Crimes are divided into 2 general classifications: felonies and misdemeanors. A misdemeanor is a lesser offense, punishable by community service, probation, fine and/or incarceration in the local jail. A felony is a more serious offense, punishable by death or imprisonment in the state prison, also called a penitentiary. The offenses we will be discussing in this course will be felonies. In Georgia, the Superior Court has jurisdiction over felonies and the State Court has jurisdiction over misdemeanors, as well as torts and most other civil actions.

When a crime is committed, the police investigate, arrest, and “book” a suspect. Booking accomplishes two things: (1) it processes the suspect into the system (e.g., personal info, info about alleged crime, background check of criminal history, photo, fingerprint, search, personal property confiscated and suspect put in holding cell in police station or cell in local jail) and (2) it is an informal charge. A suspect cannot be held very long without a formal charge, so at this point, the District Attorney’s office gets involved in formally charging the defendant.

The manner in which a defendant is formally charged depends on the type of offense this person allegedly has committed. In the case of a misdemeanor, the defendant is charged by an Information -- this is an order issued after a preliminary hearing in front of a judge or magistrate, and is based on an affidavit filed by a prosecutor.

If the offense is a felony, the charge is by an Indictment, handed down by a Grand Jury. A Grand Jury proceeding is the prosecution’s show -- the defendant has very few rights -- for instance, the defendant may not be represented by an attorney, the prosecution presents its evidence under fairly loose rules, and the role of the judge is abbreviated -- jurors can ask questions and issue subpoenas, and the grand jury can investigate on its own. D does retain the 5th a. privilege against self-incrimination. The GJ then decides whether or not to return a “true bill,” which means that it thinks there is enough evidence to go to trial. Another way of stating this is that the GJ believes there is “probable cause” to believe that this defendant may have committed this crime.

This is a very low standard, nothing at all like the “beyond a reasonable std.” that applies at the trial itself. In fact, there is simply a burden of persuasion, no real BOP. There is a common expression that a GJ will indict a ham sandwich. This means that it is fairly easy to get an indictment. (roughly, 90-95% of GJ proceedings result in a true bill). An indictment is the green light for trial.

Generally, the Indictment or Information must charge every element of the offense --i.e., every part of the crime that the prosecution must carry the burden of proving. (This is what we will be focusing on in this course).

There are exceptions to this in some jurisdictions for what are usually called “affirmative
defenses.” These are defenses which the defendant must initially raise but which the prosecution must bear the burden of disproving, though the prosecution need not have stated them in the charge. (These are usually the justification defenses (self-defense), and in some jurisdictions the excuse defenses as well (insanity)).

After the Indictment (or Information), there is an Arraignment – a short, informal hearing before a judge where the defendant appears and enters a plea.

If the defendant pleads guilty, a date will be set for sentencing. Sometimes a short trial may be held to determine the sentence.

If the defendant pleads not guilty, a date is then set for trial. Either after the Indictment or Information, or at the Arraignment, the D may “demur” or “move to quash” the formal charge on any of several grounds:

(1) D may claim that the formal charge is defective for failure to state one or more of the elements (facts that establish the crime) that the prosecution must prove,

(2) the crime charged is not a violation of criminal law in this jurisdiction, or

(3) there is insufficient evidence to convict the defendant of this crime – i.e., the GJ erred.

If the court accepts the defendant’s demurrer, it will dismiss the charge. The rule of double jeopardy (under the Fifth Amendment of the U.S. Constitution) which prevents a D from being tried twice for the same offense, will not bar the prosecution from trying again (since the rule against double jeopardy generally bars prosecution only after an actual adjudication of the facts of the case, and in any event does not raise any bar to re-prosecution, at least until a petit jury is sworn).

If the court accepts the demurrer, the prosecution may appeal to a higher court to reinstate the charge (one of the few times that the prosecution can appeal an adverse decision); if the court rejects the demurrer, the defense ordinarily may not appeal to a higher court to dismiss the charge at this point, because the defendant will then have a chance to be heard. If the defendant is later convicted, a defective charge can be a ground of appeal at that time.

About 10-30% of the cases that reach the arraignment stage are dismissed, either because of a successful motion to quash or because the prosecution decides there is insufficient evidence to go forward to trial. Of the remaining 70-90% of cases, the defendants (either before or after they are formally charged) usually agree to plea guilty to a lesser charge in return for the prosecution dropping the higher charge or recommending or acquiescing in a lighter sentence. This process is called plea bargaining, or in the vernacular “copping a plea.” So, most criminal cases never go to trial.

Often when there is a plea bargain, the defendant will be required to “allocute.” This
is a formal statement in which the D specifically admits guilt and explains in detail what he/she did and for what reason. This removes any doubt of the D’s guilt before sentence is passed.

In those that do go to trial, the next step is to impanel a jury before the trial gets underway. In felony cases, the jury (petit) consists of 12 people whose verdict must be unanimous. (A Grand Jury consists of more people -- 16-23 under both the federal and Georgia structures; in other states it varies between 12 and 23 - (majority vote) and if there is a jury trial in a misdemeanor case, it can be a jury of 6).

Next, the judge will entertain pretrial motions. (The jury is not present for these). These motions usually attack the sufficiency of the indictment and the evidence. Usually, most pretrial motions address the suppression of evidence -- here the lawyers for both sides argue over what evidence should or should not be admitted.

After this, the actual trial gets underway and there are opening statements in the presence of the jury. The District Attorney (DA) opens first and will briefly review the facts of the crime and the evidence the jury will hear, and will then try to frame the issues in terms of what it hopes to prove. The defense is then allowed a rebuttal, but may reserve its opening (rebuttal) until the conclusion of the DA’s case.

The DA represents the State (a U.S. Attorney represents the federal government if the case is federal) and he/she then presents the case against the defendant. At the end of the DA’s case, the defense may move for a “directed verdict.” This is a motion to the judge to direct the jury to find in favor of the defendant because no reasonable jury could find the defendant guilty of the crime charged on the evidence presented. There is no directed verdict of guilty. Why? Because this would improperly invade the province of the jury, which hears the facts, and it would deprive the defendant of his/her right to be heard and the right to a jury verdict.

If the motion for a directed verdict (DV) fails, which it usually does, the defense presents its case. At the end of the case there are final motions (usually a renewal by the defense of its earlier motion for a DV. If the judge previously denied the defense’s motion for a DV and the defense then presented its evidence, it may have waived its right to appeal the earlier denial of the motion for DV. So by remaking the motion, the defense preserves its right to appeal on this ground). Also, if the jury returns a guilty verdict, the defense can move for a judgment not withstanding the verdict (JNOV, from the latin “non obstante veredicto”), but in order to do so, the defense must have previously made a motion for a DV.

Also at the end of the defendant’s case, there will be closing arguments by both the government and the defense. These will sum up the case that each side has made and what each thinks the evidence has shown.
There will then be a post-trial conference to review the jury instructions. The jury will not be present, but the attorneys for both sides and the judge will be. To help the jury, the trial court instructs them on the meaning of the law -- statutes and on any judicially created law concerning elements of the offenses and any defenses that might apply. If the prosecution disagrees with the proposed instructions, it can appeal before the jury is instructed. This is called an “interlocutory appeal,” which is an appeal made before the conclusion of the trial to request guidance on a particular issue that has arisen during the trial. Such an appeal does not determine the outcome of the case. Only in very rare cases will a court of appeals accept an interlocutory appeal. If it does do so and it agrees with the prosecution, it may tell the trial judge how to instruct the jury. Usually, the defense does not get to make an interlocutory appeal if it disagrees with the jury instructions. **Why not?** Because if the defendant is convicted, the defense then gets to appeal the jury’s verdict and it can then attack the jury instructions or the interpretation of the statute underlying the instructions. If the prosecution loses, it does not generally get to appeal the verdict.

After the parties agree on the jury instructions, the jury then retires to the jury room with these instructions to deliberate. Note that to convict the defendant of a felony in most jurisdictions, the 12 jurors must be unanimous in their decision. The verdict is either guilty (conviction) or not guilty (an acquittal). An acquittal means that the government failed to prove all the elements of the offense beyond a reasonable doubt, or there was an affirmative defense that was proven by the defense.

If the D is convicted, the defense may appeal the verdict on any of several grounds such as admission of improper evidence, improper exclusion of relevant evidence, judicial bias, violation of constitutional law, and that old favorite, ineffective assistance of counsel. If the appellate court disagrees with the defendant (who is now the appellant), it will affirm the jury’s verdict. The appellant then may appeal to a higher court, if that is an option (there is an automatic right of appeal in capital cases). If the court of appeals agrees with the appellant, and finds that the appellant’s rights were violated, or that a properly instructed jury could not reasonably have convicted the defendant on the evidence before it, it may reverse the conviction and dismiss the charges. This is the best possible outcome for the appellant, because he/she walks, and the doctrine of double jeopardy prevents the government from retrying that person for the same offense.

The appellate court may also reverse the trial court’s decision and remand (send it back to the lower court) for a whole new trial -- e.g., with proper jury instructions, or it may direct the court to make a factual determination that is not inconsistent with the findings of the appellate court. On occasion, an appellate court may agree with the appellant that the trial court committed an error, but it may decide that the error was harmless and therefore will not affect the outcome. This is a terrible outcome for the appellant, because the court is saying “yeah, you were right about that point, but so what?”

If the prosecution loses, it usually does not get to appeal after the trial phase.
concludes. This would be double jeopardy but in very rare cases, the prosecution may appeal if it can prove fraud by the defense or clear evidence of jury tampering, and the prosecution may appeal the sentence if it believes that the judge erred in imposing too lenient a sentence.

Relatively few criminal cases are tried (somewhere in the range of 10-15% and even less for misdemeanor cases) but for those cases that do go to trial, the odds greatly favor conviction -- about 2/3 of felony cases end in a conviction and the percentage is higher for misdemeanors. A person who is convicted of a crime then faces punishment at the hands of the state or federal government. This is bottom line in any criminal trial.