

Answers to Frequently Asked Questions About Police Encounters and Criminal Prosecutions



© James Publishing

CONTENTS

I. Introduction

II. Frequently Asked Questions

1. Don't the police need a warrant to search?
2. What should I do if I'm pulled over by the police?
3. What are my rights if I'm arrested?
4. What should I do if I'm arrested?
5. What happens after an arrest?
6. What is bail?
7. How is bail determined?
8. Can I make a deal?
9. What rights do I give up if I agree to a plea bargain?
10. Can you get the evidence against me thrown out?
11. How do you determine whether a police search or seizure of evidence violated my rights?
12. What does guilty "beyond a reasonable doubt" mean?
13. Should I testify?
14. How can a criminal defense attorney help me?

III. In Conclusion



I. Introduction

An encounter with the police – no matter how seemingly mild or innocuous – can rattle even the most confident individual. In my experience, this unease stems in large part from the fact that few people know what their rights are in dealing with police, or how to assert those rights, or what to do if an innocuous encounter should evolve into a full-blown arrest.

I have found that the surest way to ease this anxiety is to get informed. The more you know, the better equipped you will be to deal with any situation involving the police or the larger criminal justice system.

Here, then, are the answers to the questions I am asked most often in my capacity as a criminal defense lawyer. If you would like more information about any of these topics, I would be happy to talk with you.

FAQ

II. Frequently Asked Questions

1. Don't the police need a warrant to search?

The general rule, as established by the Fourth Amendment to the Constitution, is that the police must have a warrant in order to conduct a search. However, there are many exceptions to this general rule. The police do not need a warrant to conduct a search when, for example:

- ➔ They see contraband or evidence of criminal activity in **plain view**.
- ➔ The search is conducted **incident to a lawful arrest**.
- ➔ **Emergency (or "exigent") circumstances** exist (e.g., An officer may enter your home to conduct a search if he is in hot pursuit of a suspect, or to protect the safety of someone inside the home if the officer reasonably believes that person to be in danger).
- ➔ You **consent** to the search. If the police ask you for permission to search, this means they have no warrant and likely have no other grounds to justify the search. You should refuse all requests for permission to search.

2. What should I do if I'm pulled over by the police?

If you are pulled over by the police, the first thing to do is take a deep breath. Remain calm. Then:

- ➡ Produce your driver's license, registration and proof of insurance when you are asked to do so.
- ➡ Answer any "identification" questions. Otherwise, remain silent. Don't try to make small talk or engage the officer.
- ➡ Get out of the car only if the officer tells you to do so. If you are asked to exit the vehicle, the officer may pat you down for weapons.
- ➡ If you are asked to consent to a search – of your purse/backpack, the interior of the car, the trunk – say no.
- ➡ If the officer writes you a ticket (a traffic citation), sign it. Don't try to fight the ticket there on the street.



3. What are my rights if I'm arrested?

If you are taken into custody, you have rights under the Fifth and Sixth Amendments to the Constitution. These rights are encapsulated in what is known as the "*Miranda* warnings" or "*Miranda* rights." Specifically:

- ➡ You have the right to remain silent.
- ➡ You have the right to consult with a lawyer and to have the lawyer present during questioning by the police.
- ➡ If you cannot afford a lawyer, one will be provided to you, at no cost to you.

These rights apply any time you are taken into custody. A person is “in custody” when he is arrested *or* when his freedom of movement is significantly restricted, in a manner similar to an arrest. Basically, if a reasonable person would not have felt free to walk away, then you are in custody, and these rights apply.

4. What should I do if I’m arrested?

Strange as it may sound, you have to speak up in order to exercise your right to remain silent. Silence – even prolonged silence – is not enough. You must unambiguously announce your intention to remain silent. No special words are required, but you must make your decision to be quiet and your request for an attorney plainly known. You must say, for example:



- ➡ “I wish to remain silent, and I want a lawyer”; or
- ➡ “I am not going to answer any questions until my lawyer gets here”;
or
- ➡ “I do not want to talk. I want a lawyer.”

Regardless of the words you use, once you have asserted your right to remain silent, *be silent*. Say nothing else until your attorney arrives.

5. What happens after an arrest?

If you are arrested, you will be taken to the police station and “booked.” Booking is the process of identifying you and recording your arrest. You will be photographed and fingerprinted, and an officer will ask you a series of questions, including questions about where you live, where you work, and your immigration status.

After booking, you will be taken to court for an initial appearance before a judge or other judicial officer (with, perhaps, a stop along the way for you to be interviewed by a bail agency). At this initial court appearance, the judge



will review the charges to determine whether there is probable cause to hold you. In addition, you are entitled to:

- ➔ Notice and explanation of the charges against you.
- ➔ A copy of the charges.
- ➔ Notice of your legal rights, especially your right to remain silent and your right to counsel.
- ➔ Representation by counsel or appointment of counsel.
- ➔ A bail determination.
- ➔ Setting of a preliminary hearing date.



At the conclusion of this hearing, you may be released on bail or detained to await further proceedings.

At your next court appearance (your “preliminary hearing” or “arraignment”), you will enter a plea of “guilty” or “not guilty.” Following your arraignment, your case will proceed to trial, unless the matter is resolved before the trial by means of a plea bargain.

6. What is bail?

“Bail” is the legal term for the conditions upon which a defendant will be released from custody. The conditions of your release may include the posting of collateral and the promise to obey court-ordered restrictions on your liberty. Depending on your circumstances, different types of bail might be available to you:



- ➡ An **unsecured bond** – With this type of bail, you are released on your own recognizance (ROR) or on a bond with a face amount, but requiring no cash deposit and no collateral except for your signature. If you fail to appear or otherwise violate your bail conditions, you are liable to the court for the amount of the bond.
- ➡ A **cash bond** – With a cash bond, the court requires the deposit of cash (either the full amount or a percentage) as collateral to secure your release.
- ➡ A **surety bond** requires the signature of a third party; the court also may require the third party to post collateral to secure your release.
- ➡ A **real property bond** – Putting up your home or the home of a family member or friend can be an attractive option, if available to you. It allows you and your family to keep your cash for living expenses and legal fees; it also makes a strong argument in favor of your release because if you fail to appear for trial you – or your family member or friend – will lose your home. This gives you a powerful incentive to return to court.



7. How is bail determined?

Your bail will be set at hearing, at or immediately after your initial appearance before a judge. Your attorney will present facts in your favor, including, as appropriate, your employment history and status; your personal situation; your family's need for your income and health benefits; and your ties to the community. In all likelihood, you will not testify.

The judge may deny bail and order “preventive pretrial detention,” if the charges against you are serious and detention is the only reasonable way to



ensure the safety of the community or a particular person. Alternatively, the judge may effectively deny bail by setting bail at an amount that is beyond your means. Either way, you will be returned to jail to await trial.

If you are released on bail, you may be released on conditions. These conditions might include:

- ➔ Travel restrictions.
- ➔ A curfew.
- ➔ A prohibition against the use of drugs and/or alcohol, along with monitoring or testing.
- ➔ Consent to warrantless, random searches of your person and home.
- ➔ Psychiatric evaluation.
- ➔ A prohibition against contacting witnesses or the victim.
- ➔ Electronic monitoring (e.g., if you are under house arrest or a travel restriction).

8. Can I make a deal?

You probably can make a deal. Whether you should is another matter.

Most criminal cases are resolved by means of a plea bargain – a deal negotiated with the prosecutor and approved by the judge – not by a jury trial. There are two types of plea bargains: A charge bargain is one in which the prosecutor agrees to dismiss or forego certain charges in exchange for your plea to other charges. A sentence bargain is one in which the prosecutor agrees to recommend a particular sentence or sentencing range. Whether either type of plea bargain is a wise decision in your case will depend on many factors, including:

- ➡ The **charges against you**.
- ➡ The **evidence against you**. What will the witnesses say? Can any of the evidence be suppressed?
- ➡ The **sentence you face** if you are convicted.
- ➡ Your **personal circumstances**, including, for example: Do you have a criminal record? Do you have a family to support? Do you want to keep the matter private and avoid a public trial?
- ➡ Your **willingness to take risks**. Juries are unpredictable. Are you willing to let a group of strangers decide your fate? Moreover, any deal you make with the prosecutor must be approved by the judge. If you make a sentence bargain, the prosecutor's recommendation is not binding on the judge, and you cannot withdraw your guilty plea if the judge deviates from the recommendation at the time of sentencing.
- ➡ Potential **collateral consequences of a guilty plea**. In the eyes of the law, pleading guilty amounts to a conviction, and you will be subject to all the collateral consequences that accompany a criminal conviction, including, possibly: immigration-related consequences; employment-related consequences; loss of professional licenses; loss of voting privileges; loss of driving privileges; loss of the right to possess firearms; and registration as a sex offender.

9. What rights do I give up if I agree to a plea bargain?

The Constitution guarantees criminal defendants certain rights. When you agree to a plea bargain, you agree to give up or “waive” these rights:

- ➔ **The right to a public trial, by a jury.** If you are charged with a crime that carries a penalty of more than 6 months’ imprisonment (i.e., a felony or a Class A misdemeanor), you have a constitutional right to a public trial, by a jury of your peers. When you agree to a plea bargain, in private negotiations with the prosecutor, you waive these rights.
- ➔ **The right to remain silent.** When you are taken into custody, you have the right to remain silent in the face of police questioning. That right extends to a criminal trial, as well. The Fifth Amendment provides that no one may be “compelled in any criminal case to be a witness against himself.” However, if you want to avoid a trial, you will have to talk. The prosecutor is not going to negotiate a plea with a defendant who refuses to give up anything in return.
- ➔ **The right to confront witnesses.** The Sixth Amendment’s “confrontation clause” protects your right to confront and challenge the witnesses against you, by cross-examining them under oath, in court. You give up this right when you agree to a plea bargain.



10. Can you get the evidence against me thrown out?

Maybe. One of the strongest tools available to a criminal defense lawyer is a “motion to suppress” evidence. A motion to suppress is a formal request to the court to toss out evidence that was obtained unlawfully, in violation of your constitutional rights.

In almost every criminal case, there is some piece of evidence that may be subject to suppression. In a drug case, for example, the drugs may have been uncovered during an illegal search. If you made statements to the police while you were in custody and you were never advised of your right to remain silent, your statements may be tossed out. If the police ignored your request for a lawyer, any statements you made in response to police questioning may be subject to suppression.

The court will hold a hearing to rule on the motion to suppress. If the court agrees that the evidence was illegally obtained, then the judge will grant the motion and suppress the evidence; depending on the nature of the evidence, this may result in the dismissal of all of the charges against you. Even if the judge denies the motion to suppress, however, the hearing can yield tremendous benefits because it gives me the opportunity to cross-examine the prosecution’s witnesses, including police officers. Cross-examination may reveal unknown facts or result in unexpected admissions by the witnesses. It also ties the witnesses to a particular version of the facts.



11. How do you determine whether a police search or seizure of evidence violated my rights?

The Fourth Amendment protects you against unreasonable searches and seizures. To determine whether the officers' actions were unreasonable, I ask my clients about the circumstances under which the officers obtained the evidence. For example, depending on the facts of your case, I might ask you:

- ➡ How did you come into contact with the police? Were you pulled over? Did the police come to your home or business?
- ➡ Were you placed under arrest? If so, were you handcuffed? Were you placed in a squad car?
- ➡ Did you say anything to the officers before your arrest? Did you say anything after you were placed under arrest?
- ➡ Where did the search take place – your car, your home or the surrounding area, your business, a public parking lot?
- ➡ Did the officers have a warrant? Did you read it?
- ➡ Did the officers ask for permission to search? What words did they use?
- ➡ Did you consent to a search? What words did you use? Did someone else consent?
- ➡ What was the nature and extent of the search? Were you frisked? Did they search the interior of the car? Did they search every room in the house? Did they open any boxes, bags, or other “containers,” e.g., a purse, backpack, or luggage?
- ➡ What items, if any, were seized? For example, did the police take your briefcase, your safe, or your computer?
- ➡ Did the officers use any type of technology to enhance their ability to observe your actions or to gain access to any area where you had a reasonable expectation of privacy?

12. What does guilty “beyond a reasonable doubt” mean?

In order to obtain a conviction in a criminal case, the prosecution must prove that the defendant is guilty “beyond a reasonable doubt.” In thinking about this concept, it may help to consider what “reasonable doubt” is not. Proof beyond a reasonable doubt is *not* proof beyond *all* doubt, as that would be an almost impossible standard to meet. “Beyond a reasonable doubt” does not mean “more likely than not,” which is the standard used in civil cases. Because more is at stake in a criminal case, more proof is required to convict. Practically speaking, “beyond a reasonable doubt” means that, after considering all the evidence, the jurors are steadfastly convinced that the charges are true and that the defendant is guilty of the crime charged.

13. Should I testify?

In almost all cases, the answer to this question is, “No.” Several interrelated factors play into this decision:

- ➡ You have a **constitutional right to remain silent**. While anything you say can be used against you, your silence cannot be used against you. The prosecutor may not comment on your refusal to testify; jurors may not infer guilt based on your silence.
- ➡ You are **presumed innocent**, until the government proves you guilty, beyond a reasonable doubt. In other words, you do not have to prove your innocence; the government has to prove your guilt.
- ➡ The **jury’s verdict must be unanimous**. The prosecution must convince all the jurors of your guilt beyond a reasonable doubt. This is a heavy burden to bear.

- ➡ **Cross-examination is a rigorous exercise**, not for the weak of heart. If you take the witness stand, the prosecutor will take advantage of every opportunity to undermine your credibility and poke holes in your version of events.

For these and other reasons, I would advise most criminal defendants not to testify. However, depending on the theory of your defense or other factors unique to your case, you might decide to take the stand. Ultimately, it's your decision. You should understand, though, that your testimony will be the focal point of the trial, and if the jurors don't believe you (for whatever reason), you will be convicted. Your credibility, or lack thereof, will carry the day, regardless of whether the prosecution has proved its case beyond a reasonable doubt.

14. How can a criminal defense attorney help me?

It's probably fair to say that most police encounters are the result of one or more bad decisions. If you are arrested, you will have a whole new set of decisions to make and questions to answer: Should I talk to the police? Should I try to make a deal? How do I handle my first appearance before a judge? What happens now? At this point, the best decision you can make is to let an experienced criminal defense attorney help you.



I can help you by:

- ➡ **Investigating the charges against you.** As part of my investigation into every case, I visit the scene of the crime; interview witnesses; review official reports and other documents; and examine the physical evidence. I look for holes in the evidence, gaps in proof, inconsistencies – any opening that might be construed as reasonable doubt.

- ➡ **Closely scrutinizing the officers' conduct.** Did the officers' conduct, in connection with your arrest and/or in gathering the evidence against you, violate your constitutional rights? Do we have grounds to file a motion to suppress and seek to have the illegally obtained evidence thrown out?
- ➡ **Standing between you and the government.** The law and procedures that govern a criminal case are complicated. Unless you have studied and trained in the law, it is impossible for you to know all of your rights or when those rights are being violated. I can act as a shield against overreaching by a zealous prosecutor, and help to ensure that you assert and guard your rights.
- ➡ **Developing a theory of defense.** Depending on the facts of your case, I might be able to argue and prove:
 - ➔ You were charged on the basis of an unreliable eyewitness identification;
 - ➔ You acted in self-defense;



- You did not have the legal intent required to commit the crime charged;
- You are a victim of police entrapment;
- Someone else did it;
- You have an alibi.
- ➡ **Representing you in front of the jury.** I can present your case to the jury on your behalf; cross-examine the prosecution's witnesses; and retain experts to counter the prosecution's experts.
- ➡ **Offering counsel.** Based on my knowledge of the law and my experience with the criminal justice system, I can offer counsel on the countless strategic decisions you will have to make as your case winds its way to a conclusion.
- ➡ **Offering comfort.** I can serve as an intermediary between you and your family and the criminal justice system. Your family will be worried about you. Having someone to call -- someone who can answer their questions -- will help to ease their anxiety.





III. In Conclusion

The Constitution affords you many rights that are intended to protect you from government overreaching and provide a counterbalance against the enormous power of the criminal justice system: The Fourth Amendment protects you against unreasonable searches and seizures. The Fifth Amendment guarantees that you cannot be compelled to be a witness against yourself (i.e., you have a right “to remain silent”). The Sixth Amendment guarantees your right to a speedy and public trial, by a jury, if you are charged with a crime that carries a penalty of more than six months’ imprisonment. The Sixth Amendment also guarantees your right to be represented by an attorney and to confront (cross-examine) the witnesses against you.

With those rights in mind, here is a short of list Dos and Don’ts for any encounter with law enforcement:



Do

- ➡ Remain calm.
- ➡ Answer “identification” questions.
- ➡ Demand to see a warrant. If one is produced, read it to make sure it accurately describes the place/time of the search.
- ➡ Pay attention to what is going on around you. Your criminal defense lawyer will want to know the details of the encounter and the words exchanged between you and the officers.
- ➡ Exercise your right to remain silent. Say only, “I do not want to talk or answer questions. I want a lawyer.”
- ➡ Call a lawyer if you are taken into custody.

Don't

- ➡ Make small talk.
- ➡ Volunteer information.
- ➡ Consent to a search.
- ➡ Make any kind of deal with the prosecutor (or, worse, the police detectives) until you have consulted with a lawyer.



I hope this information has been helpful. If I can provide legal assistance, please contact me at: