

Rule 702(C) of the Ohio Rules of Evidence requires expert witness testimony to be based “on reliable scientific, technical, or other specialized information.” In determining whether an expert’s opinion is reliable under Rule 702(C), the court must determine whether the expert’s conclusion is based on scientifically valid principles and methods. Valentine v. Conrad, 110 Ohio St. 3d 42 (2006). The Valentine court stressed the importance of the trial court’s “gatekeeper” role in making this determination.

Because even a qualified expert is capable of rendering scientifically unreliable testimony, it is imperative for a trial court, as gatekeeper, to examine the principles and methodology that underlie an expert’s opinion. Daubert identified a series of specific reliability inquiries that apply in the context of the “hard” or quantitative sciences. These factors include, but are not limited to: 1) whether a theory or technique can be or has been tested; 2) known error rates; 3) peer review and publication; and 4) general acceptance in the field. This is not an exclusive list because the factors a court considers must fit the facts of each particular case.

Ohio courts also apply the Daubert reliability requirements to expert witnesses with technical or specialized, rather than scientific, knowledge – adopting the rationale set forth by the U.S. Supreme Court in Kumho Tire Co. v. Carmichael, 527 U.S. 137 (1999)

that the reliability analysis adopted in Daubert should also apply to experts with other types of technical or specialized knowledge. Thus, in Ohio expert witnesses must always meet the reliability standards of Rule 702(C) of the Ohio Rules of Evidence and Daubert in order for their testimony, opinions, or test results to be admissible in any criminal case.

In cases where the prosecution is relying on expert testimony of a medical, scientific, technical, or specialized knowledge, the question of whether the reliability (and therefore admissibility) of this evidence could or should be challenged is one that the defense attorney always considers.

Evidentiary Hearings on Pretrial Motions

Rule 47 of the Ohio Rules of Criminal Procedure allows, in appropriate cases, for a court to determine and rule on pretrial motions without evidentiary or even oral hearing. However, if a motion to suppress evidence raises claims supported by factual allegations, which, if true, would justify relief, or if there is a factual conflict between the position of the prosecution and the accused, then the trial court is required to conduct an evidentiary hearing in order to resolve those conflicts and rule on the motion prior to trial. A motion based on conclusory statements alone is insufficient to warrant an evidentiary hearing. Thus, in order for an accused to be entitled to a hearing, the written motion must not only state that an evidentiary hearing is requested, but also set forth the motion's legal and factual bases with particularity to put the prosecution and trial court on notice of the legal and factual issues to be decided.

Common Defenses

In nearly every case, the defense attorney will, while reviewing discovery and investigating the case, settle on a theory of innocence to be presented to the jury if the case goes to trial. This is an ongoing process, and final decisions about it may not be made until right before trial. Defenses can include: (1) our client was there, but the crime charged was not committed; (2) our client was there, but someone else did it; (3) our client was not there, so we do not know what happened, but there is a reasonable doubt about our client's guilt because: (a) the police investigation was not thorough; (b) the state's witnesses cannot be trusted; and/or (c) the state's forensic evidence is not reliable; (4) accident; (5) lack of intent; (6) self-defense, including possible "battered Woman's syndrome"; (7) entrapment; (8) duress; (9) necessity; (10) involuntary Intox-

ication (voluntary intoxication is not a defense in Ohio); (11) blackout; (12) Insanity; or (13) statute of limitations. Different types of offenses often have unique defenses. For example, in a sex case, the defense may be that the alleged victim consented to the sexual conduct. In other words, the defense may be that the accused had sex with the alleged victim, but argue that the so-called victim consented to it.

A defense lawyer needs to evaluate the best defense for each case by applying his experience, creativity, talent, and skill. Because every case is different, you cannot use a cookie-cutter approach. Each case is a new war, with different battles, often requiring a different approach. No case can be defended the same way, and the defense attorney must recognize this as he prepares for trial. In each case however, our approach is to use our factual investigation to develop a reasonable and believable theory of innocence, and then connect with jury passionately and persuasively about it -- from jury selection to opening statement; when examining witnesses; and in closing argument.

Pretrial Conferences

After arraignment, the trial court will likely schedule one or more pretrial conferences. The purpose of a pretrial conference can be to resolve discovery disputes, determine whether evidentiary hearings are necessary to rule on pretrial motions, discuss plea negotiations, or schedule pretrial deadlines and jury trial date. Some courts hold all pretrial conferences on the record in the presence of the accused. Other courts hold them off the record, in the judge's chambers, and out of the presence of the accused. In most cases, however, the accused is required to attend – even if he is placed in the courtroom while legal counsel attends in chambers.

Intervention In Lieu of Conviction

In Ohio, under Section 2951.041 of the Ohio Revised Code, an accused can be eligible to receive treatment in lieu (instead) of conviction if the criminal behavior was caused by drug or alcohol use, mental health issues, or intellectual disabilities. Under this statute, an accused can file a motion asking the trial court to put a stop to the case and substitute a treatment plan in lieu of prosecution. If the trial court grants the motion, and the accused completes the treatment plan, then the case is dismissed.

Eligibility for treatment through Intervention In Lieu of Conviction is available for a whole host of fourth and fifth degree felonies, including theft offenses, felony nonsup-

port offenses, unauthorized use of a motor vehicle, passing bad checks, forgery, misuse of a credit card, fourth and fifth degree felony drug possession cases, and fifth degree felony drug trafficking charges, to name a few. It also is now available to certain repeat offenders. It is not available to persons charged with first, second, and third degree felonies – unless the prosecutor is willing to reduce to charge to a lesser offense. Nor is it available to persons charged with offenses of violence.

Plea Bargain or Trial

One of the biggest decisions an accused must make is whether to enter into a plea bargain with the prosecution. Plea agreements have become more and more common, so much so that about 95% of defendants in the federal system end up resolving their case by plea bargain as opposed to a trial. In Ohio, the percentage is even greater.

PLEA BARGAIN

One of the biggest decisions an accused must make is whether to enter into a plea bargain with the prosecution. Plea bargaining is a method used for disposing of criminal cases, and is an agreement between the accused and the prosecutor in which the accused agrees to plead guilty or no contest in exchange for the prosecutor's agreement to: (1) reduce a charge to a less serious one; (2) dismiss one or more charges; and/or (3) recommend to the judge a lesser sentence, such as probation or reduced term of imprisonment.

Plea agreements have become so common that in the federal system 95% of those accused end up resolving their case by plea bargain. In many state courts, the percentage is similar. In Ohio, for example, according to statistics from the Ohio Supreme Court, only 2.5% of criminal cases in common pleas courts were resolved by going to trial. In Franklin County, the percentage was even lower – with only 2.1% of felony criminal cases going to trial. The overwhelming majority of the remaining 97.9%, most likely nearly 95%, were resolved by plea bargain. Most people are stunned by the numbers. But the trial rate has been declining for decades. In 1980, for example, 11.2% of all felony criminal cases in Ohio went to trial.

The reason an accused person may want to negotiate a plea bargain is to avoid the potential adverse consequences of a trial. The reason a prosecutor may want to negotiate a plea bargain can be twofold: (1) to save time, and (2) to avoid the risk of a trial loss.

A felony criminal trial can take days, weeks, or in the rare case even a month or more. It involves a tremendous amount of pretrial preparation time. A plea bargain can be negotiated in much less time. Also, prosecutors hate to lose. If a prosecutor believes a defense attorney is focused on preparing for trial, demanding more pretrial discovery, filing pretrial motions requiring responses and possible evidentiary hearings, and exploiting weaknesses in their case, then they will be much more motivated to resolve the case on terms more favorable to the accused.

The accused can gain bargaining leverage several ways. One way is by: (1) diligently and aggressively preparing for trial; and, (2) demonstrating you are ready, willing and able to successfully try the case. Your focus should be to convince the prosecutor that his case is weak, that he is going to have to work hard even pretrial, and that he likely be unsuccessful at trial. Prosecutors see criminal defense lawyers who rarely, if ever, take a case to trial, let alone prevail. Hiring one of those is a sure path to disaster. Those attorneys do not fight hard for discovery, do not aggressively pursue pretrial litigation, and at the end of the day put their client in a position where they must choose between either; (1) accepting a bad plea bargain; or (2) going to trial with an unprepared lawyer. It is like being between a rock and a hard place. And those clients will almost never be able to resolve the case on favorable let alone acceptable terms. When the prosecutor recognizes you are prepared and will not hesitate to go to trial, you are in a better position to successfully settle the case if it is in your best interest to do so.

The second way to gain bargaining leverage is by preparing an understandable, and hopefully even sympathetic, explanation about how and why you ended up facing felony criminal charges. It requires the defense attorney to truly get to know and learn about the details of your life and about the facts giving rise to the offense. It is a mitigation strategy focused on damage control. And it is directed at controlling the narrative about why you are deserving of a much lesser punishment than the typical defendant facing the same or similar charges. In many cases it makes sense to pursue both the Aggressive Defense and the Damage Control strategies simultaneously.

TRIAL

If you do go to trial, you will most likely want a trial by jury. Your chances of acquittal are almost invariably better with a jury. But not always. There is the occasional rare case where a bench trial is preferable. In my experience, however, most judges have

an occupational bias and skepticism towards defendants that makes them less able to fairly consider whether the prosecution has proved their case beyond a reasonable doubt.

Criminal trials are conducted in the following stages: (1) selection of a jury; (2) opening statements; (3) the prosecution's evidence; (4) the defense evidence; (5) the prosecution's rebuttal evidence; (6) closing argument; (7) the trial judge's instructions to the jury; and (8) the jury's deliberations. The order of those stages is governed by Section 2945 of the Ohio Revised Code, but is generally in the order presented above. The trial judge has the power to allow the presentation of evidence out of order, and can control the mode and order of examining witnesses and presenting evidence.

Every single word that your defense attorney speaks during trial should be directly related to your theory of innocence. This includes every single question asked of prospective jurors during jury selection; every sentence delivered in opening statement; every question asked on cross examination of the prosecution's witnesses; every question asked on direct examination of your witnesses during the defense case; and every word spoken in closing argument. This singular focus on your theory of innocence reinforces its credibility and believability, and increases your chances of obtaining an acquittal.

Selection of a Jury

Rule 24 of the Ohio Rules of Criminal procedure sets forth the procedures involved in the selection of a jury. Prior to the actual jury selection process the judge will have given the prospective jurors preliminary instructions, explaining that the purpose of the process is to give each of the lawyers an opportunity to talk to them, to try to determine whether they can be fair, without any preconceived notions or outside attitudes that might affect their decision in the case. It is a process that not only gives the lawyers an opportunity to talk with the prospective jurors, but for the prospective jurors to talk to the lawyers. For that reason, jury selection is a two-way street. While the prosecution and defense are evaluating the prospective jurors, they are also evaluating you. The portion of the jury selection process where the lawyers get to ask the prospective jurors questions is called *voir dire*, derived from old French and Latin for "to speak the truth." From my experience there are three fundamental principles about juror bias that apply in each and every case. First, all jurors have outside attitudes

(bias) that can and will affect their view of the evidence, and ultimately, their decision in the case. Second, it is the life experiences of each prospective juror that cause the bias. Third, your goal is to discover what those jurors' experiences have been and then to assume the probable. During this process you should also try to educate (indoctrinate) the prospective jurors about the legal principles that support your theory of innocence, and about some of the facts that you will rely on to support your case during trial. Your ability to do this will vary from county to county and judge to judge.. In Ohio, there are 12 jurors selected for the trial of a felony criminal case. After conducting voir dire of the prospective jurors, each side gets to excuse four members of the panel for almost any reason "without cause." In addition, each side gets to excuse any juror "for cause" if during the voir dire process that juror answered questions in a way that showed he or she could not be fair and impartial.

Opening Statement

Opening statements are the attorneys' opportunity to present to the jury a summary of what they expect the evidence will show at trial. Because the prosecution has the burden of proof, it goes first. The defense goes second. A good defense opening statement allows the jury to see the evidence through the eyes of the accused. It is a compelling story about how an innocent man became wrongfully accused. It lays out the facts supporting the defense theory of innocence, educates the jurors about the law, and simplifies the issues they need to decide. The defense attorney should use opening statement to enhance his own credibility and to build trust with the jury. For that reason, opening statement must also admit any weaknesses in the defense case, albeit in the light most favorable to the defense theory of innocence. In most cases, I try to set forth the facts supporting our theory of innocence with as much detail as possible. But not always, because we may need to be flexible depending on how sure we are about how the evidence will unfold at trial. Some scholars contend that after opening statements but before hearing any evidence, between 65% to 80% of jurors not only make up their minds about the case, but in addition, in the course of the trial, do not change it. Other scholars disagree, and support the proposition that most jurors reach a tentative decision only at the end of the trial, after closing arguments. My experience is that most jurors do not make up their minds until after closing argument, but that many do make up their minds after opening statements before hearing any of evidence. For that reason, I believe the more detail you can add in opening statement to the facts supporting your theory of defense, the more credibility you will have with

the jury, and the greater chance you will have for an acquittal.

The Prosecution's Evidence

Again, because the prosecution bears the burden of proof, they get to present their case first. They do this by calling witnesses to testify about what they say and heard, and to lay the foundation for the presentation of any physical evidence taken, for example, from the scene of the alleged crime. Your attorney gets to confront and cross-examine these witnesses. Cross examination is an art that is developed by trial attorneys over years of study and practice. It is fact driven, meaning that the quality of your defense attorney's examination will be, in major part, a product of how much time, effort, and success, he has had in his pretrial investigation of the case.

There are two primary types of cross examination: (1) destructive cross examination; and (2) constructive cross examination.

Destructive cross examination is focused on discrediting a witness's testimony or character in order to question its reliability. This can be accomplished in several ways. The first way is to discredit the witness' reason for testifying by questioning his or her motive, bias, prejudice, or interest. The second way is to discredit the reliability of the witness' perception (ability to see or hear) or memory. A third way to question is by prior inconsistent statements. And a fourth way is to impeach the witness with prior criminal conduct, bad acts, or reputation for dishonesty or untruthfulness.

But not all cross examination is destructive. Constructive cross examination can also be used to bring out favorable facts to support your theory of innocence. You can use leading questions during cross examination of the prosecution's witnesses to reemphasize the strengths of your case, including portions of his or her testimony that may corroborate what one or more of your witnesses are expected to say.

The Defense Evidence

After the prosecution rests his case, your attorney will then have the opportunity to make a motion, pursuant to Rule 29 of the Ohio Rules of Criminal Procedure, for a judgment of acquittal. This motion asks the trial judge to rule that the evidence produced by the prosecution, even if believed, is not sufficient to convict you. In cases where the prosecutor has overcharged the case, this motion is used to obtain a dis-

missal of those charges. In other cases, when, for example, the prosecution's complaining or primary witness or witnesses did not testify as expected, this motion can be used to obtain a complete dismissal of all charges. When the evidence, if believed, is sufficient for the jury to consider it, then the defense will have an opportunity to put on evidence in support of its case, its theory of innocence. Many times, the defense will not call any witnesses or present any evidence. This is generally a "reasonable doubt" defense. In this type of defense your attorney may argue, for example, that since you were not there, you do not know what happened. You therefore have no evidence to present, but that the evidence presented by the prosecution is not reliable enough to prove its case beyond a reasonable doubt. Your defense attorney will then spend his entire closing argument focusing on the weaknesses in the State's case.

On the other extreme you may present a number of witnesses that support your theory, you may testify yourself, and you may even present character witnesses to testify that you have a good, strong character as a law abiding citizen, and would never become involved in the kind of conduct alleged in the indictment. The decision about what evidence, if any, evidence to present in your defense again is often a product of your defense attorney's pretrial investigation.

The Prosecution's Rebuttal Evidence

If you do present evidence in your defense, the prosecutor, again since he bears the burden of proof, has the opportunity to present rebuttal evidence. Sometimes a prosecutor will hold back evidence that he may otherwise present during his case in chief to use in rebuttal, particularly if he is firmly convinced you are going to testify on your own behalf.

Closing Argument

The closing argument is the defense attorney's final opportunity to give perspective, meaning, and context to the evidence presented at trial – and to transform it into a compelling story that will persuade the jury that either (1) the prosecution's proof is not such that any juror would be willing to "rely and act on it" in a decision of the "most important of her or her own affairs," or (2) there is a reasonable possibility that you are actually not guilty. Every closing is a finely crafted verbal work of art. Closing arguments are heard not read. And they represent the highest form of the modern day trial lawyer's art – the art of the storyteller. The defense attorney must command the

attention of the jurors, use the courtroom as his stage, and use every device at his command to tell your story. It is probably the single most important tool your lawyer has to deliver an acquittal. The defense attorney's task is to arm each juror with information and argument supporting a NOT GUILTY verdict, and to persuade them to marshal those facts and arguments in opposition to jurors who may hold a different view.

The Trial Judge's Instructions to the Jury

After closing arguments the trial judge will instruct the jury about the presumption of innocence, the burden of proof, the definition of "proof beyond a reasonable doubt," the elements of each and every charge contained in the indictment, the possible verdict forms, and their conduct in the jury room. A critical part of every defense attorney's job is to draft and submit jury instructions to the trial judge for submission to the jury. Rule 30 of the Ohio Rules of Criminal procedure requires the defense instructions to be filed no later than "the close of evidence, or at such earlier time during trial as the court reasonably directs." Your defense lawyer will also review the prosecution's proposed instructions and instructions drafted by the trial judge. Before finalizing the jury instructions, most judges will meet with both your lawyer and the prosecutor to allow each attorney to voice his objections and suggested revisions. It can be reversible error for the trial court to fail to give a jury instruction if it is a correct statement of law and relevant to the factual and legal issues in the case, so long as (1) the requested jury instruction is filed with the trial court prior to the close of the evidence, and (2) your attorney properly objects on the record before the jury retires for its deliberations.

The Jury's Deliberations

After receiving the trial judge's instruction about the law of the case, the jurors will retire to the jury room, select a foreperson, and begin deliberations. The jurors will be instructed to confer with each other in their deliberations and to give careful consideration to the views expressed by each juror. After a jury foreperson is selected, the bailiff will submit the exhibits and verdict forms to the foreperson for the jury's consideration. The jurors will be instructed that if and when all 12 jurors agree on a verdict, the foreperson should advise the bailiff, who will then advise the judge and return them to the courtroom to read the verdict to all of the parties.

During deliberations there are special procedures for answering juror questions, and

to deal with a deadlocked jury unable to reach a unanimous verdict. Your defense attorney will advise you about those procedures. When the jury returns with a verdict, you will feel your heart pound in anticipation of the verdict. Hopefully, the outcome will be a positive one.

Sentencing

In the event you have resolved your case by plea bargain, or were convicted of one or more criminal offenses at trial, then you will be sentenced to the offense to which you plead or of which you were convicted. All penalties for Ohio felony crimes are set forth by statute in the Ohio Revised Code. Section 2901.03 of the Ohio Revised Code abolished common-law crimes in Ohio, and states that a person's conduct is not a crime in Ohio unless a statute provides two elements: (1) a prohibition or duty, and (2) a penalty for violation. A trial court is required to impose the sentence provided by statute and has no power to substitute a different sentence. Penalties for felony offenses are found mainly in the Title 29 of the Ohio Revised Code. Purposes, principals, guidelines, and procedures for imposing sentences for felony offenses are covered in Chapter 2929 of the Ohio Revised Code.

PURPOSES AND PRINCIPLES

The sentence must comply with the purposes and principles of sentencing set forth in Section 2929.11 of the Ohio Revised Code. Section 2929.11(A) provides that the purposes of sentencing are to punish the offender and protect the public "using the minimum sanctions that the court determines accomplish the purposes without imposing an unnecessary burden on state or local government resources."

FACTORS TO CONSIDER IN EVERY CASE

The court must consider whether the conduct is more serious or less serious than that normally constituting the offense, and whether the offender is more likely or less likely to commit future crimes. With respect to whether the conduct is more serious, the court must weigh the factors under Section 2929.12(B) of the Ohio Revised Code against the factors showing that the conduct is less serious under Section 2929.12(C).

Section 2929.12(B) sets forth "more serious" factors:

- Injury exacerbated by victim's physical or mental condition or age;

- Victim suffered serious physical, psychological, or economic harm;
- Offender held public office or position of trust and the offense related to the office or position;
- Offender's occupation obliged the offender to prevent the offense or to bring those committing it to justice;
- Offender's reputation, occupation, or office facilitated the offense or is likely to influence others' conduct;
- Offender's relationship with the victim facilitated the offense;
- Offender acted for hire or as part of organized criminal activity;
- Offender was motivated by prejudice based on race, ethnicity, gender, sexual orientation, or religion;
- In a domestic violence or assault case, offender is a parent or other custodian, victim was a family or household member, and offense was committed in the vicinity of one or more children other than the victim.

Section 2929.12(C) sets forth “less serious” factors:

- Victim induced or facilitated the offense;
- Offender acted under strong provocation;
- Offender did not cause or expect to cause physical harm to person or property;
- Substantial grounds exist to mitigate the offender's conduct, even if they don't constitute a defense.

In deciding whether the offender is likely to commit future crimes, the court has to weigh the factors under Section 2929.12(D) against the factors under Section 2929.12(E). Section 2929.12(D) sets forth the following factors that tend to show the offender is more likely to commit future crimes:

- Offense was committed while on bail, awaiting sentencing, on community control or PRC, or after PRC was unfavorably terminated;
- Offender has a history of criminal convictions or juvenile delinquency adjudications;
- Offender has not responded favorably to sanctions previously imposed in adult or juvenile court;
- Offender shows a pattern of alcohol/drug use related to the offense and doesn't

- acknowledge it or refuses treatment;
- Offender shows no genuine remorse.

Factors that show the person is less likely to commit future crimes are set forth under Section 2929.12(E) of the Ohio revised Code:

- Offender has no prior juvenile delinquency adjudication;
- Offender has no prior adult conviction;
- Offender led a law-abiding life for a significant number of years;
- Offense was committed under circumstances unlikely to recur;
- Offender shows genuine remorse.

LENGTH OF POSSIBLE PRISON TERMS

The general rule is that the court must select a definite term from the ranges set forth in Section 2929.14(A) of the Ohio Revised Code:

Felony of the First Degree: 3, 4, 5, 6, 7, 8, 9, 10, or 11 years in prison.

Felony of the Second Degree: 2, 3, 4, 5, 6, 7, or 8 years in prison.

Felony of the Third Degree: 9, 12, 18, 24, 30, or 36 months in prison for most, but 12, 18, 24, 30, 36, 42, 48, 54, or 60 months for a few F3s.

Felony of the Fourth Degree: 6 to 18 months in one month increments.

Felony of the Fifth Degree: 6 to 12 months in one month increments.

There are certain offenses that carry indefinite prisons terms, such as aggravated murder, murder, certain sex offenses, human trafficking, and crimes with a sexual motivation.

MANDATORY VERSUS OPTIONAL PRISON TERMS

The Ohio Legislature makes prison mandatory for certain types of offenses. Most mandatory prison terms are set forth in Section 2929.13(F) of the Ohio Revised Code, which includes the following:

- Aggravated Murder or Murder
- Assaults against peace officers
- Any F-1 or F-2 when the offender has a prior conviction for aggravated murder,

murder, or an F- 1 or F-2

- Certain sex offenses
- Certain drug offenses
- Certain traffic offenses

There are many other offenses, some listed in section 2929.13(F) and others that are not listed, that require mandatory prison terms. The length of the mandatory prison term is usually selected from the range set forth in section 2929.14(A), but for certain offenses and specifications there are specific prison sentences that must be imposed. For example, if a firearm is used, displayed, brandished, or otherwise indicated and the offense has a firearm specification under Section 2941.145, then there is a mandatory three year prison sentence.

When a prison sentence is not mandatory, then the judge has discretion to impose a prison term and/or community control sanctions (probation). For most F-1s and F-2s, and for certain F-3s, there is a presumption “in favor” of prison. See Section 2929.13(D)(1) of the Ohio Revised Code. The presumption can be rebutted by the defense if certain factors are met, and in that case the prosecutor has the right to appeal the sentence. See Sections 2929.13(D)(1) and 2953.08(B) of the Ohio Revised Code. For most F-3s, there is no presumption one way or the other, so the judge has discretion to impose prison or probation. See Section 2929.13(C) of the Ohio Revised Code.

For certain types of F-4s and F-5s, it is mandatory that the court sentence the offender to community control (probation) if:

- The most serious charge is F-4 or F-5;
- Not an offense of violence; and
- No prior felony conviction at any time or prior misdemeanor offense of violence within 2 years. See Section 2929.13(B)(1)(a)(i)-(iii) of the Ohio Revised Code.

Like most things favorable to defendants under Ohio law, there are exceptions, so mandatory doesn't necessarily mean mandatory. The judge can still impose prison, even if probation is “mandatory,” if he makes certain findings under Section 2929.13(B)(1)(b)(i)-(xi), or follows the procedure set forth in § 2929.13(B)(1)(c).

CONSECUTIVE VERSUS CONCURRENT SENTENCES

The general rule under Ohio law is that there is a presumption that prison terms be served concurrently (meaning at the same time). See Section 2929.41(A) of the Ohio Revised Code. However, the court has discretion to impose consecutive sentences if he finds it necessary to protect the public or punish the offender, that consecutive sentences are not disproportionate, and finds one of the following:

- Crimes were committed while awaiting trial/sentencing, under sanction, or under PRC;
- Harm so great or unusual that a single term does not adequately reflect the seriousness of the conduct; or
- Offender's criminal history shows that consecutive terms are needed to protect the public. Ohio Rev. Code § 2929.14(C)(4).

Furthermore, there are circumstances where the court has no discretion and must impose consecutive sentences. For instance, firearm and other specifications carry consecutive terms that must be served before the underlying term for the offense. See Section 2929.14(C)(1)(a)-(c) of the Ohio Revised Code.

COMMUNITY CONTROL (PROBATION)

When the sentencing court is not required to and chooses not to impose a prison sentence, the court may impose a sentence of only time served or a simple fine, but will usually put the defendant on "community control," with conditions involving one or more community control sanctions. Community control sanctions are what used to be called conditions of probation. Under Ohio law, probation is now called "Community Control." See Section 2929.15 of the Ohio Revised Code. Community control sanctions can include residential or non-residential sanctions. Non-residential sanctions can include basic or intensive probation supervision (usually simple reporting), or more stringent requirements such as community service, educational or training requirements, conditions of employment, counseling, drug and/or alcohol treatment, or even house arrest or daily reporting. See Section 2929.17 of the Ohio Revised Code. Residential sanctions are the most restrictive and can include local jail time (up to 6 months), half-way house, or time at a community-based correctional facility (CBCF) for up to 6 months. See Section 2929.16 of the Ohio Revised Code. The court can impose other conditions of community control reasonable related to the conduct involved in the criminal offense.

The duration of community control can range from 1 to 5 years. Violations of community control can result in the imposition of more restrictive sanctions, such as residential sanctions, extension of the time served under community control up to the maximum of 5 years, or imprisonment.

FINANCIAL SANCTIONS (FINES AND COURT COSTS)

In addition to prison or probation, there is also the possibility of financial sanctions. These can include fines, court costs, pay-for-stay jail costs, cost of prosecution and investigation, and restitution. The amount of a fine depends on the level of the offense and whether there is a specific provision that would call for a specific fine to be imposed. For example, the maximum fine for an F-1 offense is \$20,000. Generally, the judge has discretion to fine the offender anywhere from \$0 to \$20,000. However, if the F-1 is a drug offense, the judge must impose at least a \$10,000 fine, up to the maximum of \$20,000. Even when fines are “mandatory,” you may be excused from having the fine imposed if you are financially unable to pay (indigent). Section 2929.18(B)(1) of the Ohio Revised Code provides that if you file an affidavit of indigency prior to sentencing and the court determines you are unable to pay, then the court must not impose the fine. Inability to pay can also be grounds to avoid imposition of court costs.

PRE-SENTENCE INVESTIGATION AND SENTENCING HEARING

A sentencing hearing is required in all felony cases before the judge can impose a sentence. See Section 2929.19 of the Ohio Revised Code. At sentencing, you, your lawyer, the prosecutor, the victim or victim’s representative, and any other witness the court allows, may present evidence relevant to sentencing. The court must consider those statements, the record, a pre-sentence investigation report, if any, and a victim impact statement, if any, before imposing sentence. It is important to note that a pre-sentence investigation and report (PSIR) is required if the person is going to be sentenced to community control or probation. See Section 2951.03 of the Ohio Revised Code and Rule 32.2 of the Ohio Rules of Criminal Procedure.

The purpose of the PSIR is to provide the sentencing judge with more information about your history and characteristics, family and social background, prior record, circumstances surrounding the offense, and a risk assessment. Even when a PSIR is not required, there can be reasons for wanting one anyway, such as when one plans to file an application for judicial release under Section 2929.20 or in the hope of qualifying

for a transitional control program under Section 2967.26. Likewise, there can be many reasons not to request a PSIR, such as when more damaging information would likely be presented to the court.

The PSIR is not the only way relevant information can be gathered and presented to the sentencing court for consideration before the sentencing hearing. It is common practice in all federal criminal cases, and, for experienced lawyers in state cases, to file a sentencing memorandum. The purpose of the sentencing memorandum is to provide relevant information to the judge, in a persuasive and positive way, to mitigate the sentence. A well-drafted and supported sentencing memorandum can make a huge difference in the ultimate outcome at sentencing.

Conclusion

Here are some final thoughts about what attorney you might want to consider hiring to guide you through this process. Hiring a really good, first-class criminal defense attorney can make all the difference in the world. Finding such a lawyer, however, is not always easy. In central Ohio alone, there are literally hundreds of lawyers who call themselves criminal defense attorneys. If you ask them, they will all tell you they are very good, great, even the best, at defending felony criminal cases. Here are a few thoughts that might help you make a wiser choice.

The best criminal defense attorneys are those with a proven and verifiable record taking cases to trial and, at least on occasion, winning acquittals. The reason is twofold. First, the prosecutor will know during the plea negotiation process that if the case is not resolved short of trial then your attorney will be ready, willing, and able to try the case and even win an acquittal. That gives you a strong edge at negotiating a better plea, if that is the route you choose to take. Second, if your case does go to trial, then your lawyer will have a much better knowledge and experience base about what it takes to win.

You would be stunned to discover the number of so-called criminal defense attorneys who have never ever tried a felony criminal case to verdict, let alone have won a single acquittal. Those lawyers have no real chance at favorably resolving your case. The real difficulty is getting potential lawyers to honestly reveal their record to you. Good criminal defense lawyers are proud of their record, and can give you a list of some

of the important cases they have tried and won. Mediocre ones will not. While it is important to remember that prior wins cannot predict future results, an attorney with an established record is nearly always in a better position to favorably resolve the case, whether through plea negotiations or trial.

I would like to give you some final thoughts about legal fees. Be wary of any lawyer who asks for a “retainer,” “minimum fee,” or “base fee” and presents it to you as though it will or could be the total fee for the entire case from beginning to end. After carefully reading the attorney’s written fee agreement (which will often come later in the form of a letter), you will likely discover one of two scenarios.

The first involves the payment of a “retainer” that will be an advance payment against an hourly billing arrangement.” In this situation, you will soon discover that the “retainer” you hoped might be the total fee is only a small advance payment for bills that will be calculated hourly (based on the number of hours spent on the case multiplied by the attorney’s hourly rate), that will be submitted to you monthly. In that case, your “retainer” may well be used up quickly, and you will face continued monthly billings that will increase in amount dramatically as the case progresses towards trial. In this situation, if you will not be able to afford additional monthly payments, tell the lawyer up front. Honest about legal fees is a two-way street, and is essential to a sound attorney-client relationship.

The second involves the payment of a “minimum fee” or “base fee.” In this scenario, you will likely discover that the minimum or base fee is not the total fee, not even close; that additional “investigatory and preparation fees” will come due with additional billings; and that the entire fee may well grow exponentially as the case progresses. In this situation, you may have to deal with the situation where you: (1) have paid the attorney a significant amount of money; (2) have additional bills you are unable to pay; and, (3) have a lawyer threatening to withdraw half way through the case unless he is promptly paid the balance of the billings that are due. Unless you are able to negotiate a cap on the total fees due under this type of arrangement, I would avoid it entirely.

In criminal cases, hourly billings are common in two situations. The first is when there is an ongoing criminal investigation, and the lawyer cannot be reasonably expected to quote an exact fee without either being unfair to you or to him. The second

is where the case is extremely complex, either involving a large number of witnesses, or documents, or perhaps novel legal issues. In either of these situations it is understandable why the defense attorney would insist on billing your hourly based on the time he and other lawyers in his firm may have to spend on the case. However, it is almost always better for the client to negotiate a flat or fixed fee for the entire case, with a significant up-front payment, and then additional payments over a four to six month period thereafter.

Contact Koenig & Long

Need help with your case? Please feel free to contact us for a free consultation.

Koenig & Long, LLC
Criminal & DUI Defense Attorneys
5354 N. High Street
Columbus, Ohio 43214

(614) 454-5010

888-454-5070

columbuscriminaldefenseattorney.com