

presumption of innocence is merely "a doctrine that allocates the burden of proof in criminal trials."<sup>24</sup> Also, it is important to note that the protection against excessive bail does not apply to the states, so states can basically set bail at any level.

## Pretrial Release Hearing

The Constitution does not specify whether bail should be set in a separate hearing, but numerous Court decisions seem to suggest that a separate hearing is warranted. In *Stack v. Boyle*, the Court stated that as part of the bail determination, judges should consider "the nature and circumstances of the offense charged, the weight of the evidence against [the accused], the financial ability of the defendant to give bail and the character of the defendant."<sup>25</sup>

It is also not clear, assuming that a bail hearing is required, whether a more adversarial proceeding is necessary. Since bail is set once charges have already been filed, it would seem that, at a minimum, counsel should be provided. In fact, in *United States v. Salerno*,<sup>26</sup> the Court concluded that a federal preventive detention (see below for more on preventive detention) statute that provided for counsel, evidence presentation, and cross-examination was acceptable, but it did not state whether such rights should be afforded to the accused in every bail hearing. Thus, the question of what type of bail hearing is required, if any, remains unanswered. In some situations and in certain jurisdictions, the bail decision is made during another hearing.

## Mechanisms for Release (or Continued Detention)

There are three accepted methods for either releasing defendants prior to their trial or keeping them locked up. The first is bail, which occurs when the court collects a deposit from the individual being released in order to ensure that he or she appears for later scheduled hearings. Next, some arrestees are released on their own recognizance, which means that they simply promise to show up when required. Finally, in recent years, the courts have adopted a policy of what is called "preventive detention" for certain individuals; this involves a calculation as to the arrestee's level of dangerousness and flight risk, denying release to those individuals who are likely to pose a threat to others or who are likely not to appear at their scheduled hearings. Preventive detention is a mechanism for continued detention, in contrast to bail or release on recognizance.

**Bail** Bail has been defined formally as follows: "To effect the release of an accused person from custody, in return for a promise that he or she will appear at a place and time specified and submit to the jurisdiction and judgment of the court, guaranteed by a pledge to pay to the court a specified sum of money or property if the person does not appear."<sup>27</sup> Some common types of bail are described in Box 11-3.

Federal law provides that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death."<sup>28</sup> Most states have adopted similar language in their constitutions; California's constitution, for example, provides that "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evidence or the presumption great."<sup>29</sup>

The bail decision is sometimes problematic because more often than not, judges set bail according to the nature of the offense in question, not according to the accused's ability to pay.<sup>30</sup> A frequent result is that indigent defendants languish in jail cells until their court dates if they cannot afford to pay.

If the defendant cannot afford to post bail, he or she may turn to the services of a professional bail bondsman, who collects a fee (usually a percentage of bail) and then posts a court as required.

"To effect the release of an accused person from custody, in return for a promise that he or she will appear at a place and time specified and submit to the jurisdiction and judgment of the court, guaranteed by a pledge to pay to the court a specified sum of money or property if the person does not appear."<sup>27</sup> It is the money or property pledged to the court or actually deposited with the court to effect the release of a person from legal custody.

**bail bondsman** A person, usually licensed, whose business it is to effect release on bail for people charged with offenses and held in custody by pledging to pay a sum of money if the defendants fail to appear in court as required.

### BOX 11-3 Common Types of Bail and Alternatives to Bail

- *Cash bail.* The defendant or someone else on the defendant's behalf pays the full bail amount out of pocket.
- *Secured bail.* The defendant must pay a specified amount or post security in order to be released. Security can include property.
- *Unsecured bail.* The defendant is not required to pay money but must sign a bond guaranteeing that he or she will return for future court appearances. A fine is imposed if the defendant fails to appear.
- *Conditional bail.* In lieu of paying cash, the defendant is ordered to satisfy some specific condition (e.g., complete drug treatment) in exchange for being released before trial.
- *Release on recognizance.* The defendant is not required to pay money but must sign a bond guaranteeing that he or she will return for future court appearances. ■

bond so that the accused can be released. If, for instance, bail is set at \$20,000, the bond agent might charge a fee of \$2,000 and post the rest. If the accused shows up at trial, the bondsman keeps the fee and gets his money back from the court; if the accused fails to show up, then the bondsman loses the amount posted. In order to avoid such an eventuality, bondsmen employ bounty hunters, whose job it is to catch the accused and bring him or her before the court. Many bondsmen also maintain third-party insurance to protect them from loss.

There is a misperception that bail bonds agents can, with impunity, do whatever it takes to apprehend those who skip bail, a perception that has been fueled by popular "bounty hunter" programs on cable television. In response to concerns that bail bondsmen have been given too much authority, some states have adopted legislation to restrict their activities.

The bondsman system gives power to private citizens to determine who gets released or who stays in jail. It discriminates against the poor because the decision is based on the accused's ability to pay a fee in order to get a bond: Those who can pay the fee effectively buy their freedom, even if only temporarily; those who cannot pay stay in jail. The courts sit on the sidelines while the whole bail bond process plays out.<sup>31</sup>

Because of these problems, a number of alternative bail release mechanisms have been developed. One example is called "deposit bail," a system in which the defendant pays a percentage of the bail amount to the court. When the defendant appears in court, the fee is returned, less a percentage of that which covers administrative costs.

**Release on Recognizance** Courts have also experimented with releasing people on their own recognizance. **Release on recognizance** means that the accused is released with the assumption that he or she will show up for scheduled court hearings. For obvious reasons, this method of pretrial release is reserved for those individuals posing a minimal risk of flight.

New York City's Manhattan Bail Project was the first significant effort to explore the possibilities of release on recognizance. This program, administered by the Vera Institute, focused on indigent defendants who, according to carefully set criteria, posed a minimal flight risk. Among the criteria considered were what the previous convictions were, what the nature of the offense was, whether the accused was employed, and whether the accused had roots in the community (e.g., a family to go back to). The program was a resounding success; only 1.6% of those individuals recommended for release intentionally failed to appear at court.

#### Library Extra

11-7 Pretrial Release: Key Policy Issues and Research

**release on recognizance**  
The unsecured pretrial release of an accused person with the assumption that he or she will show up for subsequently scheduled court hearings.

The results of the Manhattan Bail Project prompted other cities around the country to adopt similar programs. In 1996, Congress passed the Federal Bail Reform Act, which provided that any person charged with a noncapital offense “be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines . . . that such a release will not reasonably assure the appearance of the person as required.”<sup>32</sup>

An important feature of the new legislation is that bail was to be considered as only one of many options to ensure the accused’s appearance at trial. Among the other options were restrictions on travel and association as well as other conditions that would ensure the appearance of the accused.<sup>33</sup> The Bail Reform Act also provided that when bail was to be used, the money should be deposited with the court, not with a bail bondsman.

The Bail Reform Act further provided that “the judge shall . . . take into account the available information concerning: the nature and the circumstances of the offense charged, the weight of evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.”<sup>34</sup>

### Preventive Detention

Growing concern over crimes committed by defendants out on pretrial release prompted some reforms. In 1970, for example, the District of Columbia passed the first statute regarding **preventive detention**, which authorized denial of bail to “dangerous” persons charged with certain offenses for up to 60 days.<sup>35</sup> Then Congress passed the **Federal Bail Reform Act of 1984**,<sup>36</sup> which authorized judges to revoke pretrial release for firearm possession, failure to comply with curfew, or failure to comply with other conditions of release. The act also permitted detention for up to ten days for an individual who “may flee or pose a danger to any other person or the community.”<sup>37</sup> The Bail Reform Act of 1984 permits pretrial detention for *more than* ten days with certain individuals, if it is deemed that no pretrial release condition “will reasonably assure the appearance of the person as required and the safety of any other person and the community,” then indefinite detention is acceptable. For a detention of this nature to conform to Fourth and Eighth Amendment restrictions, a hearing must be held to determine whether the case “involves a serious risk that the person will flee; [or] a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or jury.”<sup>38</sup>

### Bail Decision

As indicated already, the Constitution does not guarantee the right to bail. Some people are denied bail, and others are granted bail. What criteria influence the judge’s decision? Three factors are typically considered: the accused’s flight risk, the accused’s level of dangerousness, and the accused’s financial status.

**Flight Risk** In *Stack v. Boyle*, the Supreme Court declared that the purpose of bail is to ensure the accused’s appearance at trial:

Like [the] ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.<sup>39</sup>

preventive detention  
 A statutory authorization to  
 deny bail to dangerous persons  
 charged with certain offenses for  
 up to 60 days.  
 Federal Bail Reform Act  
 The U.S. legislation that  
 authorized judges to revoke  
 pretrial release for firearm  
 possession, failure to comply  
 with curfew, or failure to comply  
 with other conditions of release  
 and that permitted detention for  
 up to ten days of an individual  
 who “may flee or pose a danger  
 to any other person or the  
 community.”

proof of an element that the other does not, so a person who is found guilty of joy-riding can also be charged with the crime of car theft, although from a practical standpoint this almost never occurs.<sup>59</sup>

### Learning Objective 6

Summarize the purpose of arraignment and the different defendant pleas.

#### Web Extra

11-3 Electronic Discovery Blog

#### *nolo contendere*

A plea to a criminal charge that means “I do not desire to contest the action.” While it resembles a guilty plea, it is different in the sense that it may not be used against the defendant in any later civil litigation arising from the act that gave rise to the criminal charges.

#### allocution

The defendant’s explanation to the judge, usually in open court, of exactly what he or she did and why. An allocution is documented in court records and can be used against the defendant in related civil proceedings.

### Learning Objective 7

Describe the discovery process and the types of discovery.

#### discovery

The process whereby both parties to a case learn of the evidence that the opposition will present.

## ARRAIGNMENT

Once a person has been formally charged, he or she will be arraigned. The purpose of arraignment is to formally notify the defendant of the charge lodged against him or her. At arraignment, the defendant enters one of three pleas: guilty, not guilty, or *nolo contendere*. A plea of guilty, which can be entered for a number of reasons, is an admission by the defendant of every allegation in the indictment or information. For example, the defendant could simply elect to “fess up” and admit responsibility, or the defendant may plead guilty because of a plea agreement with the prosecution.

A plea of not guilty is fairly self-explanatory—the defendant formally contends that he or she did not commit the crime in question. A plea of not guilty will result, especially for serious crimes, in a full-blown criminal trial. Finally, a plea of *nolo contendere*, which means “I do not desire to contest the action,” resembles a guilty plea but is different in the sense that it may not be used against the defendant in any later civil litigation arising from the acts that gave rise to the criminal charges. Also, in some jurisdictions, if the defendant enters a plea of *nolo contendere*, the court may not ask the defendant whether he or she committed the crime in question, whereas with a guilty plea, the defendant is required to allocute. **Allocution** is the act of the defendant explaining to the judge exactly what he or she did and why; it is documented in court records and can be used against the defendant in related civil proceedings.

## DISCOVERY

**Discovery** is the process whereby both parties to a case learn of the evidence that the opposition will present. Rule 16 of the Federal Rules of Evidence provides that the defendant may, on request, “discover” the following from the prosecution: (1) any written statements or transcriptions of oral statements made by the defendant that are in the prosecution’s possession, (2) the defendant’s prior criminal record, and (3) any documents, photographs, tangible items, results from physical and mental evaluations, and other forms of real evidence considered material to the prosecution’s case. The term *materiality* refers to whether evidence is consequential to the case, that is, whether it is capable of influencing the outcome of the case. If the defense requests items in the second or third category, then the prosecution will be granted “reciprocal discovery,” where it learns of the defense’s evidence. Relevant portions of Rule 16 that govern the prosecution’s disclosure of evidence are reprinted in Box 11-4.

Federal Rule 16 is actually restrictive. Several states permit even more discovery, such as the names and addresses of all persons known to have any information concerning the case. This means that the prosecution must provide the defense (and vice versa) with a list of all individuals likely to give testimony at trial.

Discovery ends where strategy begins; that is, while both sides are given great latitude in terms of learning what evidence the opposition intends to use, strategy does not need to be shared. For example, the method of argument that the prosecution wishes to use in order to convince the jury of a particular fact is not subject to discovery, and neither is the order in which the defense seeks to call witnesses. Strategy is also referred to as “work product,” and work product is off limits and not part of the discovery process.

**BOX 11-4 Examples of Prosecution Discovery**

**INFORMATION SUBJECT TO DISCLOSURE**

- *Defendant's oral statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

- *Defendant's written or recorded statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following.

- *Defendant's prior record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

- *Documents and objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items.

- *Reports of examinations and tests.* Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment. ■

Source: Rule 16, Federal Rules of Evidence.

**Forms of Discovery**

Discovery is part of the pretrial process and takes place in the hours and days leading up to the criminal trial. However, if a new witness becomes available during the course of a trial, then discovery can take place later in the criminal process. There are three types of discovery: discovery by the defense, discovery by the prosecution, and nonreciprocal discovery.

**Discovery by the Defense** Discovery should benefit the defense more than the prosecution. After all, the prosecution presents the state's case against the defendant, so it's only sensible that the defense learn the nature of the prosecution's case. Generally, though, the prosecution has more information because it has to prove beyond a reasonable doubt that the defendant committed the crime; the defense, by contrast, needs only to raise reasonable doubt in the minds of the jurors. As an example of defense discovery, the Supreme Court has held that the prosecution must provide the defense with a list of witnesses who will testify in rebuttal to the defendant's alibi or defense.<sup>60</sup>

**Discovery by the Prosecution** Discovery by the prosecution is relatively limited because of the constitutional rights enjoyed by criminal defendants. For example, the defense cannot be compelled to provide the prosecution with incriminating information, particularly in the form of statements and admissions.

What if the defense wishes to present an alibi at trial or assert a defense to criminal liability? Should the prosecutor be permitted to discover this information? The Supreme Court faced the alibi issue in *Williams v. Florida*.<sup>61</sup> Florida had a "notice of alibi" statute that provided that the defendant had to permit discovery of alibi defenses coupled with a list of witnesses who support it. The Court found that this type of discovery does not violate the Fifth Amendment because it is not self-incriminating.

The *Williams* decision extends to other defenses as well. For example, if the defense intends to argue that the defendant is not guilty by reason of insanity, then the prosecutor needs to be notified in advance of this intention. Alternatively, if the defense intends to

argue that the defendant acted in self-defense, then the prosecution should be notified. The reason for requiring this notification is that it provides the prosecutor with an opportunity to plan its argument to the contrary.

One item concerning witnesses that the defense is *not* required to share with the prosecutor is whether the defendant will testify. In one case, the Supreme Court declared unconstitutional a state statute that required defendants, if they were to testify, to do so immediately after the prosecution rested its case.<sup>62</sup> The Court held that the statute violated the Fifth Amendment's privilege against self-incrimination and diminished the role of defense counsel's ability to make such determinations as to when witnesses will testify.

In another prosecution discovery case,<sup>63</sup> the defense attempted to call to the stand a private investigator whose testimony would have cast doubt on the prosecution's case. The trial judge ruled that the investigator could not testify until the prosecution received portions of the investigator's pretrial investigative report, and the Supreme Court upheld this decision. Plaintiff Nobles argued that this decision infringed on his right to compulsory process, namely, to call the investigator to the stand, but according to the Court, "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."<sup>64</sup> The defense argued that being forced to supply information from the investigator's report violated attorney-client privilege, but the Court countered by concluding that attorney-client privilege was basically waived when the defense decided to have the investigator testify about the contents of his report.

Another prosecution discovery issue concerns whether the testimony of a witness about whom the defense does not inform the prosecution can be excluded. In *Taylor v. Illinois*,<sup>65</sup> the defense called a witness who had not been on a witness list supplied to the prosecution before trial, and the trial court excluded the witness's testimony, citing a violation of discovery procedure. The defendant appealed, arguing that exclusion of the witness's testimony violated the compulsory process clause of the Sixth Amendment. The Supreme Court sided with the trial court's decision.

**Nonreciprocal Discovery** With few exceptions, discovery is a two-way street: The defense must supply the prosecution with certain information and vice versa. For example, when the defense wants to assert an alibi, it must supply the prosecution with that alibi, and the prosecution must in turn supply the defense with a list of witnesses who will testify in rebuttal to the alibi. On the other hand, there are some circumstances where the prosecution is required to supply information to the defense but the reverse is *not* required. Examples of nonreciprocal discovery include the prosecutor's duty to disclose exculpatory evidence and to preserve evidence.

First, if the prosecution obtains evidence suggesting that the defendant is not guilty, it needs to inform the defense of this fact either before or well into the trial.<sup>66</sup> In *Brady v. Maryland*,<sup>67</sup> the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material either to guilt or to punishment*, irrespective of the good faith or bad faith of the prosecution."<sup>68</sup> Later cases have interpreted this to mean that the prosecution's constitutional duty to disclose exculpatory evidence hinges on whether such evidence would have a "reasonable probability" of changing the outcome of the case.<sup>69</sup> If the evidence would not have a reasonable probability of changing the outcome of the case, failure to disclose it will not violate due process.

As for preserving evidence, the prosecution cannot destroy exculpatory evidence in an effort to gain a conviction, and to do so would be a violation of due process. For the defense to convince the court that the prosecution destroyed exculpatory evidence, it must demonstrate three facts: (1) that the evidence was expected to "play a significant role in the