SIXTH AMENDMENT
RIGHTS IN CRIMINAL PROSECUTIONS

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SIXTH AMENDMENT—RIGHTS IN CRIMINAL PROSECUTIONS

Amdt6.1 Overview of Sixth Amendment, Rights in Criminal Prosecutions

Like with other provisions of the Bill of Rights, the application of the Sixth Amendment evolved. In considering a bill of rights in August 1789, the House of Representatives adopted a proposal to guarantee a right to a jury trial in state prosecutions,[1] but the Senate rejected the proposal, and the 1869 case of *Twitchell v. Commonwealth* ended any doubt that the states were beyond the direct reach of the Sixth Amendment.[2] The reach of the Amendment thus being then confined to federal courts, questions arose as to its application in federally established courts not located within a state. The Court found that criminal prosecutions in the District of Columbia[3] and in incorporated territories[4] must conform to the Amendment, but those in the unincorporated territories need not.[5] Under the *Consular* cases, of which the leading case is *In re Ross*, the Court at one time held that the Sixth Amendment reached only citizens and others within the United States or brought to the United States for trial, and not to citizens residing or temporarily sojourning abroad.[6] *Reid v. Covert* made this holding inapplicable to proceedings abroad by United States authorities against American civilians.[7] Further, though not applicable to the states by the Amendment's terms, the Court has come to protect all the rights guaranteed in the Sixth Amendment against state abridgment through the Due Process Clause of the Fourteenth Amendment.[8]

The Sixth Amendment applies in criminal prosecutions. Only those acts that Congress has forbidden, with penalties for disobedience of its command, are crimes.[9] Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions,[10] nor are deportation proceedings,[11] nor appeals or post-conviction

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[1] 1 Annals of Congress 755 (August 17, 1789).

[2] 74 U.S. (7 Wall.) 321, 325–27 (1869).

[3] Callan v. Wilson, 127 U.S. 540 (1888).

[4] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). *See also* Lovato v. New Mexico, 242 U.S. 199 (1916).

[5] Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922); Dorr v. United States, 195 U.S. 138 (1904). These holdings are, of course, merely one element of the doctrine of the *Insular Cases*, De Lima v. Bidwell, 182 U.S. 1 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901), concerned with the "Constitution and the Advance of the Flag". *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

[6] In re Ross, 140 U.S. 453 (1891) (holding that a United States citizen has no right to a jury in a trial before a United States consul abroad for a crime committed within a foreign nation).

[7] 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in time of peace for capital offenses committed abroad). Four Justices, Hugo Black, William Douglas, William Brennan, and Chief Justice Earl Warren, disapproved *Ross* as "resting . . . on a fundamental misconception" that the Constitution did not limit the actions of the United States Government against United States citizens abroad, *id.* at 5–6, 10–12, and evinced some doubt with regard to the *Insular Cases* as well. *Id.* at 12–14. Justices Felix Frankfurter and John Harlan, concurring, would not accept these strictures, but were content to limit *Ross* to its particular factual situation and to distinguish the *Insular Cases*. *Id.* at 41, 65. *Cf.* Middendorf v. Henry, 425 U.S. 25, 33–42 (1976) (declining to decide whether there is a right to counsel in a court-martial, but ruling that the summary court-martial involved in the case was not a "criminal prosecution" within the meaning of the Amendment).

[8] Citation is made in the sections dealing with each provision.

[9] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Britton, 108 U.S. 199, 206 (1883); United States v. Eaton, 144 U.S. 677, 687 (1892).

[10] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909); United States v. Regan, 232 U.S. 37 (1914).

[11] United States *ex rel.* Turner v. Williams, 194 U.S. 279, 289 (1904); Zakonaite v. Wolf, 226 U.S. 272 (1912).

applications for collateral relief,[12] but contempt proceedings, which at one time were not considered criminal prosecutions, are now considered to be criminal prosecutions for purposes of the Amendment.[13]

Amdt6.2 Right to a Speedy Trial

Amdt6.2.1 Overview of Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Constitution protects against "undue delay" in criminal prosecution through a series of component measures rather than through one overarching requirement of timely prosecution.[1] These serial constitutional protections, in turn, are supplemented by statutory protections.[2] First, the Due Process Clause provides a basic safeguard against extreme government delay in bringing criminal charges against a suspect,[3] although statutes of limitations are generally thought to supply the principal protection against such delays.[4] The Speedy Trial Clause of the Sixth Amendment is the next component: as interpreted by the Supreme Court, it applies to delay between the initiation of criminal proceedings (as marked by an arrest or formal charge) and conviction (whether by trial or plea).[5] Statutory time limits bolster and, at least in the case of the federal Speedy Trial Act of 1974,[6] largely eclipse, by their greater protections, the constitutional right to a speedy trial.[7] Upon conviction, the constitutional speedy trial right detaches, leaving due process and applicable criminal procedure statutes or rules to guard against unreasonable delay in imposing a sentence.[8]

In its landmark 1972 decision *Barker v. Wingo*, the Supreme Court called the speedy trial protection a "vague concept," about which "[i]t is impossible to do more than generalize" and

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[12] *Cf.* Evitts v. Lucey, 469 U.S. 387 (1985) (right to counsel on criminal appeal a matter determined under due process analysis).

[13] *Compare* In re *Debs*, 158 U.S. 564 (1895), *with* Bloom v. Illinois, 391 U.S. 194 (1968).

[1] *See* Betterman v. Montana, 578 U.S. 437, 446–48 (2016).

[2] *See id.* at 440, 446–47.

[3] *Id.* at 446–47.

[4] United States v. Ewell, 383 U.S. 116, 122 (1966) ("[T]he applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges.").

[5] *Betterman*, 578 U.S. at 439 ("We hold that the [speedy trial] guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.").

[6] 18 U.S.C. §§ 3161–3174. For a discussion of corresponding state provisions, see 5 Wayne R. LaFave et al., Criminal Procedure § 18.3(c) (4th ed. 2020) ("All but a few states have adopted statutes or rules of court on the subject of speedy trial.").

[7] *See* Betterman, 578 U.S. at 445 (noting that the Speedy Trial Act directs "that no more than 30 days pass between arrest and indictment, and that no more than 70 days pass between indictment and trial" and explaining that these "'more stringent'" statutory provisions "'have mooted much litigation about the requirements of the [Sixth Amendment] Speedy Trial Clause'") (quoting United States v. Loud Hawk, 474 U.S. 302, 304 n.1 (1986)) (internal citations omitted); *see also id.* at 8 & n.7 (citing "numerous state analogs" to the federal Speedy Trial Act which "similarly impose precise time limits for charging and trial").

[8] *Id.* at 2, 9.

which necessitates a "functional analysis."[9] Under Barker, to determine whether a delay between accusation and conviction violates the speedy trial right, the Supreme Court applies a balancing test that considers the following four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether and to what extent the defendant asserted his speedy trial right; and (4) the prejudice to the defendant caused by the delay.[10] This balancing test requires courts to evaluate speedy trial claims on an ad hoc basis and does not prescribe rigid time limits on the length of criminal proceedings.[11] The Speedy Trial Act, in contrast, sets forth two clear time limits: an information or indictment must follow within 30 days of arrest, and a trial must begin within 70 days of indictment or arraignment.[12] The Act, however, exempts numerous types of delay from these time limits, including continuances that serve the ends of justice and delays resulting from pre-trial motions.[13]

The remedy for a violation of a defendant's Sixth Amendment speedy trial right is dismissal of the charges with prejudice.[14] Courts do not have discretion to fashion less drastic remedies after finding a violation of the Speedy Trial Clause.[15]

Amdt6.2.2 Historical Background on Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Safeguards against delay in criminal prosecution predate the Magna Carta and the abandonment of trial by ordeal in England around 1215.[1] In 1166, the Assize of Clarendon described a procedure for obtaining speedy justice for accused persons arrested in a place not

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[9] Barker v. Wingo, 407 U.S. 514, 521–22 (1972); *see also* Vermont v. Brillon, 556 U.S. 81, 89 (2009) ("The speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.'") (quoting *Barker*, 407 U.S. at 522).

[10] *Barker*, 407 U.S. at 530.

[11] *Id.* at 523, 530.

[12] *See Betterman*, 578 U.S. at 445 (citing 18 U.S.C. § 3161).

[13] *See* United States v. Tinklenberg, 563 U.S. 647, 650 (2011); LaFave, *supra* note 6, § 18.3(b). Many state laws contain similar provisions about time limits and exemptions. *See Betterman*, 578 U.S. at 445; LaFave, *supra* note 6.

[14] Strunk v. United States, 412 U.S. 434, 440 (1973).

[15] *Id.* at 439 (holding that remedies other than dismissal with prejudice, such as a sentencing reduction equal to the length of the unconstitutional delay, do not fully vindicate the purposes of the speedy trial protection, including protection against the stress and disruption of prolonged accusation and the "prospect of rehabilitation").

[1] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) ("[T]he right to a speedy trial . . . has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right'; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).") (footnotes omitted); *see* Thomas Andrew Green, Verdict According to Conscience 3 (1985) ("Trial by jury, as is well known, replaced trial by ordeal after the Church in 1215 proscribed clerical participation in that 'barbaric' practice."). The ordeal was a trial procedure that sought to procure divine judgment of guilt or innocence through a physical test that, to modern eyes, resembled torture. *See* John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 43 (2009). Two principal types of ordeal were used in England before 1215: ordeal by hot iron (in which the accused was forced to grip a hot iron and was deemed innocent if the resulting wounds resisted infection) and ordeal by cold water (in which the accused was bound and submerged into cold water on a rope and was deemed innocent if he sank). *Id.* at 44.

scheduled to receive an imminent judicial visit.[2] Later, Sir Edward Coke listed speed as one of the three essential qualities of justice in his *Institutes*, a work widely read by lawyers in the American colonies.[3] Thus, the right to a speedy trial appears to have been well-established during the colonial period, and several state constitutions already guaranteed the right at the time of the Sixth Amendment's ratification in 1791.[4]

Amdt6.2.3 When the Right to a Speedy Trial Applies

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Until 1971, the Supreme Court did not clearly delineate the stage of the criminal proceeding to which the speedy trial right applied. In the 1957 case *Pollard v. United States*,[1] the Court assumed, without deciding, that the right applied to the sentencing phase of a criminal prosecution.[2] In a series of subsequent cases over the ensuing decade, the Court articulated the primary purposes of the speedy trial right,[3] held that the right applied against the states through the Due Process Clause of the Fourteenth Amendment,[4] and determined that the right applied to defendants already serving prison sentences in another jurisdiction.[5] These cases did not, however, determine which events during a criminal prosecution trigger the speedy trial right and which events extinguish it.[6]

The Court resolved the front end of this ambiguity in the 1971 case *United States v. Marion*, where it held that the speedy trial right does not attach before the initiation of criminal proceedings against the accused through an arrest or formal charge.[7] In *Marion*, the defendants complained of a three-year delay between the commission of the charged crimes

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[2] *Klopher*, 386 U.S. at 223 n.9 (the sheriffs were to send word to the nearest justice for instructions as to where to take the accused for trial) (citing 2 English Historical Documents 408 (1953)).

[3] *Id.* at 224–25 (quoting Edward Coke, The Second Part of the Institutes of the Laws of England 55 (Brooke ed., 5th ed. 1797)).

[4] *Id.* at 225–26.

[1] 352 U.S. 354 (1957).

[2] *Id.* at 361 ("We will assume arguendo that sentence is part of the trial for purposes of the Sixth Amendment."). The Court determined that the two-year delay between conviction and sentencing at issue in the case would not have violated the defendant's right to a speedy trial even if that right applied to sentencing. *Id.* at 361–62. The Court thus found it unnecessary to decide whether the right encompassed sentencing. *Id.* at 361.

[3] United States v. Ewell, 383 U.S. 116, 120 (1966) ("This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.").

[4] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.").

[5] Dickey v. Florida, 398 U.S. 30, 37 (1970) ("[O]n demand a State ha[s] a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial."); Smith v. Hooey, 393 U.S. 374, 378 (1969) ("The [ ] demands [of the right to a speedy trial] are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction.").

[6] *See Dickey*, 398 U.S. at 40 (Brennan, J., concurring) (observing that "the Court has as yet given scant attention to . . . questions essential to the definition of the speedy-trial guarantee," including "when during the criminal process the speedy-trial guarantee attaches").

[7] *404 U.S. 307, 313 (1971)* ("[T]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused' . . . ."); *id.* at 321 ("Invocation of the speedy trial provision . . . need not await indictment, information, or other formal charge. But we decline to extend th[e] reach of the amendment to the

and the issuance of an indictment against them.[8] The government apparently had knowledge of the criminal conduct during those three years but did not commence the prosecution earlier because of limited resources.[9] Although the Court recognized that pre-charge delays might cause prejudice to the defense, it determined that other considerations compelled the conclusion that the speedy trial right does not protect against such delays.[10] These considerations included the text of the Sixth Amendment itself,[11] the history of the speedy trial right and ensuing legislative interpretations of it,[12] and the right's purpose of holding in check the attendant "evils" of public accusation.[13] The Court also emphasized that other sources of law apart from the Sixth Amendment—namely, statutes of limitations and the Due Process Clause—protect against excessive pre-charge delays.[14]

Then, in the 2016 case *Betterman v. Montana*, the Court held that the speedy trial right "detaches" (i.e., no longer applies) upon conviction,[15] thereby resolving the question left open sixty years earlier in *Pollard*.[16] The defendant in *Betterman* argued that a fourteen-month delay between his conviction by guilty plea and the imposition of his sentence violated his right to a speedy trial.[17] In rejecting the claim, the Court reasoned that the speedy trial right serves primarily to safeguard the presumption of innocence and that this purpose does not comport

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period prior to arrest.") (footnote omitted). For a discussion of how the attachment rule of *Marion* applies to peculiar charging scenarios, including prosecutions initiated by sealed indictment, see 5 Wayne R. LaFave et al., Criminal Procedure § 18.1(c) (4th ed. 2020).

[8] *Marion*, 404 U.S. at 313.

[9] *Id.* at 309 (noting evidence in record, including newspaper articles and a Federal Trade Commission cease and desist order, indicating that federal prosecutors had knowledge of the criminal fraud scheme about three years before securing the indictment); *id.* at 335 (Douglas, J., concurring) ("The justifications offered [for the delay] were that the United States Attorney's office was 'not sufficiently staffed to proceed as expeditiously' as desirable and that priority had been given to other cases.") (citation omitted).

[10] *Id.* at 321–22 ("Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context."); *see also* Dillingham v. United States, 423 U.S. 64, 64–65 (1975) (per curiam) (holding that speedy trial right applies to time after arrest but before indictment).

[11] *Marion*, 404 U.S. at 313 ("On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution.").

[12] *Id.* at 313–14 ("Our attention is called to nothing in the circumstances surrounding the adoption of the [Sixth] Amendment indicating that it does not mean what it appears to say . . . ."); *id.* at 316 ("Legislative efforts to implement federal and state speedy trial provisions also plainly reveal the view that these guarantees are applicable only after a person has been accused of a crime.").

[13] *Id.* at 320 ("[T]he major evils protected against the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, . . . and create anxiety in him, his family and his friends.").

[14] *Id.* at 323 ("There is . . . no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function."); *id.* at 324 ("[T]he Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."). Although the Court declined, given the lack of a developed record, to conduct a complete due process analysis as to whether the pre-accusation delays in *Marion* had caused defendants actual prejudice, *id.* at 325, the Court has applied due process principles to pre-indictment delays in other cases. *See* United States v. Lovasco, 431 U.S. 783, 796 (1977) (holding that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time," so long as the government does not delay solely to gain a tactical advantage); *see also* Fifth Amendment (discussing procedural due process rights on confessions in criminal cases).

[15] Betterman v. Montana, 578 U.S. 437, 440 (2016).

[16] *Pollard*, 352 U.S. at 361 (assuming arguendo "that sentence is part of the trial for purposes of the Sixth Amendment").

[17] *Betterman*, 578 U.S. at 440.

with applying the right to post-conviction proceedings such as sentencing.[18] The Court also noted, much as it did in *Marion*, that other sources of law protect against undue delay at the sentencing stage, including rules of criminal procedure and the constitutional right to due process.[19]

Amdt6.2.4 Early Doctrine on Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Before the 1972 *Barker v. Wingo*[1] decision, where the Supreme Court established a four-factor balancing test for determining when the speedy trial right is abridged,[2] the Court decided speedy trial cases under more general notions of the bounds of appropriate delay in prosecution. In *Pollard v. United States* in 1957, the Court held that a two-year delay between conviction and sentencing—resulting from the trial court's failure to impose a sentence in the defendant's presence at the original sentencing hearing—did not violate the Sixth Amendment because the delay was not "purposeful or oppressive."[3] The Court used a similar touchstone in the 1966 decision *United States v. Ewell*, which concerned a nineteen-month delay between initial arrest and a hearing on a second indictment.[4] The delay was caused largely by the defendants' successful motion to vacate their convictions by guilty plea.[5] The Court rejected the defendants' speedy trial claim due to a lack of "oppressive or culpable government conduct."[6] The Court also reasoned that to hold a delay caused by a successful defense appeal unconstitutional would undermine the general principle that a defendant may be "retried in the normal course" of events following the reversal of a conviction.[7]

Aspects of the reasoning in *Pollard* and *Ewell* would carry through the landmark *Barker* case and into the Supreme Court's modern speedy trial jurisprudence. In both pre-*Barker* cases, the Court emphasized that speedy trial claims required ad hoc analysis of the particular

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[18] *Id.*; *Id.* at 446 (noting arguments that the "prevalence of guilty pleas and the resulting scarcity of trials in today's justice system" have made sentencing proceedings a more significant forum for criminal dispute resolution, but concluding that this "modern reality . . . does not bear on the presumption-of-innocence protection at the heart of the Speedy Trial Clause").

[19] *Id.* at 447–48 ("The federal rule [of criminal procedure] on point directs the court to 'impose sentence without unnecessary delay.' Many States have provisions to the same effect. . . . Further, as at the prearrest stage, due process serves as a backstop against exorbitant delay.") (quoting Fed. R. Crim. P. 32(b)(1)). Because the defendant in *Betterman* did not advance a due process claim, the Court limited its due process analysis to the observation that a defendant's right to liberty after conviction, while "diminished," nonetheless encompasses "an interest in a sentencing proceeding that is fundamentally fair." *Id.* at 448–49.

[1] 407 U.S. 514 (1972).

[2] *Id.* at 530.

[3] Pollard v. United States, 352 U.S. 354, 361–62 (1957).

[4] 383 U.S. 116, 118–19 (1966).

[5] *Id.*

[6] *Id.* at 123.

[7] *Id.* at 121.

circumstances surrounding a delay in prosecution,[8] a point that *Barker* would go on to reiterate more emphatically.[9] Perhaps more importantly, the *Ewell* Court attributed three primary purposes to the Speedy Trial Clause: "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[10] In subsequent cases, including *Barker*, the Court would rely on this passage as the definitive formulation of the Speedy Trial Clause's purposes.[11]

In another line of pre-*Barker* cases that remains important, the Court rejected the contention that prosecutors could, after charging a defendant, leave the charges dormant for extended periods of time free of the strictures of the Speedy Trial Clause. In *Klopfer v. North Carolina* in 1967, a state prosecutor invoked a procedure called "nolle prosequi with leave" to defer proceedings on an indictment for criminal trespass until an uncertain future date when the prosecutor might restore the case for trial.[12] The Court held that such "indefinite[ ] prolonging" of criminal prosecution violated the defendant's speedy trial right.[13] Similarly, in two cases from 1969 and 1970, the Court held that the government may not defer proceedings against a charged defendant until his release from incarceration in another jurisdiction;[14] rather, the charging authority must make a "diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial" upon his request, notwithstanding the inter-jurisdictional cooperation that such a trial might require.[15] In short, the government may not evade the limitations of the Speedy Trial Clause by deferring already-filed charges until the occurrence of some later event.

Amdt6.2.5 Modern Doctrine on Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[8] *See Pollard*, 352 U.S. at 361 ("Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances."); *Ewell*, 383 U.S. at 120 ("[T]his Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends on circumstances.'") (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

[9] *Barker*, 407 U.S. at 530 ("A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.").

[10] *Ewell*, 383 U.S. at 120.

[11] *See*, *e.g.*, Betterman v. Montana, 578 U.S. 437, 442 (2016) ("The Speedy Trial Clause implements [the presumption of innocence] by" minimizing the likelihood of lengthy incarceration before trial, lessening the "anxiety and concern accompanying public accusation," and limiting the effect of long delay on the defense.); *Barker*, 407 U.S. at 532.

[12] 386 U.S. 213, 214, 217 (1967).

[13] *Id.* at 222.

[14] Dickey v. Florida, 398 U.S. 30, 37 (1970); Smith v. Hooey, 393 U.S. 374, 383 (1969).

[15] *Dickey*, 398 U.S. at 37.

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In *Barker v. Wingo*, the Supreme Court refined its approach to the Speedy Trial Clause by adopting a balancing test to govern claims of unconstitutional delay in prosecution.[1] Willie Mae Barker, the defendant in the case, was convicted of murder.[2] He contended that a five-year delay between his indictment and the start of his trial violated his speedy trial right.[3] The prosecution's decision to put off Barker's trial until it had obtained a conviction against his co-defendant—a necessary witness in the case against Barker—accounted for most of the delay, as it took six trials over more than four years to convict the co-defendant on all counts.[4] Barker did not object to this prosecution tactic until roughly three-and-a-half years of the eventual five-year delay had elapsed.[5]

In considering Barker's claim, the Supreme Court (in a majority opinion joined by seven justices, with the remaining two concurring and no dissents) began by acknowledging that its prior cases did not establish a clear test for determining when a delay in prosecution violated the Speedy Trial Clause.[6] The Court then rejected two proposed "rigid" approaches to applying the Clause that would have provided bright-line rules for prosecutors and lower courts. First, the Court declined to set out a time period—a "specified number of days or months"—within which a defendant must be offered a trial.[7] To establish such a rule, the Court reasoned, would have required the Court to step improperly beyond its adjudicative function and into the realm of "legislative or rulemaking activity."[8] Second, the Court rejected a so-called "demand-waiver" approach, pursuant to which a defendant's failure to demand a trial would have been construed as a waiver of the speedy trial right.[9] The Court concluded that this approach conflicted with its jurisprudence on the waiver of constitutional rights, under which a finding of waiver requires a showing of the defendant's "intentional relinquishment or abandonment of a known right" rather than a presumption based on the defendant's mere inaction.[10]

Having rejected these "rigid" approaches, the Court settled upon a "balancing test" that would consider "the conduct of both the prosecution and the defendant."[11] The test that the Court announced consists of four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[12] Importantly, the Court acknowledged that this test provides only loose guidance to lower courts, which must apply and weigh the four factors "on an ad hoc basis" to resolve individual speedy trial claims.[13] The

[1] *Barker*, 407 U.S. at 530 ("The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.").

[2] Barker v. Wingo, 407 U.S. 514, 517–18 (1972).

[3] *Id.*

[4] *Id.* at 516–17.

[5] *Id.* at 517.

[6] *Id.* at 516 ("[I]n none of these [speedy trial] cases have we attempted to set out the criteria by which the speedy trial right is to be judged.").

[7] *Id.* at 523.

[8] *Id.*

[9] *Id.* at 525 ("The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right.").

[10] *Id.* at 525–26 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[11] *Id.* at 530.

[12] *Id.*

[13] *Id.*

balancing approach does not, in other words, offer the sort of clear rule of decision that either of the two "rigid" approaches (rejected by the *Barker* Court) would have supplied.[14]

Applying the four factors in its test to the five-year delay in Barker's case, the Court called the case "close" but held that the delay did not violate the Speedy Trial Clause.[15] The first two factors—the delay's length and the reason for it—favored Barker's claim.[16] Five years was an "extraordinary delay," the Court determined, and, in particular, the prosecution's objective of presenting the co-defendant's testimony at Barker's trial did not justify the four years it took to accomplish.[17] But the other two factors—prejudice and the defendant's assertion of the speedy trial right—went against Barker and outweighed the first two factors.[18] Barker did not claim that the delay significantly impaired his defense at trial, and the Court thus concluded that he suffered little prejudice.[19] Most important, the Court determined that Barker's failure to demand a speedy trial during most of the delay showed that "he definitely did not want to be tried" and that he had made a strategic choice to "gambl[e]" that his co-defendant would be acquitted.[20] This last consideration appeared essentially outcome-determinative: a defendant who did not want a speedy trial, the Court reasoned, would not be deemed to have suffered a deprivation of his speedy trial right absent "extraordinary circumstances," such as the receipt of incompetent legal advice.[21]

Although the Court has generally refrained from reviewing lower court applications of the ad hoc balancing analysis it prescribed in *Barker*, a group of later opinions, discussed below, clarifies *Barker*'s guidance on how to apply each of the four factors.[22]

Amdt6.2.6 Length of Delay and Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The length of delay factor works as a "triggering mechanism" for the remainder of the balancing test.[1] In *Barker*, the Court made clear that courts need not reach the other three factors absent a post-accusation delay that is long enough to be "presumptively prejudicial."[2]

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[14] *See Id.*

[15] *Id.* at 533–34.

[16] *Id.*

[17] *Id.* at 534.

[18] *Id.*

[19] *Id*. ("[P]rejudice was minimal. Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay.").

[20] *Id.* at 535–36.

[21] *Id.*

[22] *See* Vermont v. Brillon, 556 U.S. 81, 91 (2009) (noting that "the balance arrived at [by lower courts under *Barker*] in close cases ordinarily would not prompt this Court's review" but deeming it necessary nonetheless to correct a state court's "fundamental error in its application of *Barker*").

[1] Barker v. Wingo, 407 U.S. 514, 530 (1972).

[2] *Id.*

The Court held that the delay in Barker's case satisfied this standard,[3] but the Court did not set a concrete time frame for presumptively prejudicial delay.[4] Rather, the Court said that the inquiry would depend upon the nature of the criminal charges.[5] The less serious the charges, the less a court should tolerate delay.[6] In later cases from 1986 and 1992, the Supreme Court held presumptively prejudicial a 90-month post-arrest delay in a prosecution for possession of firearms and explosives[7] and an eight and one-half year post-indictment delay in a prosecution for conspiracy to import and distribute cocaine.[8] In the latter case, the Court observed without comment that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."[9] If a delay is presumptively prejudicial, the court must proceed to weigh its excessive length—that is, "the extent to which [it] stretches beyond the bare minimum needed to trigger" the full *Barker* analysis—along with the other three factors of the balancing test.[10]

Time that elapses between the formal dismissal and reinstatement of charges does not count toward the length of delay for speedy trial purposes, so long as the defendant is not subject to any restraint on liberty during the interim period.[11] Thus, the Supreme Court held in 1982 that the passage of four years between the dismissal of military charges and a later federal grand jury indictment for the same alleged crimes, during which time the defendant was not subject to restraints, did not support a claim for a violation of the Speedy Trial Clause.[12] Similarly, in a 1986 case where the trial court dismissed an indictment before trial, leaving the defendants free of restraints, the Supreme Court held that the duration of the government's successful appeal of the dismissal did not count towards the defendants' speedy trial claims.[13] In contrast, the duration of an interlocutory appeal[14] that proceeds while an indictment or restraints on liberty (such as bail or incarceration) remain in place does count toward the length of delay factor under *Barker*.[15]

Amdt6.2.7 Reason for Delay and Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[3] *Id.* at 533–34.

[4] *Id.* at 530.

[5] *Id.* at 530–31.

[6] *Id.*

[7] United States v. Loud Hawk, 474 U.S. 302, 314 (1986).

[8] Doggett v. United States, 505 U.S. 647, 652 (1992).

[9] *Id.* at 652 n.1.

[10] *Id.* at 652.

[11] United States v. MacDonald, 456 U.S. 1, 7 (1982) ("[T]he Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges.").

[12] *Id.* at 9–10.

[13] *Loud Hawk*, 474 U.S. at 311 ("We find that after the District Court dismissed the indictment against respondents and after respondents were freed without restraint, they were 'in the same position as any other subject of a criminal investigation.'") (quoting *MacDonald*, 456 U.S. at 8–9).

[14] An interlocutory appeal is an "appeal that occurs before the trial court's final ruling on the entire case," Appeal, Black's Law Dictionary (10th ed. 2014), such as an appeal from a pre-trial order suppressing evidence. *See Loud Hawk*, 474 U.S. at 306–07, 313.

[15] *Loud Hawk*, 474 U.S. at 314 (adopting the *Barker* test "to determine the extent to which appellate time consumed in the review of pretrial motions should weigh towards a defendant's speedy trial claim").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The *Barker* Court divided government justifications for delay into three categories and explained how each category should impact the balance of factors.[1] First, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government."[2] Second, "[a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government . . . ."[3] Third, "a valid reason, such as a missing witness, should serve to justify appropriate delay."[4] The five-year delay at issue in Barker's case (caused primarily by the government's choice to postpone trial until the conclusion of proceedings against the co-defendant) appeared to fall into the second category.[5] Accordingly, the Court seemed to count the reason for delay moderately in Barker's favor, but the factor did not carry enough weight—not even when combined with the "extraordinary" length of delay—to overcome Barker's failure to assert adequately his speedy trial right and the lack of specific prejudice to his defense.[6]

In a 1992 case, the Supreme Court articulated the "reason for delay" inquiry as "whether the government or the criminal defendant is more to blame for th[e] delay."[7] Later cases also clarified the interplay between the reason for delay factor and the other *Barker* factors and indicated that, in some circumstances, the reason for delay could do much to determine the outcome of the balancing test.[8] Where the government causes delay on purpose to gain a trial advantage, a long delay will generally amount to a constitutional violation.[9] Where the government bears no blame for a long delay—not even in the "more neutral" sense of negligence or crowded dockets—a constitutional violation likely does not exist absent a showing of specific evidentiary prejudice.[10] In contrast, government negligence "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution" and amounts to a constitutional violation, even without a showing of specific evidentiary prejudice, if it causes a delay that "far exceeds the [presumptive prejudice] threshold" and if the defendant did not exacerbate the delay through a failure to assert the

[1] Barker v. Wingo, 407 U.S. 514, 531 (1972).

[2] *Id.*

[3] *Id*; *see also* Strunk v. United States, 412 U.S. 434, 436 (1973) ("Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense . . . .").

[4] *Barker*, 407 U.S. at 531.

[5] *Id.* at 534 ("[A] good part of [the delay] was attributable to the Commonwealth's failure or inability to try [the co-defendant] under circumstances that comported with due process.").

[6] *Id.* at 534–35.

[7] Doggett v. United States, 505 U.S. 647, 651 (1992).

[8] Vermont v. Brillon, 556 U.S. 81, 90–94 (2009); *Doggett*, 505 U.S. at 656–58.

[9] *Doggett*, 505 U.S. at 656.

[10] *Id.*

speedy trial right.[11] Finally, delays caused by defendants or their counsel—regardless of whether counsel is appointed or privately retained—weigh against defendants and generally will not support a speedy trial claim.[12]

Amdt6.2.8 Assertion of Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Supreme Court's most extensive commentary on the third balancing factor came in *Barker* itself, where the defendant's failure to assert his right to a speedy trial promptly and forcefully appeared to doom his claim in the eyes of the Court.[1] The Court made clear that a defendant's failure to assert the right is not a prerequisite to a speedy trial claim.[2] Put differently, a defendant does not waive the right by failing to assert it.[3] Moreover, the significance of a failure to assert the right depends on circumstance.[4] A failure to object to delay for a compelling reason—such as representation by "incompetent counsel"—might not undermine a speedy trial claim,[5] just as a pro forma objection will weigh less in the defendant's favor than an objection made with "frequency and force."[6] In the final analysis, however, the *Barker* Court homed in on the defendant's litigation strategy as the fulcrum of the inquiry under the third element: where the record shows that the defendant does not want a speedy trial, the Court reasoned, only on rare occasion will he be deemed to have been denied his right

[11] *Id.* at 657–58 (8.5-year delay caused by government negligence violated defendant's speedy trial right, despite lack of showing of specific prejudice, where defendant did not know of charges against him and therefore could not be blamed for not demanding a speedy trial).

[12] *Brillon*, 556 U.S. at 94 ("[A] defendant's deliberate attempt to disrupt proceedings [should] be weighted heavily against the defendant)"; *id*. ("[D]elays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned."). The Court left open the possibility that a delay caused by breakdown in the public defender system could count against the government for speedy trial purposes. *Id.*

[1] Barker v. Wingo, 407 U.S. 514, 534 (1972) ("More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial.").

[2] *Id.* at 528.

[3] *Id*. ("We reject . . . the rule that a defendant who fails to demand a speedy trial forever waives his right.").

[4] *Id.* at 529 (explaining that, under the balancing test for speedy trial claims, a court may "attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay" and may also "weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection").

[5] *Id.* at 536 ("We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte.").

[6] *Id.* at 529.

to a speedy trial.[7] This analytical approach seemed to echo the Court's earlier observation in *Ewell* that delay in prosecution often benefits the defendant.[8]

In the 1992 case *Doggett v. United States*, the Court clarified that failure to demand a speedy trial does not count against defendants who are unaware of the charges against them.[9] In that case, the factual record indicated that the defendant did not know that he had been indicted on federal charges of narcotics distribution during the entirety of an eight-and-one-half year delay between the date of the indictment and the date authorities arrested him to face the charges.[10] The Supreme Court reasoned that such ignorance of the proceedings neutralized the third factor in the balancing test;[11] accordingly, the Court proceeded to find a violation of the Speedy Trial Clause based on the interplay of the other three factors alone.[12]

Amdt6.2.9 Prejudice and Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Barker instructed courts to consider prejudice in terms of the three primary purposes of the speedy trial guarantee: (1) prevention of "oppressive pretrial incarceration;" (2) minimization of the "anxiety and concern" caused by criminal accusation; and (3) protection against "the possibility that the defense will be impaired" by delay (i.e., evidentiary prejudice).[1] Generally, the Court has emphasized evidentiary prejudice as the most consequential of the three types.[2] In *Barker*, for example, where the defendant had spent ten months in pre-trial detention and endured 4.5 years under the "cloud" and "anxiety" of pending murder charges (and could therefore establish prejudice of the first two types), the Court counted the prejudice factor against the defendant because he did not show that the delay actually damaged his defense.[3]

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[7] *Id.* at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."); *id.* at 536 ("[B]arring extraordinary circumstances, we would be reluctant . . . to rule that a defendant was denied [the speedy trial] right on a record that strongly indicates . . . that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.")

[8] *See id.* at 521 ("A . . . difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic."); United States v. Ewell, 383 U.S. 116, 122–23 (1966) ("[T]he problem of delay is the Government's too, for it still carries the burden of proving the charges beyond a reasonable doubt.").

[9] 505 U.S. 647, 654 (1992).

[10] *Id.* at 653.

[11] *Id.* at 654 ("[The defendant] is not to be taxed for invoking his speedy trial right only after his arrest.").

[12] *Id.* at 656–58 (considering length of delay, reason for delay, and prejudice).

[1] Barker v. Wingo, 407 U.S. 514, 532 (1972).

[2] *Id*. ("[T]he most serious [type of prejudice] is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."); Doggett v. United States, 505 U.S. 647, 654 (1992) (quoting *Barker* for same proposition).

[3] *Barker*, 407 U.S. at 534.

Amdt6.2.9
Prejudice and Right to a Speedy Trial

Multiple times the Court has said that a showing of evidentiary prejudice is not essential.[4] Yet on one occasion, in the 1994 case *Reed v. Farley*, the Supreme Court made a statement directly to the contrary, declaring that a showing of evidentiary prejudice "is required" to show a speedy trial violation.[5] That statement did not appear to constitute a binding holding: *Reed* dealt with the Speedy Trial Clause only in passing because the defendant did not actually press a constitutional speedy trial claim.[6] Nonetheless, even though *Reed* probably does not establish that a speedy trial claim must include a showing of evidentiary prejudice to succeed, the case does underline the Court's tendency to treat impairment to the defense as the key aspect of the prejudice prong and one of the most impactful considerations in the overall *Barker* analysis.[7]

The Supreme Court's consistent emphasis on the significance of evidentiary prejudice, however, has, from the outset, included one subtle qualification: the damage that delay causes to the defense does not always lend itself to an affirmative showing.[8] Thus, in *Doggett*, where government negligence delayed proceedings by at least six years but where the defendant failed to show any specific impairment to his defense, the Court weighed the prejudice factor in the defendant's favor based on the presumption that such a long delay had hurt the defense case in ways that neither side could demonstrate.[9] The Court stressed, however, that the presumption of evidentiary prejudice—as opposed to an affirmative showing of such prejudice—would support a speedy trial violation only in the case of particularly long delays[10] and only where other factors also favored the defendant.[11]

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[4] *Doggett*, 505 U.S. at 655 ("[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim."); Moore v. Arizona, 414 U.S. 25, 26 (1973) (per curiam) (rejecting, based on *Barker*, the "notion that an affirmative demonstration of prejudice [i]s necessary to prove a denial of the constitutional right to a speedy trial"); *Barker*, 407 U.S. at 533 ("We regard none of the four factors [in the balancing test] identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.").

[5] 512 U.S. 339, 353 (1994) ("[The defendant] does not suggest that his ability to present a defense was prejudiced by the delay [in his prosecution]. . . . A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here.").

[6] *Id.* at 352 (noting the defendant's concession that "his constitutional right to a speedy trial was in no way violated"). *Reed* dealt primarily with the scope of collateral review of state court convictions under 28 U.S.C. § 2254. 512 U.S. at 342 ("We hold that a state court's failure to observe the 120-day rule of [the Interstate Agreement on Detainers Act] Article IV(c) is not cognizable under § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement.").

[7] *See Id.* at 352; *Barker*, 407 U.S. at 532.

[8] *Barker*, 407 U.S. at 532 ("There is . . . prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."); *see Doggett*, 505 U.S. at 655 ("We generally have to recognize that excessive delay presumptively compromises the reliability of a trial in way that neither party can prove or, for that matter, identify.").

[9] *Doggett*, 505 U.S. at 658 ("When the Government's negligence thus causes delay [of six years] . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, . . . nor persuasively rebutted, the defendant is entitled to relief.") (footnotes omitted); *id* at 658 n.4 (emphasizing that the government "ha[d] not, and probably could not have, affirmatively proved that the delay left [defendant's] ability to defend himself unimpaired").

[10] *Id.* at 657 ("[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice.").

[11] *Id.* at 656 ("Presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria . . . .").

Amdt6.3 Right to a Public Trial

Amdt6.3.1 Overview of Right to a Public Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment guarantees criminal defendants the right to be tried in public.[1] The Supreme Court has interpreted this right to apply to criminal trials and certain important pre-trial proceedings,[2] although the Court has also recognized that the right is subject to limitation where overriding interests require the exclusion of all or some members of the public from the courtroom.[3] The Sixth Amendment public trial right only protects the defendant,[4] but members of the public have the right to attend criminal proceedings under the First Amendment.[5] The Supreme Court has carefully avoided calling the First and Sixth Amendment public trial rights coextensive.[6] The Court has made clear, however, that the Sixth Amendment offers criminal defendants at least as much protection from closed proceedings as the First Amendment offers the public.[7] To a more limited extent, the Court has also determined that due process plays some role in protecting the accused from secret proceedings.[8]

Amdt6.3.2 Historical Background on Right to a Public Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Criminal trials have generally been open to the public since the origins of the Anglo-American legal system.[1] Indeed, the public nature of the criminal trial was one of the

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[1] Presley v. Georgia, 558 U.S. 209, 212 (2010). As noted elsewhere, the Court held the public trial right applicable against the states in *In re Oliver*, 333 U.S. 257, 272–73 (1948). *See* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights (discussing the due process clause and incorporation).

[2] Waller v. Georgia, 467 U.S. 39, 46–47 (1984).

[3] *Id.* at 48.

[4] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 391 (1979)

[5] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980); *see* Amdt1.9.1 Overview of Freedom of the Press to Amdt1.10.1 Historical Background on Freedoms of Assembly and Petition (discussing public trial rights).

[6] *Presley*, 558 U.S. at 212–13.

[7] *Id.*

[8] *See* Levine v. United States, 362 U.S. 610, 616 (1960); *see also* Fifth Amendment (discussing procedural due process rights on confessions in criminal cases).

[1] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–65 (1980) (noting that community participation in criminal trials in England predated the Norman conquest and carried through into the development of the common law) (*citing* Frederick Pollock, English Law Before the Norman Conquest, *in* 1 Select Essays in Anglo-American Legal History 88, 89 (1907)); In re *Oliver*, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public

principal attributes that, historically, distinguished common law "accusatorial" criminal procedure from the "inquisitorial" system that took root in so-called civil law countries (i.e., countries where the dominant legal tradition descends from Roman law)[2] in the sixteenth century under the influence of canonical law.[3] The publicity of the criminal trial has traditionally been regarded as a protection against oppressive use of the judicial power to impose punishment and as a means of safeguarding the right to a fair proceeding.[4] The most commonly-referenced outlier to the tradition of open criminal justice in Anglo-American legal history—the English Court of Star Chamber, abolished in 1641, which followed the inquisitorial practice of deciding criminal cases based on a written record of interrogations of the accused and witnesses,[5] and which may have conducted some interrogations in secret[6]—is generally considered by its infamy to have reaffirmed the paramount importance of public trials.[7] The tradition of holding public criminal trials was apparently well-established in the American colonies before the ratification of the Sixth Amendment.[8]

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trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.").

[2] *See* John Henry Merryman & Rogelio Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 2–3 (3d ed. 2007) ("The traditional date of [the civil law tradition's] origin is 450 B.C., the supposed date of publication of the Twelve Tables in Rome. It is today the dominant legal tradition in Europe, all of Latin America, many parts of Asia and Africa, and even a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico).").

[3] *Id.* at 128 ("Historically, inquisitorial proceedings have tended to be secret and written rather than public and oral."). One should not confuse the historical and contemporary forms of criminal procedure in civil law countries, many of which have long since incorporated public trials into their criminal law systems. *Id.* at 131–32 (explaining that the predominant modern form of the criminal trial in civil law countries, though different in nature from the common law trial, is "a public event, which by its very publicity tends to limit the possibility of arbitrary governmental action."). Careful analysis of the differences between the modern accusatorial and inquisitorial systems does not yield simple conclusions about their comparative merit. *Id.* at 133 ("For those readers who wonder which is the more just system, the answer must be that opinion is divided. . . . The debate is clouded by . . . preconceptions that are difficult to dispel.").

[4] In re Oliver, 333 U.S. at 270 ("[T]he [public trial] guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

[5] *See* John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 570 (2009) ("The cornerstone of European procedural systems, civil and criminal, as well as the . . . Star Chamber, was the ability to examine parties and witnesses under oath, preserving their responses as written evidence for the court."); Merryman & Perez-Perdomo, *supra* note 2, at 128 ("[T]he Star Chamber . . . was basically an inquisitorial tribunal. The Star Chamber was, however, exceptional in the common law tradition.").

[6] In re *Oliver*, 333 U.S. at 269 n.22 ("Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agreed that the accused himself was grilled in secret, often tortured . . . ."); *but see* John H. Langbein et al., *supra* note 5, at 575 (calling "quite false" the claim that the Star Chamber "used torture in its investigations," and suggesting that the tribunal's infamy arose instead from its "afflictive sanctions," such as amputation of the ears).

[7] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 387 n.18 (1979) ("After the abolition of the Star Chamber in 1641, defendants in criminal cases began to acquire many of the rights that are presently embodied in the Sixth Amendment. . . . It was during this period that the public trial first became identified as a right of the accused."); In re *Oliver*, 333 U.S. at 268–69 ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet.") (footnotes omitted); Merryman & Perez-Perdomo, *supra* 2, at 128 (labeling the Star Chamber "[t]he most infamous analogue [to the secret and written criminal trial of the civil law tradition] familiar to us in the common law world").

[8] Richmond Newspapers, Inc., 448 U.S. at 567–68 ("We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential qualities of a court of justice,' was not also an attribute of the judicial systems of colonial America.") (quoting Daubney v. Cooper (1829) 109 Eng. Rep. 438, 440); In re *Oliver*, 333 U.S. at 266–67; *see* Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984) ("Public jury selection thus was the common practice in America when the Constitution was adopted."). Congress did not discuss the public trial right in its debates on the Sixth Amendment. Harold Shapiro, *Right to a Public Trial*, 41 J. Crim. L. & Criminology 782, 783 (1951).

Amdt6.3.3 Right to a Public Trial Doctrine

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Supreme Court precedent establishes that the Sixth Amendment public trial right applies not only to criminal trials themselves,[1] but also to at least two types of pre-trial proceedings: hearings on motions to suppress evidence[2] and voir dire (when potential jurors are questioned during jury selection).[3] Such pre-trial proceedings, the Court has reasoned, can carry an importance commensurate with the trial itself[4] and, in the case of voir dire, were traditionally open to the public at common law.[5] Furthermore, guaranteeing a defendant's right to have such proceedings held openly vindicates the public trial right's object of harnessing the scrutiny of the community as a check against arbitrary, unfair, or irregular proceedings.[6] The Supreme Court has never considered whether the public trial right applies at sentencing.[7]

In two cases, the Court appeared to take contrasting positions as to whether the public trial right applies to one particular type of criminal proceeding: summary prosecutions for criminal contempt of court. Criminal contempt prosecutions are, in some circumstances, held as summary proceedings "to punish certain conduct committed in open court without notice, testimony or hearing."[8] In *In re Oliver*, decided in 1948, the Court held that it violated an accused's right to a public trial for a court to summarily try, convict, and sentence him in a secret grand jury proceeding (conducted by a state court judge acting as a one-man grand jury, in that case) for committing contempt by providing false and evasive testimony during the proceeding.[9] The Court seemed to ground this holding on the conclusion that the Fourteenth Amendment Due Process Clause incorporated the Sixth Amendment public trial right, making

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[1] In re *Oliver*, 333 U.S. 257, 265 (1948).

[2] Waller v. Georgia, 467 U.S. 39, 47 (1984) ("[W]e hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests [governing the closure of public trials].").

[3] Presley v. Georgia, 558 U.S. 209, 213 (2010) ("[T]he Sixth Amendment right to a public trial extends to the voir dire of prospective jurors."); *see also* Weaver v. Massachusetts, No. 16-240, slip op. at 3 (U.S. June 22, 2017) ("*Presley* made it clear that the public-trial right extends to jury selection as well as to other portions of the trial."). Before *Presley*, "Massachusetts courts would often close courtrooms to the public during jury selection, in particular during murder trials.") (citation omitted).

[4] *Waller*, 467 U.S. at 46 ("[S]uppression hearings often are as important as the trial itself.").

[5] Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984).

[6] *Id.* ("[T]he sure knowledge that *anyone* is free to attend [a criminal trial] gives assurance that established procedures are being followed and that deviations will become known."); *Waller*, 467 U.S. at 46 ("The requirement of a public trial is for the benefit of the accused . . . that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ") (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)).

[7] 6 Wayne R. LaFave et al., Criminal Procedure § 24.1(a) (4th ed. 2020) (citing lower court opinions for the proposition that "[a]lthough the Supreme Court has not held whether the right to a public trial extends to sentencing proceedings, there is little doubt that it does").

[8] In re *Oliver*, 333 U.S. at 274.

[9] *Id.* at 272–73 ("In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.").

it applicable against the states.[10] Nonetheless, twelve years later in *Levine v. United States*, another case involving a recalcitrant grand jury witness convicted of contempt in a closed proceeding, the Court stated flatly that "[c]riminal contempt proceedings are not within 'all criminal prosecutions' to which th[e Sixth] Amendment applies."[11] *Levine*—authored by Justice Felix Frankfurter, who had dissented in *In re Oliver*—held that only the Due Process Clause, and not the Sixth Amendment (either directly or as made applicable to the states via incorporation through the Fourteen Amendment), protected an accused during a criminal contempt proceeding.[12] Further, *Levine* held that the exclusion of the public from the courtroom during the proceeding did not violate the more flexible due process protection so long as the defendant did not specifically object to the exclusion.[13]

In *Bloom v. Illinois*, decided eight years after *Levine*, the Court called *Levine* into doubt by holding that a different aspect of the Sixth Amendment—the jury trial clause—applies to some criminal contempt prosecutions.[14] Neither *Levine* nor *In re Oliver*, however, has been expressly overruled.[15] Whether the public trial right applies to criminal contempt proceedings thus remains unclear.[16]

As mentioned above, the Sixth Amendment public trial right belongs only to the criminal defendant and cannot be asserted by members of the press or public.[17] Members of the public may challenge their exclusion from a criminal trial under the First Amendment, however,[18] and as discussed in the next section, such First Amendment challenges appear to draw the same analysis as challenges to the closure of a criminal trial brought under the Sixth Amendment.[19]

Amdt6.3.4 Scope of Right to a Public Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[10] *See id.* (relying upon "the universal requirement of our federal and state governments that criminal trials be public" to support the conclusion that due process prohibits secret trials); Presley, 558 U.S. at 212 ("The Court in *In re Oliver* . . . made it clear that [the Sixth Amendment public trial] right extends to the States."); *but see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 591 n.16 (1980) (Brennan, J., concurring in judgment) ("Notably, *Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process . . . .").

[11] 362 U.S. 610, 616 (1960).

[12] *Id.* at 616–17 ("Inasmuch as the petitioner's claim thus derives from the Due Process Clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.'").

[13] *Id.* at 619 ("The continuing exclusion of the public in this case is not . . . deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom . . . .").

[14] *See* Bloom v. Illinois, 391 U.S. 194, 198 (1968) ("Our deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution."). *Bloom* included a "but cf." citation to *Levine* after stating that "[i]t has . . . been recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge." *Id.* at 205.

[15] *See*, *e.g.*, *id.* at 205 (citing *In re Oliver* with approval and acknowledging without overruling *Levine*).

[16] *See id.*

[17] *Gannett*, 443 U.S. at 391 ("[M]embers of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.").

[18] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 at 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ") (footnotes omitted).

[19] Amdt6.2.4 Early Doctrine on Right to a Speedy Trial to Amdt6.2.9 Prejudice and Right to a Speedy Trial (discussing scope of the right to a speedy trial).

> *nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Supreme Court has determined that the right to a public trial, like most constitutional safeguards, is not absolute but is instead subject to balancing against countervailing governmental or public interests.[1] As the Court summarized in the 2017 case of *Weaver v. Massachusetts*, "courtroom closure is to be avoided, but . . . there are some circumstances when it is justified. The problems that may be encountered by trial courts in deciding whether some closures are necessary, or even in deciding which members of the public should be admitted when seats are scarce, are difficult ones."[2] Three decades earlier, in *Waller v. Georgia*, the Court held that the test that governs First Amendment claims against the closure of criminal proceedings also governs public trial claims brought by criminal defendants under the Sixth Amendment.[3] The *Waller* Court, drawing from the First Amendment case of *Press-Enterprise Co. v. Superior Court*,[4] articulated this test as follows:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[5]

In *Waller* and the 2010 case *Presley v. Georgia*, the Court clarified aspects of the test. First, "overriding interests" favoring closure probably do not include preventing risks inherent to all open trials (such as the risk that the jury might overhear prejudicial comments from the gallery), absent a "specific threat or incident" that aggravates a risk in a particular case.[6] Second, courts must narrowly tailor any closure of proceedings to the specific subset of the attending public and the specific portion of the proceedings that gives rise to the overriding interest in closure.[7] Thus, in the context of voir dire, an interest in protecting prospective jurors from embarrassment only justifies closure when a prospective juror requests privacy in answering a question.[8] Finally, a trial court must consider reasonable alternatives to closure before excluding the public from proceedings, even if the parties do not propose any such alternatives.[9]

On how to remedy a violation of the public trial right, the Supreme Court has held that a defendant who has suffered such a violation need not show prejudice to obtain relief,[10] so long

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[1] Presley v. Georgia, 558 U.S. 209, 213 (2010); Waller v. Georgia, 467 U.S. 39, 47–48 (1984).

[2] No. 16-240, slip op. at 8 (U.S. June 22, 2017).

[3] *Waller*, 467 U.S. at 47.

[4] 464 U.S. 501, 510 (1984).

[5] *Waller*, 467 U.S. at 48. The Court reaffirmed this formulation as the controlling test in *Presley*. 558 U.S. at 214.

[6] *Id.* at 215.

[7] *See Waller*, 467 U.S. at 49 (noting that prosecutorial concern for the privacy of individuals mentioned on tapes to be played at suppression hearing would only have justified closure of two and half hours of the seven-day hearing).

[8] Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 512 (1984).

[9] *Presley*, 558 U.S. at 214 ("[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties . . . "); *Waller*, 467 U.S. at 48.

[10] *Waller*, 467 U.S. at 49–50; *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 149 (2006) (citing *Waller* for the proposition that violations of the right to public trial are structural and not subject to harmless error analysis); Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (same).

as the defendant preserves the issue by objecting and raising it on direct appeal.[11] This rule of automatic relief rests on the notion that the benefits of a public trial, despite carrying enough significance to warrant express protection in the Bill of Rights, are "frequently intangible, difficult to prove, or a matter of chance."[12] Entitlement to relief for a preserved violation of the public trial right, however, does not necessarily entail entitlement to a new trial.[13] "Rather, the remedy should be appropriate to the violation."[14] In *Waller*, where the violation occurred in the form of a closed pre-trial suppression hearing, and where the defendant was thereafter convicted in an open trial, the Court ordered a new suppression hearing. The Court instructed, however, that a new trial should follow only if the public suppression hearing resulted in a material change to the scope of admissible evidence or the parties' positions.[15]

Amdt6.4 Right to Trial by Jury

Amdt6.4.1 Overview of Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment guarantees the right to trial by jury for criminal defendants charged with non-petty offenses.[1] Article III of the Constitution also provides for jury trials in criminal cases.[2] As such, the Supreme Court has recognized that the Constitution protects the accused's right to trial by jury twice,[3] although the Court has grounded its analysis of the right primarily in the Sixth Amendment.[4]

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[11] *Weaver*, slip op. at 9. In contrast, to prevail on a claim of ineffective assistance of counsel on the ground that defense counsel incompetently failed to object to a courtroom closure, the defendant must show "either a reasonable probability of a different outcome in his or her case or . . . that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* at 12.

[12] *Waller*, 467 U.S. at 49 n.9; *see also Weaver*, slip op. at 9 ("[A] public-trial violation is structural . . . because of the 'difficulty of assessing the effect of the error.'") (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4).

[13] *Id.* at 50.

[14] *Id.*

[15] *Id.*

[1] Southern Union Co. v. United States, 567 U.S. 343, 350–51 (2012); *see* Amdt6.4.3.3 Petty Offense Doctrine and Maximum Sentences Over Six Months.

[2] Art. III, § 2; *see* ArtIII.S2.C3.1 Jury Trials.

[3] Ramos v. Louisiana, No. 18-5924, slip op. at 4 (U.S. Apr. 20, 2020) (explaining that the Constitution guarantees criminal jury trials "*twice*—not only in the Sixth Amendment, but also in Article III") (emphasis in original); *see also* Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting in part) ("When this Court deals with the content of this [criminal jury trial] guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.").

[4] *See, e.g., Ramos*, slip op. at 4, 7 (noting that both the Sixth Amendment and Article III provide for jury trials in criminal cases, but proceeding to analyze only the Sixth Amendment in holding that the right to a jury trial requires a unanimous verdict in both state and federal court); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (noting the Article III provision but grounding the analysis of whether the jury trial right applies in state court in the Sixth and Fourteenth Amendments; "we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee"); *cf.* Patton v. United States, 281 U.S. 276, 298 (1930) (reasoning that the Sixth Amendment and Article III jury trial provisions "mean substantially the same thing" and the Sixth Amendment "fairly may be regarded as reflecting the meaning of" the Article III provision).

By virtue of its incorporation through the Fourteenth Amendment Due Process Clause, the Sixth Amendment right to trial by jury applies in both federal and state court.[5] A criminal defendant may, however, waive the right and agree to a trial before a judge alone.[6] A valid waiver requires the "express and intelligent consent" of the defendant,[7] along with the consent of the court and the prosecution.[8] In a similar vein, a defendant may plead guilty in lieu of trial.[9] A valid guilty plea requires knowing and intelligent waiver of the right to trial by jury,[10] among other constitutional rights.[11]

Amdt6.4.2 Historical Background on Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The use of juries in criminal cases dates back to medieval England.[1] By the time of the founding, the right to trial by jury was well-recognized as a safeguard against the arbitrary

[5] *Ramos*, slip op. at 7. But the Supreme Court has yet to hold that the Fourteenth Amendment incorporates the Sixth Amendment vicinage requirement—i.e., the requirement that the jury be "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." *See* Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004); Amdt6.4.7 Notice of Accusation.

[6] *Patton*, 281 U.S. at 312.

[7] *Id*. at 312–13; *see also* Adams v. United States *ex rel*. McCann, 317 U.S. 269, 278 (1942) ("There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.").

[8] *Patton*, 281 U.S. at 312; Singer v. United States, 380 U.S. 24, 34 (1965) (holding that the waiver of a jury trial in a criminal case "can be conditioned upon the consent of the prosecuting attorney and the trial judge"); *see* Fed. R. Crim. P. 23(a) (requiring government consent and court approval).

[9] *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.").

[10] Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he [guilty] plea . . . is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

[11] United States v. Ruiz, 536 U.S. 622, 629 (2002) (explaining that a defendant who pleads guilty "forgoes not only a fair trial, but also other accompanying constitutional guarantees" and citing precedent for the proposition that these guarantees include "the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury"). Guilty pleas and plea bargaining practices also implicate other questions of constitutional law. *See, e.g.,* Missouri v. Frye, 566 U.S. 134, 145 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978) (considering "whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged," and holding that no due process violation occurred).

[1] John H. Langbein et al., History of the Common Law 59–60 (2009) ("When the Fourth Lateran Council of 1215 destroyed the ordeals, a different mode of proof had to be devised. Jury trial was already in use in English criminal procedure in some exceptional situations, as an option available to a defendant who wished to avoid trial by battle or by ordeal. The path of inclination for the English was thus to extend jury procedure to fill the enormous gap left by the abolition of the ordeals."); Paul Marcus et al., Rights of the Accused under the Sixth Amendment 47 (2d ed. 2016) ("In the English common law, the right to a jury trial in criminal cases developed in response to the law's need to abandon the old trials by ordeal."); *see* Duncan v. Louisiana, 391 U.S. 145, 151 (1968) ("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta."); Francis H. Heller, The Sixth Amendment 6–7 (1951). The once-widespread notion

exercise of power.[2] William Blackstone, in eighteenth century commentary familiar to the Framers, described the right as a bedrock guarantee of English criminal procedure:

> Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. . . . [T]he founders of the English law have, with excellent forecast, contrived, that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.[3]

Most colonial charters protected the right to jury trial by guaranteeing colonists the enjoyment of the "liberties and immunities of Englishmen."[4] The constitutions of each of the original thirteen states also guaranteed the right.[5]

During colonial times, "[r]oyal interference with the jury trial was deeply resented."[6] Such interference took the form of numerous exceptions to the accused's right to trial by jury.[7] Many of the exceptions were for minor offenses, but some "bordered on serious felonies and were punished with appropriate severity."[8] As the Framers debated adding a Bill of Rights to the original Constitution, concerns surfaced that the jury trial provision of Article III offered the accused inadequate protection.[9] Debate focused, in particular, over whether to build out the constitutional guarantee by including, in what eventually became the Sixth Amendment, a vicinage requirement (that is, a requirement that the jury be drawn locally)[10] and language entitling the accused to strike potential jurors.[11] Criminal jury trial procedure took a variety of forms in the colonies,[12] which complicated the debate: representatives of some colonies were wary of procedural mandates that, if too specific, might clash with existing practices at home.[13] The language that was ultimately ratified as the Sixth Amendment jury trial provision

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that Magna Carta recognized the right to trial by jury in criminal cases has been discredited. *Duncan*, 391 U.S. at 151 n.16; Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922 (1926) ("That the modern institution of trial by jury derives from Magna Carta is one of the most revered of legal fables."); *cf.* HELLER, *supra* note 1, at 15 ("Considering the almost religious veneration accorded to that document [Magna Carta] by the great majority of the people both in England and in this country, it is more important to recognize the fact that our ancestors associated trial by jury with this renowned mainspring of liberty than to insist that in so doing they were guilty of historical error.").

[2] *Duncan*, 391 U.S. at 151; Williams v. Florida, 399 U.S. 78, 87 (1970).

[3] 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769); *see* United States v. Wood, 299 U.S. 123, 138 (1936) ("Undoubtedly, as we have frequently said, the framers of the Constitution were familiar with Blackstone's Commentaries. Many copies of the work had been sold here and it was generally regarded as the most satisfactory exposition of the common law of England.").

[4] Frankfurter & Corcoran, *supra* note 1 at 934–37; HELLER, *supra* note 1, at 14.

[5] *Duncan*, 391 U.S. at 153.

[6] *Id*. at 152.

[7] Frankfurter & Corcoran, *supra* note 1 at 933 ("The settled practice in which the founders of the American colonies grew up reserved for the justices innumerable cases in which the balance of social convenience, as expressed in legislation, insisted that proceedings be concluded speedily and inexpensively.").

[8] *Id*. at 927.

[9] Williams v. Florida, 399 U.S. 78, 93 (1970); HELLER, *supra* note 1 at 25.

[10] *Williams*, 399 U.S. at 93 n.35 ("Technically, 'vicinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county.").

[11] HELLER, *supra* note 1 at 25–26.

[12] *Id.* at 15 ("The jury trial of colonial days is . . . not a rigid copy of its English prototype but rather the result of variegated experiences, experimentation, and adaptation.").

[13] *Id*. at 15, 27.

represents an apparent compromise between the desire to bolster what was seen as an essential guarantee and the desire to leave the language capacious enough to embrace the range of colonial practices.[14]

Amdt6.4.3 When the Right Applies

Amdt6.4.3.1 Early Jurisprudence on Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment, by its plain language, extends its guarantees to "all criminal prosecutions." Yet the Supreme Court has long excluded a category of minor offenses—called "petty offenses" in the doctrine, as distinct from "serious offenses"—from the reach of the right to trial by jury.[1] Considerations both historical and practical have served as justifications for this textual departure: as the Supreme Court recognized, "[s]o-called petty offenses were tried without juries both in England and in the Colonies . . . and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from . . . inexpensive nonjury adjudications."[2]

The early doctrine did not trace a neat divide between petty and serious offenses but instead based the distinction on a broad analysis of the nature of each offense.[3] This analysis considered the following factors: (1) whether the offense was triable by jury at common law; (2) whether the proscribed conduct was *malum in se* (i.e., inherently wrong)[4] or merely *malum prohibitum* (i.e., prohibited by law but not inherently wrong)[5]; and (3) the maximum statutory penalty.[6] Under this analysis, the Court held that the crime of reckless driving at excessive speed was not petty (and accordingly triggered the jury trial right), even though it carried a maximum penalty of only 30 days in jail, because the crime was indictable at common law and

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[14] *Id*. at 33–34; *cf.* Ramos v. Louisiana, No. 18-5924, slip op. at 12 (U.S. Apr. 20, 2020) (reasoning that the Senate might have deleted language about the right of challenge and other specific requirements from the original draft of the Sixth Amendment "because all this was so plainly included in the promise of a 'trial by an impartial jury' that Senators considered the language surplusage.")

[1] *See* Callan v. Wilson, 127 U.S. 540, 552 (1888) ("According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury . . . .").

[2] Duncan v. Louisiana, 391 U.S. 145, 160 (1968). For a criticism of the petty offense doctrine, see Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring in judgment) ("The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between 'petty' offenses and 'serious' offenses. . . . Many years ago this Court, without the necessity of an amendment pursuant to Article V, decided that 'all crimes' [for purposes of Article III and the Sixth Amendment] did not mean 'all crimes,' but meant only 'all serious crimes.'").

[3] *See Callan*, 127 U.S. at 555.

[4] *Malum in se*, Black's Law Dictionary (11th ed. 2019).

[5] *Malum prohibitum*, Black's Law Dictionary (11th ed. 2019).

[6] District of Columbia v. Clawans, 300 U.S. 617, 624–25 (1937); District of Columbia v. Colts, 282 U.S. 63, 73 (1930); Schick v. United States, 195 U.S. 65, 67 (1904).

covered conduct that the Court considered *malum in se*.[7] In contrast, the crime of conducting a secondhand sales business without a license, which had a maximum statutory penalty of ninety days' imprisonment, was petty, the Court held, because it was not a crime at common law and amounted only to a breach of regulations (i.e., was *malum prohibitum*).[8] Even these early cases, however, presaged in dicta the clearer rule that constitutes the Court's current doctrine: crimes punishable by more than six months' imprisonment cannot be deemed petty and are therefore subject to the jury trial right.[9]

The Court's early doctrine on the right to jury trial also made special provision for summary trials for criminal contempt of court. In a long line of cases, the Court held consistently that the right simply did not apply to prosecutions for criminal contempt.[10] These cases reasoned that contempt in England had not been triable by jury since at least the early eighteenth century,[11] and that courts would lose power to enforce their orders effectively and maintain courtroom decorum if required to submit cases of contempt to juries for adjudication.[12] Perhaps the most historically significant of these cases was also one of the most recent. In *United States v. Barnett*, the Court held that the governor and lieutenant governor of Mississippi did not have a right to a jury trial in a contempt prosecution for obstructing state officials' compliance with federal court orders directing the University of Mississippi to admit an African-American student.[13] But while the *Barnett* Court reiterated the rule against applying the jury trial right to contempt,[14] the Court also expressed discomfort with the rule's absoluteness.[15] In *Cheff v. Schnackenberg*, decided two years later, the Court divided over the issue, with a plurality of four justices concluding that contempt did not require a jury trial so long as the actual sentence imposed did not exceed six months,[16] while two concurring justices held to the absolute rule that the Sixth Amendment does not require a jury trial for any contempt offense.[17] Criminal contempt continues to receive unique treatment under the Court's current doctrine on the jury trial right.

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[7] *Colts*, 282 U.S. at 73 ("The offense here charged is not merely malum prohibitum, but in its very nature is malum in se. . . . An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.").

[8] *Clawans*, 300 U.S. at 630.

[9] *Id*. at 627–28 ("[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible, without concluding that a penalty of ninety days is too much.").

[10] Green v. United States, 356 U.S. 165, 183 (1958) ("The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.").

[11] *Id*. at 185–86.

[12] United States v. Barnett, 376 U.S. 681, 697, 700 (1964); *see also* Bloom v. Illinois, 391 U.S. 194, 196 (1968) (explaining that the Court's early cases construed "the Sixth Amendment as permitting summary trials in contempt cases because at common law contempt was tried without a jury and because the power of courts to punish for contempt without the intervention of any other agency was considered essential to the proper and effective functioning of the courts and to the administration of justice").

[13] *Id*. at 685–86, 692.

[14] *Id*. at 692 ("[I]t is urged that those charged with criminal contempt have a constitutional right to a jury trial. This claim has been made and rejected here again and again.").

[15] *Id*. at 695 n.12 ("Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.").

[16] 384 U.S. 373, 380 ("[W]e rule . . . that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.").

[17] *Id*. at 381–82 (Harlan, J., concurring in the result).

Amdt6.4.3.2 Right to Trial by Jury Generally

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Supreme Court's current doctrine on the applicability of the Sixth Amendment right to jury trial comprises two major principles: (1) the right applies to prosecutions for any offense with a maximum authorized penalty that exceeds six months' imprisonment, because such offenses are not "petty";[1] and (2) the right applies to the adjudication of all elements of a criminal offense, a category that includes any fact (other than the fact of a prior conviction) that increases the minimum or maximum applicable penalty.[2] As a result of this second principle, a statutory sentencing scheme cannot constitutionally delegate determination of any penalty-increasing fact to the judge at sentencing.[3] Aside from these two major points, the Court has also established that the right to jury trial does not apply in juvenile court proceedings,[4] military cases (e.g., courts martial),[5] or proceedings to determine whether a defendant is intellectually disabled and therefore protected from capital punishment under the Eighth Amendment.[6]

Amdt6.4.3.3 Petty Offense Doctrine and Maximum Sentences Over Six Months

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under its earlier, multi-factor approach to defining petty offenses, the Supreme Court had given close and arguably preeminent consideration to the maximum statutory penalty.[1] In

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[1] Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989).

[2] Alleyne v. United States, 570 U.S. 99, 111 (2013) ("[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime . . . [and] the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt."); *id*. at 113 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty.").

[3] *Id*. at 113 n.2.

[4] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.").

[5] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 37 (1955) ("Defendants in cases arising in the armed forces, we think, are not entitled to demand trial by jury, whether the crime was committed on foreign soil or at a place within a State or previously ascertained district."); *see* Amdt5.2.3 Military Exception to Grand Jury Clause.

[6] Schriro v. Smith, 546 U.S. 6, 7 (2005); *see also* Atkins v. Virginia, 536 U.S. 304, 317 (2002).

[1] *See* Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) ("[T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."); District of Columbia v. Clawans, 300 U.S. 617, 624–25 (1937) (construing the question before it as "whether the penalty, which may be imposed for the present offense, of ninety days in a common jail, is sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded").

Baldwin v. New York, however, the Court fashioned from this criterion a bright line rule, stating: "we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."[2] Robert Baldwin was charged in New York City with a pick-pocketing offense called "jostling," punishable by a maximum of one year in prison.[3] Under a New York City statute, he was not eligible for a jury trial and, over his Sixth Amendment objection, was tried and convicted before a judge instead.[4] The Supreme Court, in pronouncing its bright line rule and holding that the denial of Baldwin's request for a jury trial violated his Sixth Amendment right, relied primarily upon legislative consensus.[5] Apart from New York City, the Court observed, no jurisdiction within the United States denied criminal defendants the right to jury trial for crimes with a maximum penalty exceeding six months' imprisonment.[6] The Court reasoned that this "near-uniform" legislative judgment about when the jury trial right should apply constituted "the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury."[7] In the messy business of line-drawing, in other words, legislative consensus provided the best and only mark.[8] The Court also concluded that the six-month rule struck the appropriate balance between the accused's interest in "interpos[ing] between himself and a possible prison term . . . the commonsense judgment of a jury of his peers,"[9] on the one hand, and the government's interest in efficient and inexpensive adjudications, on the other hand.[10]

Although *Baldwin* established that the right to jury trial applies whenever the maximum sentence for an offense exceeds six months, the case did not address the counter-proposition: whether the right necessarily does *not* apply when the maximum sentence for the charged offense does not exceed six months' imprisonment.[11]

The Court took up this question in *Blanton v. City of North Las Vegas*, where it established a "presumption"—but not a rule—that an offense with a maximum sentence of six months or less is petty for Sixth Amendment purposes and thus outside the reach of the jury trial right.[12] A defendant might rebut this presumption in a "rare situation" by demonstrating "that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the

[2] 399 U.S. 66, 69 (1970) (plurality opinion). A plurality of only three Justices supported the bright-line rule, but because two additional Justices concurred in the judgment on a much broader ground (that the Sixth Amendment requires a jury trial for all crimes, petty or not), the plurality opinion set the petty offense doctrine. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989) ("[O]ur decision in *Baldwin* established that a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months.").

[3] *Baldwin*, 399 U.S. at 67.

[4] *Id*. at 67–68.

[5] *Id*. at 70–71.

[6] *Id*. at 71–72 ("In the entire Nation, New York City alone denies an accused the right to interpose between himself and a possible prison term of over six months, the commonsense judgment of a jury of his peers.").

[7] *Id*. at 72–73.

[8] *Id*.

[9] *Id*. at 72.

[10] *Id*. at 73–74 ("Where the accused cannot possibly face more than six months' imprisonment, we have held that the[ ] disadvantages [of criminal conviction without jury trial], onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.").

[11] *Id*. at 69 n.6 ("In this case, we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'").

[12] 489 U.S. 538, 543 (1989) ("Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a 'petty' offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'").

offense in question is a 'serious' one."[13] In *Blanton*, the defendants faced charges for driving under the influence of alcohol (DUI), punishable under Nevada law by a term of imprisonment ranging from two days to six months, a fine ranging from $200 to $1,000, a ninety-day driver's license suspension, and a mandatory course on alcohol abuse.[14] As an alternative to the prison term, the statute authorized the trial court to order offenders to perform forty-eight hours of community service in garb identifying them as DUI offenders.[15] The Court held that these statutory penalties, as a package, were not sufficiently severe to rebut the petty offense presumption arising from the absence of a potential prison term exceeding six months.[16] In particular, the Court concluded that the $1,000 maximum fine fell well within the range of fines typically associated with petty offenses, and that the alternate punishment of two days of community service in DUI-offender clothing did not impose a burden or level of embarrassment commensurate with a prison sentence exceeding six months.[17]

In the wake of *Blanton*, it remained unclear what kind of alternate penalties might suffice to render an offense punishable by a maximum prison sentence of six months or less (and, accordingly, subject to the presumption of pettiness) "serious" so as to trigger a right to a trial by jury under the Sixth Amendment.[18] The Court reiterated after *Blanton*, in a case holding the jury trial right inapplicable to a federal DUI offense, that alternate, non-incarceration penalties would trigger the right only in "rare case[s]."[19] On the other side of the ledger, a more recent case acknowledged, without having to decide the issue, that a federal environmental statute providing for a fine of $50,000 for each day of an ongoing violation—and therefore capable of triggering aggregate fines into the tens of millions of dollars—imposed a punishment sufficiently serious to fall within the jury trial right.[20]

The other cases that bear most directly on the issue of when non-incarceration penalties trigger the jury trial right concern the imposition of large fines in criminal contempt prosecutions. Even before *Baldwin*, the Court had overruled its early doctrine treating contempt as a thing apart when it held that a case of "serious" contempt, like all other serious crimes, was subject to the jury trial right.[21] The test the Court ultimately adopted to distinguish petty and serious cases of contempt, however, turns on the "penalty actually imposed" rather than the maximum statutory penalty.[22] This distinction was necessary

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[13] *Id*.

[14] *Id*. at 539–40.

[15] *Id*. at 539.

[16] *Id*. at 544–45.

[17] *Id*. at 544.

[18] *See id*. at 543 (calling the standard for rebutting the petty offense presumption "somewhat imprecise" but indicating that it "should ensure the availability of a jury trial in the rare situation where a legislature" makes a serious offense punishable by "onerous penalties" other than a prison term exceeding six months).

[19] United States v. Nachtigal, 507 U.S. 1, 5 (1993).

[20] Southern Union Co. v. United States, 567 U.S. 343, 352 (2012) ("The [statute] subjects Southern Union to a maximum fine of $50,000 for each day of violation. The Government does not deny that, in light of the seriousness of that punishment, the company was properly accorded a jury trial.") (citation omitted). The corporate defendant faced a maximum potential fine of $38.1 million for a 762-day violation and was sentenced to pay a total of $18 million, *id*. at 347, but the Supreme Court held the sentence unconstitutional because a judge rather than a jury determined the duration of the violation. *Id*. at 352; Amdt6.4.3.7 Other Applications of Apprendi.

[21] Bloom v. Illinois, 391 U.S. 194, 208 (1968) ("If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases."); *id*. at 209 ("[M]any contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must give way . . . .").

[22] Muniz v. Hoffman, 422 U.S. 454, 476 (1975) ("[C]riminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary . . . but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial."); Taylor v. Hayes, 418 U.S. 488, 495 (1974) ("[O]ur cases hold that petty contempt like other petty criminal

because varying degrees of contempt often do not have maximum penalties fixed in statute.[23] In *Muniz v. Hoffman*, the Court held that imposing, against a labor union defendant, a $10,000 fine with no prison sentence did not render a criminal contempt prosecution serious for Sixth Amendment purposes.[24] "Imprisonment and fines are intrinsically different" in terms of the deprivation they impose on a contemnor, the Court reasoned.[25] While the Court refused to rule out the possibility that a fine by itself could trigger the jury trial right in some cases, it held that the $10,000 fine imposed on a union with 13,000 members was not "of such magnitude" as to make the contempt prosecution "serious."[26] In contrast, in *International Union, United Mine Workers of America v. Bagwell*, also involving labor union defendants, the Court held that the much larger criminal contempt fine of $52 million did trigger the jury trial right.[27] *Bagwell* and *Muniz*, although decided under the modified petty offense test that applies to criminal contempt prosecutions, together cast some light on the issue of when non-incarceration penalties cross the threshold of a "serious" offense: enormous fines like the one in *Bagwell* clearly do cross the threshold,[28] but even substantial fines like the $10,000 sum at issue in *Muniz* fall beneath the line and constitutionally may be prescribed for offenses tried without a jury.[29]

A defendant charged with multiple counts does not have a right to a jury trial based on the aggregated maximum potential sentence on all counts combined; rather, the maximum statutory penalty for each individual offense controls the analysis.[30] In *Lewis v. United States*, the defendant faced two counts of obstructing the mail, each punishable by a maximum prison term of six months.[31] The Supreme Court rejected the defendant's argument that the total potential prison term of one year triggered the jury trial right.[32] The Court reasoned that the legislative determination of the seriousness of an offense, as reflected in the maximum

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offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute.").

[23] Frank v. United States, 395 U.S. 147, 149 (1969) ("[I]n prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense."); *Bloom*, 391 U.S. at 211.

[24] 422 U.S. 454, 476–77 (1975).

[25] *Id*. at 477.

[26] *Id*.

[27] 512 U.S. 821, 837 n.5 ("We need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a $52 million fine unquestionably is a serious contempt sanction."). The *Bagwell* Court also addressed the antecedent question of whether a contempt penalty is civil or criminal in nature. *Id*. at 836–38 (determining the criminal or civil nature of a contempt order in light of "the character of the entire decree" and holding that the $52 million contempt fine was criminal because the defendants had no opportunity to purge the fine once imposed, the underlying misconduct occurred outside of the court's presence and consisted of "widespread" violations of a "complex injunction" resembling an "entire code of conduct," and because the fine itself was so severe). The Court has most often taken up the question of whether a proceeding is civil or criminal in the due process context. *See, e.g.,* Hicks v. Feiock, 485 U.S. 624, 637 (1988) (considering whether a contempt proceeding was criminal in nature so as to trigger the due process requirement that the government carry the burden of proof beyond a reasonable doubt).

[28] *See Bagwell*, 512 U.S. at 837 n.5; *see also* Southern Union Co. v. United States, 567 U.S. 343, 351 (2012) (stating that "not all fines are insubstantial, and not all offenses punishable by fines are petty" and citing as authority federal court judgments imposing criminal fines of $400 million, $448.5 million, and $1.195 billion).

[29] *Muniz*, 422 U.S. at 476–77; United States v. Nachtigal, 507 U.S. 1, 5 (1993) (holding that a maximum $5,000 fine and the possibility of certain "discretionary [sentencing] conditions," such as the payment of restitution or obligatory participation in a program at a community correctional facility, did not render a DUI offense with a maximum prison term of six months "serious").

[30] Lewis v. United States, 518 U.S. 322, 330 (1996) ("Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply.").

[31] *Id*. at 324.

[32] *Id*. at 327.

authorized sentence, governs the applicability of the jury trial right.[33] The maximum potential penalty faced by particular defendants based on the circumstances of their individual prosecutions is not relevant to that legislative judgment and thus not relevant to the Sixth Amendment question, the Court determined.[34] In other words, the constitutional issue of whether the jury trial right applies turns on the statutorily-defined offense, not on the case against the defendant.[35] In reaching this holding, the *Lewis* Court distinguished its earlier opinion in *Codispoti v. Pennsylvania*—which had held that the jury trial right applied where the total sentence imposed for multiple criminal contempt violations exceeded six months (even though none of the individual violations triggered a sentence over six months)[36]—on the ground that the contempts at issue there did not have a statutory maximum penalty and therefore did not reveal a legislative judgment as to their seriousness.[37]

Amdt6.4.3.4 Increases to Minimum or Maximum Sentences and Apprendi Rule

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Since the landmark case *Apprendi v. New Jersey*,[1] decided in 2000, Supreme Court jurisprudence on the applicability of the jury trial right has focused on the constitutionality of sentencing laws that delegate to judges rather than juries the determination of certain facts that affect the range of potential sentences for a crime. Before *Apprendi*, the Court had upheld such laws on the reasoning that although the jury trial right extended to every element of a criminal offense,[2] it did not extend to "sentencing factors."[3] *Apprendi* changed this doctrine.

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[33] *Id*. ("[W]e determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment.").

[34] *Id*. ("The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense . . . ."); *id*. at 328 ("Where we have a judgment by the legislature that an *offense* is "petty," we do not look to the potential prison term faced by a *particular defendant* who is charged with more than one such petty offense.") (emphasis in original).

[35] *Id*. at 328.

[36] 418 U.S. 506, 509, 517 (1974) ("We find unavailing respondent's . . . argument that petitioners' contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury.").

[37] *Lewis*, 518 U.S. at 328 ("In such a situation, where the legislature has not specified a maximum penalty, courts use the severity of the penalty actually imposed as the measure of the character of the particular offense.").

[1] 530 U.S. 466 (2000).

[2] *See* United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that the Fifth and Sixth Amendments together "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); *id*. at 511 ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.").

[3] McMillan v. Pennsylvania, 477 U.S. 79, 85–86, 93 (1986) (upholding against due process and Sixth Amendment challenges a statutory sentencing scheme under which a judge's factual determination that the defendant "visibly possessed a firearm" during the commission of certain felonies triggered an otherwise inapplicable five-year mandatory minimum sentence) ("[T]he Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt.") (citation omitted), *overruled by* Alleyne v. United States, 570 U.S. 99, 103 (2013); *see also* Walton v. Arizona, 497

The defendant in the case was convicted of a firearms offense punishable by a maximum prison term of ten years.[4] Under a separate sentencing-enhancement statute, however, the maximum penalty increased to twenty years after a trial judge determined by a preponderance of the evidence—at a hearing held after the defendant pleaded guilty—that the defendant committed the offense with the purpose of intimidating a group of individuals due to their race.[5] The trial court sentenced the defendant to twelve years in prison for the offense, two years above the statutory maximum that would have applied absent the judge-found fact.[6]

The Supreme Court held that this sentencing procedure violated the Sixth Amendment.[7] The Court articulated its essential holding as follows: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[8] The jury trial right serves as a bulwark against unjust loss of liberty at the hands of government tyranny or oppression, the Court reasoned.[9] Accordingly it does not comport with the Sixth Amendment to take the determination of facts that can lead to increased punishment away from the jury,[10] especially in light of the historic connection between offense and punishment in the Anglo-American legal tradition.[11]

Amdt6.4.3.5 Sentencing Guidelines

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

U.S. 639, 649 (1990) (upholding a statutory scheme that conditioned imposition of the death penalty upon a judge's finding of certain aggravating factors), *overruled by* Ring v. Arizona, 536 U.S. 584, 589 (2002).

[4] *Apprendi*, 530 U.S. at 468 (noting that the offense was "possession of a firearm for an unlawful purpose," punishable by imprisonment for between five and ten years).

[5] *Id*. at 468–69, 471.

[6] *Id*. at 471.

[7] *Id*. at 490.

[8] *Id*. A passage in *Jones v. United States*, decided the year before, anticipated *Apprendi*'s holding, although the Court decided *Jones* on statutory grounds and did not make a clear constitutional holding. Jones v. United States, 526 U.S. 227, 243 n.6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. . . . [O]ur prior cases suggest rather than establish this principle."). As for the exception for the fact of a prior conviction, the Court held before *Apprendi* that judges could constitutionally determine such facts. Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998) ("[W]e reject petitioner's constitutional claim that his recidivism must be treated as an element of his offense."). The Court has reaffirmed that holding after *Apprendi* while carefully delimiting its scope. *See* Mathis v. United States, 136 S. Ct. 2243, 2252 (2016) ("This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . [The judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

[9] *Id*. at 477.

[10] *Id*. at 484 ("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.").

[11] *Id*. at 480 ("Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment [at common law], so too were the circumstances mandating a particular punishment."); *id*. at 484 (noting "the historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided [by statute]").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The rule of *Apprendi* upended the use of binding sentencing guidelines in state and federal courts. In *Blakely v. Washington*, decided in 2004, the defendant pleaded guilty to an offense (second degree kidnapping involving domestic violence and use of a firearm) with a statutory maximum sentence of ten years in prison based on the applicable felony class.[1] The state sentencing guidelines restricted the sentence to a "standard range" of forty-nine to fifty-three months, unless the trial judge found the presence of an aggravating factor that justified an "exceptional sentence" above the standard range.[2] The trial judge did find an aggravating factor (deliberate cruelty) and imposed a sentence of ninety months—thirty-seven months above the upper limit of the "standard range" but thirty months below the ten-year maximum linked to the felony class.[3] The Supreme Court held that the imposition of the sentence violated the Sixth Amendment,[4] stating "[t]he statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[5] The ten-year offense maximum did not matter for Sixth Amendment purposes because the binding guidelines directed the judge to impose a sentence within the much lower "standard range" absent an aggravating factor.[6] The "standard range," therefore, constituted the maximum sentence authorized "*without* any additional findings"; the fact that a judge instead of a jury made the additional finding necessary to permit a sentence above this range violated the right to jury trial.[7]

The year after *Blakely*, the Supreme Court applied *Apprendi* to federal sentencing law in the 2005 case *United States v. Booker*.[8] Since 1987, federal statute had required (with limited exception) federal district courts to impose sentences within narrow ranges calculated under the Sentencing Guidelines of the United States Sentencing Commission.[9] *Booker* produced two separate majority opinions: one majority struck down a sentence imposed under the mandatory federal guidelines as unconstitutional, but a different majority (which shared only one member, Justice Ruth Bader Ginsburg, with the first majority) set the remedy and path forward.[10] The first majority determined that the federal guidelines, like the state guidelines at issue in *Blakely*, violated the Sixth Amendment because they premised increases in the

[1] 542 U.S. 296, 298–99 (2004). The offense was a "class B felony," which under state law was punishable by a prison term not to exceed ten years. *Id*. at 299.

[2] *Id*. at 299.

[3] *Id*. at 299–300.

[4] *Id*. at 305.

[5] *Id*. at 303.

[6] *Id*.

[7] *Id*. at 303–04 (emphasis in original).

[8] 543 U.S. 220 (2005).

[9] *See* Kimbrough v. United States, 552 U.S. 85, 96 n.7 (2007) ("Congress created the Sentencing Commission and charged it with promulgating the Guidelines in the Sentencing Reform Act of 1984, but the first version of the Guidelines did not become operative until November 1987.") (citations omitted); Mistretta v. United States, 488 U.S. 361, 367 (1989) (explaining that the Sentencing Reform Act made the "guidelines binding on the courts, although [the Act] preserve[d] for the judge the discretion to depart from the guideline applicable to a particular case if the judge f[ound] an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines."). The *Blakely* majority avoided comment on the constitutionality of the federal guidelines, 542 U.S. at 305 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."), but dissenters pointed out that the Court's reasoning almost certainly rendered them unconstitutional. *Id*. at 325 (O'Connor, J., dissenting) (noting lack of relevant distinction between Washington and federal guidelines).

[10] *Booker*, 543 U.S. at 226–27.

maximum authorized sentence upon judicial factfinding.[11] One of the defendants in *Booker*, for instance, saw his sentencing range for a narcotics violation under the federal guidelines increase significantly (from 210–262 months to 360 months' life imprisonment) due to two factual findings made by the trial judge during the sentencing proceedings.[12] The trial court ultimately imposed a sentence of 360 months.[13] Applying *Apprendi* and *Blakely*, the first *Booker* majority held that the "need to preserve Sixth Amendment substance" and the "ancient guarantee" of the jury trial right required invalidation of that sentence.[14]

While the first *Booker* majority's holding followed ineluctably from *Blakely*,[15] the second majority's formulation of a remedy broke newer ground. It transformed the federal guidelines from mandatory to advisory in nature by severing and excising two provisions of the federal sentencing statute that required federal courts to follow the guidelines, but leaving the rest of the statute and the guidelines program it created intact.[16] In their advisory form, the guidelines no longer violated the jury trial right because, rather than requiring the court to impose a particular sentence based upon a judge-found fact, they now simply offered recommendations as to how judges should "exercise [their] broad discretion in imposing a sentence within a statutory range."[17] As modified, federal sentencing law would now "require[ ] a sentencing court to consider guidelines [sentencing] ranges, but . . . permit[ ] the court to tailor the sentence in light of other statutory concerns as well . . . ."[18] Further, the sentences imposed by district courts would be subject to appellate review only for "unreasonableness," rather than *de novo* review for compliance with the guidelines.[19] The second majority reasoned that this remedy effectuated Congress's goal of instilling uniformity in federal sentencing better than the primary alternative remedy, which would have retained the mandatory nature of the guidelines but barred sentencing courts from increasing a sentence based on a judge-found fact.[20]

After *Booker*, the Court struck down another determinate sentencing scheme in *Cunningham v. California* because, much like the guidelines schemes at issue in *Blakely* and *Booker*, the California sentencing law at issue authorized the trial court to depart upwards from a standard sentencing threshold if the court found one or more "circumstances in aggravation."[21] The defendant's offense in that case triggered a standard sentence or "middle term" of twelve years, but the trial court departed upwards and sentenced the defendant to the

[11] *Id*. at 223.

[12] *Id*. at 227, 235. The findings concerned that amount of illegal narcotics that the defendant actually possessed and the defendant's obstruction of justice. *Id*. at 227.

[13] *Id*. at 227.

[14] *Id*. at 237. The first *Booker* majority reiterated the rule of *Apprendi* as follows: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*. at 244.

[15] *Id*. at 233.

[16] *Id*. at 245.

[17] *Id*. at 233.

[18] *Id*. (citations omitted).

[19] *Id*. at 260–61.

[20] *Id*. at 246, 253 ("Congress's basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

[21] Cunningham v. California, 549 U.S. 270, 279 (2007) ("California's DSL [Determinate Sentencing Law], and the Rules governing its application, direct the sentencing court to start with [a] middle term [of imprisonment], and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense.").

"upper term" of sixteen years after finding the presence of six aggravating factors.[22] The Supreme Court held this sentencing procedure unconstitutional under a straightforward application of *Apprendi*.[23]

Amdt6.4.3.6 Appellate Review of Federal Sentencing Determinations

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

A series of decisions clarified the "unreasonableness" standard of appellate review that *Booker* established for federal sentencing determinations under the now-advisory federal guidelines.[1] First, *Rita v. United States* held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines."[2] In other words, if a district court calculates the defendant's sentencing range correctly and imposes a sentence within that range, it does not violate the Sixth Amendment for the appellate court to presume the reasonableness of the sentence.[3] While recognizing that such a presumption would have some tendency to encourage district courts to follow the guidelines, the Supreme Court held that the presumption nevertheless does not violate the jury trial right because it does not go so far as to "forbid" deviation from the guidelines ranges absent judicial fact-finding.[4]

Whereas *Rita* concerned appellate review of sentences within the guidelines ranges, the Court took up the matter of appellate review of sentences that deviate from the guidelines (non-guidelines sentences) in *Gall v. United States*.[5] There, the Court reaffirmed that the "unreasonableness" standard of review applies to all federal sentences, including

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[22] *Id*. at 275–76.

[23] *Id*. at 288 ("Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, the DSL violates *Apprendi*'s bright-line rule . . . .") (citation omitted).

[1] One narrow aspect of the post-*Booker* federal guidelines, concerning modifications to already-imposed sentences following a subsequent reduction in the applicable guidelines range, does remain binding. Dillon v. United States, 560 U.S. 817, 819 (2010) (holding that *Booker* does not require treating as advisory a guidelines provision that "instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range [made retroactively applicable] except to the extent the original term of imprisonment was below the range then applicable"); *id*. at 828 ("[S]entence-modification proceedings . . . are not constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. . . . Viewed that way, [sentence-modification] proceedings . . . do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.").

[2] 551 U.S. 338, 347 (2007).

[3] *Id*. at 350–51.

[4] *Id*. at 352–53 ("The Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find . . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *prohibit* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone.") (emphasis in original).

[5] 552 U.S. 38 (2007).

non-guidelines sentences.[6] "Appellate courts may . . . consider the extent of a deviation from the Guidelines,"[7] but they may not "apply a presumption of unreasonableness" to non-guidelines sentences.[8] Nor may appellate courts apply standards of review that "come too close" to a presumption of unreasonableness, such as a rule that non-guidelines sentences must be supported by "extraordinary circumstances" or a "rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[9] To subject non-guidelines sentences to additional scrutiny of this sort, the Court reasoned, would too nearly resemble a requirement that sentencing judges follow the guidelines—exactly what *Booker* struck down.[10]

Two cases concerned below-guidelines sentences imposed for crack cocaine offenses. In *Kimbrough v. United States*[11] and *Spears v. United States*,[12] the Supreme Court held that district courts have authority to "vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."[13] Until 2007, the federal guidelines employed a "100-to-1 ratio" that treated every gram of crack cocaine as equal to 100 grams of powder cocaine for purposes of setting sentencing ranges for cocaine offenses.[14] The Supreme Court concluded in both *Kimbrough* and *Spears* that the discretion left to district courts under the post-*Booker* advisory guidelines permits "categorical disagreement" with the crack cocaine provisions by the sentencing court and is subject only to deferential abuse-of-discretion review of the imposition of a particular sentence.[15] Accordingly, in both cases, the Court reversed appellate court decisions that treated non-guidelines sentences based on categorical disagreement with the crack cocaine guidelines as invalid per se.[16] The Supreme Court did not

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[6] *Id*. at 41. The Court equated the "unreasonableness" standard with an abuse of discretion standard. *Id*. ("[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

[7] *Id*. at 47.

[8] *Id*. at 51.

[9] *Id*. at 47.

[10] *Id*. *Gall* contains perhaps the most comprehensive description of the requirements of appellate review of federal sentences under the post-*Booker* guidelines: "[The appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [sentencing statute] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the [sentencing statute] factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." 552 U.S. at 51.

[11] 552 U.S. 85 (2007).

[12] 555 U.S. 261 (2009).

[13] *Spears*, 555 U.S. at 843; *see also Kimbrough*, 552 U.S. at 110 ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve [the federal sentencing statute's] purposes, even in a mine-run case.").

[14] *Kimbrough*, 552 U.S. at 96–97. The federal guidelines drew the 100-to-1 ratio from the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, which used the ratio in setting mandatory minimum sentences for cocaine offenses. *Kimbrough*, 552 U.S. at 97.

[15] *Spears*, 555 U.S. at 264; *Kimbrough*, 552 U.S. at 110.

[16] *Spears*, 555 U.S. at 263; *Kimbrough*, 552 U.S. at 91.

clarify, however, whether its holding extended beyond the crack cocaine provisions to categorical disagreement with other guidelines provisions.[17]

Amdt6.4.3.7 Other Applications of Apprendi

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Apprendi prompted a major revision of the Court's Sixth Amendment jurisprudence concerning sentencing procedure in death penalty cases. In *Ring v. Arizona*, the Court struck down an Arizona statute (which the Court had upheld before *Apprendi*) that conditioned imposing the death penalty upon a judge's factual determinations as to the presence or absence of enumerated aggravating factors.[1] Although the statute imposed a burden on the prosecution to prove the existence of the aggravating factors beyond a reasonable doubt, the Court ruled that, under *Apprendi*, those findings must be made by a jury rather than a judge.[2] In *Hurst v. Florida*, the Court extended this holding to invalidate Florida's death penalty statute (also upheld before *Apprendi*), which used an advisory jury to make a sentencing recommendation but left the ultimate sentencing determination to "the trial judge's independent judgment about the existence of aggravating and mitigating factors."[3] In striking down the statute, the Court reiterated that the jury trial right requires the government "to base [a defendant's] death sentence on a jury's verdict, not a judge's factfinding."[4]

In a different vein, *Apprendi* applies to the factual predicates for mandatory minimum sentences. The Supreme Court held in *Alleyne v. United States* that "[a]ny fact that increases the mandatory minimum is an 'element' [of the offense] that must be submitted to the jury."[5]

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[17] In both cases, the Court mainly limited its statements of holding to the crack cocaine guidelines. *Spears*, 555 U.S. at 265–66 ("[D]istrict courts are entitled to reject and vary categorically *from the crack cocaine guidelines* . . . .") (emphasis added); *Kimbrough*, 552 U.S. at 110 (holding that district courts may disregard the "crack/powder disparity"); *but see* id. at 91 ("We hold that, under *Booker*, the cocaine guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory."). The Court also premised its reasoning partly upon considerations unique to the cocaine guidelines. *See id*. at 109–110 (concluding that the cocaine guidelines "do not exemplify the [Sentencing] Commission's exercise of its characteristic institutional role" because the Commission based those provisions upon the mandatory minimums in the 1986 Anti-Drug Abuse Act and not upon empirical data).

[1] 536 U.S. 584, 589 (2002) ("Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). *Ring* overruled an earlier case that had upheld the same Arizona statute. Walton v. Arizona, 497 U.S. 639, 649 (1990) ("[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances.").

[2] *Ring*, 536 U.S. at 589, 597.

[3] 136 S. Ct. 616, 620 (2016) (quoting Blackwelder v. State, 851 So.2d 650, 653 (Fla. 2003) (per curiam)). *Hurst* overruled two earlier Supreme Court cases that upheld the Florida statute. Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam); Spaziano v. Florida, 468 U.S. 447 (1984); *see Hurst*, 136 S. Ct. at 624 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.").

[4] *Hurst*, 136 S. Ct. at 624.

[5] 570 U.S. 99, 103 (2013).

Alleyne overruled one post-*Apprendi* case[6] and one pre-*Apprendi* case,[7] both of which upheld statutory schemes that premised increases in the mandatory minimum sentence upon judicial fact-finding.[8] The *Alleyne* Court rejected attempts to "distinguish facts that raise the maximum from those that increase the minimum" under *Apprendi*'s Sixth Amendment analysis;[9] both types of facts, the Court reasoned, constitute offense elements and therefore fall within the scope of the jury trial right.[10] Accordingly, "[j]uries must find any facts that increase either the statutory maximum or minimum,"[11] except for the fact of a prior conviction.[12]

In *United States v. Haymond*, a splintered majority of five Justices extended *Alleyne* to the context of supervised release.[13] *Haymond* held unconstitutional a federal statute, 18 U.S.C. § 3583(k), that required imposing a mandatory minimum term of imprisonment of five years for any violation of a condition of supervised release through the commission of certain federal crimes, such as the possession of child pornography, by defendants required to register as sex offenders.[14] The statutory scheme required judges to determine violations by a preponderance of the evidence.[15] A plurality of four Justices reasoned that punishments for supervised release violations constitute part of the overall punishment for the initial offense of conviction, and that, as such, any violation found by a judge that triggered a new mandatory minimum prison term violated the jury trial right under *Alleyne*.[16] A concurring opinion that supplied the decisive fifth vote, however, offered a narrow rationale. That opinion reasoned that supervised release proceedings generally do not implicate the jury trial right, but that the unique nature of Section 3583(k)—essentially, its requirement of a mandatory minimum prison term for enumerated offenses—rendered it "less like ordinary revocation [of supervised release] and more like punishment for a new offense, to which the jury right would typically attach."[17]

Apprendi also applies to the factual predicate for a criminal fine imposed for a non-petty offense.[18] Under the petty offense doctrine, not all criminal fines trigger the jury trial right, but "[w]here a fine is substantial enough to trigger that right, *Apprendi* applies in full."[19] As a result, it violates the Sixth Amendment for a judge to make a factual finding that increases the maximum potential fine for a serious (non-petty) offense.[20] A judge may not, for example,

[6] Harris v. United States, 536 U.S. 545, 567 (2002) ("[T]he political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.").

[7] McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

[8] *Harris*, 536 U.S. at 567; *McMillian*, 477 U.S. at 93.

[9] *Alleyne*, 570 U.S. at 116.

[10] *Id*. at 114–15 ("As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

[11] *Id*. at 113 n.2.

[12] *Id*. at 111 n.1.

[13] No. 17-1672, slip op. at 10–11 (U.S. June 26, 2019) (plurality opinion).

[14] *Id*. at 3.

[15] *Id*.

[16] *Id*. at 10–11.

[17] United States v. Haymond, No. 17-1672, slip op. at 2 (U.S. June 26, 2019) (Breyer, J., concurring).

[18] Southern Union Co. v. United States, 567 U.S. 343, 360 (2012) ("We hold that the rule of *Apprendi* applies to the imposition of criminal fines.").

[19] *Id*. at 352.

[20] *Id*.

determine the duration of ongoing criminal conduct in order to calculate the maximum potential fine under a statute prescribing penalties for each day of violation.[21]

In contrast, beyond the fact of prior conviction, at least one other type of factual determination relevant to sentencing remains unaffected by *Apprendi*. In *Oregon v. Ice*, the Supreme Court held that a state legislature may, without running afoul of the jury trial right, assign to a judge factual determinations that govern whether a defendant convicted of multiple offenses should receive consecutive rather than concurrent sentences.[22] The Court noted that juries traditionally did not take part in this decision[23] and that states take a variety of approaches to regulating how judges make the decision.[24] Accordingly, on the basis of "twin considerations—historical practice and respect for state sovereignty," the Court declined to extend *Apprendi* to the sentencing decision of whether to impose multiple sentences consecutively.[25]

Amdt6.4.4 Scope of the Right

Amdt6.4.4.1 Overview of Scope of Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The right to a jury trial entails the "right to have a jury make the ultimate determination of guilt."[1] As such, the criminal jury is not a "mere factfinder," but instead an adjudicative body that decides "guilt or innocence on every issue, which includes application of the law to the facts."[2] The trial court may not usurp the jury's function by directing a guilty verdict, "no matter how conclusive the evidence;"[3] nor may the trial court "attempt[ ] to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."[4] In modern doctrine, these foundational principles regarding the scope of the jury function have had perhaps their most significant ramifications in due process jurisprudence,

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[21] *Id*. ("This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow.").

[22] 555 U.S. 160, 163–64 (2009).

[23] *Id*. at 163.

[24] *Id*. ("Most States continue the common-law tradition: They entrust to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently. In some States, sentences for multiple offenses are presumed to run consecutively, but sentencing judges may order concurrent sentences upon finding cause therefor. Other States, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences.").

[25] *Id*. at 168.

[1] United States v. Gaudin, 515 U.S. 506, 510 (1995).

[2] *Id*. at 513–14; *see also id.* at 514 ("[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.").

[3] United Bhd. of Carpenters & Joiners of Am. v. United States, 330 U.S. 395, 408 (1947); *see also* Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."); Sandstrom v. Montana, 442 U.S. 510, 516 n.5 (1979) ("[V]erdicts may not be directed against defendants in criminal cases.").

[4] United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977).

where the Supreme Court has addressed claims that particular types of jury instructions unconstitutionally impinge upon or skew the jury's adjudicative task.[5] The Court's Sixth Amendment doctrine, on the other hand, has taken up three central issues of jury structure and operation: size, unanimity, and juncture (i.e., the stage of the proceedings at which the jury participates).

Amdt6.4.4.2 Size of the Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under current doctrine, a criminal jury must have at least six members.[1] The Court's early doctrine endorsed the stricter view that the Sixth Amendment required a twelve-member jury in conformity with historical practice.[2] But because the federal criminal system used a twelve-person jury,[3] the Supreme Court did not squarely confront the constitutionality of a state law providing for smaller juries until after it held in *Duncan v. Louisiana* in 1968 that the jury trial right applied against the states.[4] In the first case after *Duncan* to address such a law,

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[5] *See Sandstrom*, 442 U.S. at 523 (holding that jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated due process because the "jurors could reasonably have concluded that they were directed to find against defendant on the element of intent" and "[t]he State was thus not forced to prove beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged") (internal quotation marks and citation omitted); *see also* Schad v. Arizona, 501 U.S. 624, 630 (1991) (rejecting under due process analysis the claim that a "conviction under [jury] instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony murder is unconstitutional"); Amdt5.5.1 Overview of Due Process through Amdt5.5.2 Historical Background on Due Process. Although the Court has tended to address them in the due process context, erroneous jury instructions may implicate both the right to due process and the right to jury trial. The Supreme Court has noted that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," such that a jury instruction that misstates the burden of proof as something less than the reasonable doubt standard violates both constitutional requirements and constitutes a structural error not subject to harmless error analysis. *Sullivan*, 508 U.S. at 278, 281 ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.").

[1] Ballew v. Georgia, 435 U.S. 223, 245 (1978) (opinion of Blackmun, J.) ("[T]rial on criminal charges before a five-member jury deprive[s] [a defendant] of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments."); *id*. at 245–46 (Powell, J., concurring in the judgment, also on the theory that five-member juries violate the right to jury trial).

[2] Thompson v. Utah, 170 U.S. 343, 353 (1898) ("[T]he word 'jury' and the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . [and therefore] require[ ] that [a criminal defendant] should be tried by a jury composed of not less than twelve persons."); *see also Ballew*, 435 U.S. at 230 n.8 (collecting additional cases decided between 1900 and 1930 that made the "assumption . . . that the 12-member feature was a constitutional requirement"). In *Thompson*, the Court held that application of a provision of Utah's state constitution providing for an eight-person jury in non-capital cases to prosecutions for crimes committed before Utah became a state, when as a territory it followed the federal practice of twelve-person juries, violated the *ex post facto* clause of Article I, §10 of the U.S. Constitution. *Thompson*, 170 U.S. at 355.

[3] *See*, *e.g.*, Fed. R. Crim. Proc. 23(b) advisory committee's note to 1944 adoption (explaining that the rule restated the "existing practice" of providing for twelve-member jury, absent stipulation by the parties for a smaller jury). In 1983, Rule 23(b) was amended to authorize federal courts "to permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror [after the jury has retired to deliberate]." Fed. R. Crim. Proc. 23(b)(3) advisory committee's note to 1983 amendments.

[4] *See* Burch v. Louisiana, 441 U.S. 130, 134 (1979) ("Only in relatively recent years has this Court had to consider the practices of the several States relating to jury size and unanimity. *Duncan v. Louisiana* marked the beginning of

Williams v. Florida,[5] the Court rejected the traditional, historically-based view that the jury trial right required a twelve-person jury and applied instead a functional analysis to uphold a Florida law providing for a six-person criminal jury.[6] The Supreme Court stated: "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . [b]ut we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained."[7]

Eight years later, in *Ballew v. Georgia*,[8] the Court converted the six-person jury upheld in *Williams* into the constitutional minimum when it struck down a Georgia law providing for five-person juries in certain cases.[9] Relying on a number of academic studies about problems with small juries released after *Williams*, the leading opinion in *Ballew* concluded that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."[10] *Ballew* did not overturn or disavow *Williams*; instead, it simply prohibited any "further reduction" in the jury size that *Williams* upheld.[11]

Amdt6.4.4.3 Unanimity of the Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under current doctrine, jury verdicts must be unanimous to convict a defendant of a non-petty offense in both federal and state criminal trials.[1] For federal criminal trials, the Supreme Court's recognition of this unanimity requirement is long-standing, dating back at

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our involvement with such questions.") (citation omitted); Williams v. Florida, 399 U.S. 78, 90, 103 (1970) (explaining that before *Duncan*, the Court's decisions had "assumed" that the Constitution required a twelve-person jury).

[5] 399 U.S. 78 (1970).

[6] *Id*. at 86 ("We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth.").

[7] *Id*. at 100.

[8] 435 U.S. 223 (1978).

[9] *Id*. at 245 (opinion of Blackmun, J.). Only Justice John Stevens joined Justice Harry Blackmun's opinion, which announced the judgment; four other Justices concurred in the judgment in opinions that also concluded that five-member juries violated the Sixth Amendment. *See id*. (White, J., concurring in judgment on ground that "a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments"); *id*. at 245–46 (Powell, J., concurring in judgment on ground that "use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness . . . and a line has to be drawn somewhere if the substance of jury trial is to be preserved," but disagreeing with plurality's implication that the Fourteenth Amendment fully incorporates the right to jury trial and with plurality's reliance on "numerology derived from statistical studies").

[10] *Id*. at 239 (opinion of Blackmun, J.).

[11] *Id*. ("While we adhere to, and reaffirm our holding in *Williams v. Florida*, the[ ] [academic] studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the . . . [Constitution prohibits] a reduction in [jury] size to below six members.").

[1] Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. Apr. 20, 2020).

least as far as the late 1800s.[2] But for state criminal trials, it was not until 2020 that the Court held for the first time, in *Ramos v. Louisiana*, that the Sixth Amendment unanimity requirement applies by incorporation via the Fourteenth Amendment.[3]

Before *Ramos*, the unanimity requirement did not apply to state criminal trials under the splintered decision in the 1972 case *Apodaca v. Oregon*.[4] This outcome was significant for the two states—Oregon and Louisiana—that authorized non unanimous verdicts in criminal trials (the other 48 states required unanimity).[5] In *Apodaca*, the Supreme Court upheld a provision of the Oregon constitution that permitted jury verdicts by votes of 10-2 in all but first-degree murder cases.[6] A plurality of four justices concluded that the Sixth Amendment did not require unanimity. Much like the *Williams* majority that upheld the six-person Florida jury, these justices preferred functional over historical considerations when interpreting the Sixth Amendment.[7] They reasoned that a jury allowed to convict on a 10-2 vote adequately safeguarded a criminal defendant's Sixth Amendment interest in "having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him . . . ."[8] Justice Lewis Powell's narrower concurrence, however, set the doctrine on unanimity that would endure until 2020. He agreed with four dissenters on the point that "in accord both with history and precedent . . . the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial."[9] He voted to uphold the Oregon constitutional provision, however, on the ground that the Fourteenth Amendment Due Process Clause did not incorporate the unanimity component of the Sixth Amendment jury trial right, even though it incorporated the right to a jury itself.[10] As a result, under *Apodaca*, federal but not state criminal juries were constitutionally required to render unanimous verdicts.[11]

Until the Supreme Court overruled *Apodaca* in 2020, state laws that authorized small juries (as opposed to the twelve-member jury at issue in *Apodaca*) to render non-unanimous verdicts triggered special Sixth Amendment concerns. In *Burch v. Louisiana*, the Supreme

[2] *Id*. at 6 ("As early as 1898, the Court said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'") (quoting Thompson v. Utah, 170 U.S. 343, 351 (1898)); Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury."); Maxwell v. Dow, 176 U.S. 581, 586 (1900) (stating that the right to jury trial "implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held"); *see also* Johnson v. Louisiana, 406 U.S. 366, 369–70 (1972) (Powell, J., concurring) (citing "an unbroken line of cases reaching back into the late 1800's [in which] the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial").

[3] *Ramos*, slip op. at 7.

[4] 406 U.S. 404 (1972).

[5] *Ramos*, slip op. at 1.

[6] 406 U.S. at 406.

[7] *Id*. at 410 ("[A]s in *Williams*, our inability to divine 'the intent of the Framers' . . . requires that in determining what is meant by a jury we must turn to other than purely historical considerations.").

[8] *Id*. at 411.

[9] *Johnson*, 406 U.S. at 371 (Powell, J., concurring in judgment). Justice Powell's concurring opinion in *Apodaca* is reported together with his concurring opinion in a companion case, Johnson v. Louisiana, 406 U.S. 356 (1972), at 406 U.S. at 366.

[10] *Johnson*, 406 U.S. at 373 (Powell, J., concurring in judgment) (reasoning that incorporation of the unanimity requirement "would give unwarranted and unwise scope to the incorporation doctrine as it applies to the due process right of state criminal defendants to trial by jury."); *see Ramos*, slip op. at 8 ("Justice Powell doubled down on his belief in 'dual-track' incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.").

[11] Timbs v. Indiana, No. 17-109, slip op. at 3 n.1 (U.S. Feb. 20, 2019) (citing *Apodaca* for the proposition that "the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings").

Court held that six-person juries must convict unanimously.[12] The Court struck down, as a violation of the jury trial right, a Louisiana law permitting conviction for nonpetty offenses upon the agreement of five members of a six-person jury.[13] Just as the *Apodaca* plurality opinion followed the reasoning in *Williams* in departing from historical understandings of jury structure to afford the states more flexibility in crafting criminal procedure, the *Burch* decision followed the reasoning in *Ballew* in putting a limit on the flexibility.[14] The *Burch* Court conceded its inability to "discern *a priori* a bright line below which the number of jurors participating in the trial or the verdict"[15] would violate the Sixth Amendment and emphasized that "line-drawing . . . 'cannot be wholly satisfactory.'"[16] The Court concluded, however, that "lines must be drawn somewhere if the substance of the jury trial right is to be preserved" and that "conviction for a nonpetty offense by only five members of a six-person jury presents a . . . threat [to that preservation] and justifies . . . requiring verdicts rendered by six-person juries to be unanimous."[17] The Court "intimated no view" as to the constitutionality of nonunanimous juries with more than six but fewer than twelve members.[18]

In the 2020 *Ramos* decision, the Supreme Court overruled *Apodaca*, reaffirmed that the Sixth Amendment requires unanimity, and held that the Fourteenth Amendment incorporates the Sixth Amendment unanimity requirement against the states.[19] The Court reasoned that "*Apodaca* was gravely mistaken" and that "Justice Powell refused to follow this Court's incorporation precedents" when he determined that an alternative version of the jury trial right—one without a unanimity requirement—applied in state criminal trials.[20] In 2021, the Court held that *Ramos* did not apply retroactively to invalidate, on federal collateral review, convictions from non-unanimous verdicts that were already final at the time *Ramos* was decided.[21]

Amdt6.4.4.4 Two-Tier Trial Court Systems

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[12] 441 U.S. 130, 138 (1979).

[13] *Id*. at 134 ("[C]onviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury.").

[14] *Id*. at 138 (resting decision on "much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury").

[15] *Id*. at 137.

[16] *Id*. at 138 (quoting Duncan v. Louisiana, 391 U.S. 145, 161 (1968)).

[17] *Id*.; *see also* Brown v. Louisiana, 447 U.S. 323, 326–27 (1980) (holding that the rule of *Burch* applies to convictions still pending on direct review on the date *Burch* was decided, even where the jury was empaneled before that date).

[18] *Burch*, 441 U.S. at 138 n.11.

[19] Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. Apr. 20, 2020) ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.").

[20] *Id*. at 21. The Court also explained that the Louisiana and Oregon laws had "racist origins": both states originally had provided for non-unanimous verdicts to "dilute" the participation of African Americans and other minorities on juries. *Id*. at 2–3.

[21] Edwards v. Vannoy, No. 19-5807, slip op. at 2 (U.S. May 17, 2021).

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Court held in *Ludwig v. Massachusetts* that the provision of a jury trial on appeal, instead of at the first level of adjudication, does not violate the right to jury trial so long as the accused does not face any undue burdens in reaching the jury trial stage.[1] *Ludwig* upheld Massachusetts's "two-tiered" system for trying certain non-petty crimes, which afforded the accused the possibility of a jury trial only after conviction in a non-jury trial at the first tier.[2] A defendant keen on a jury trial could expedite the procedure by "admitting sufficient findings of fact" at the first tier, thereby obviating most of the proceedings before the second-tier jury trial, which was de novo (i.e., not influenced by the outcome of the first tier trial).[3] The Court held that this procedure did not violate what it called the "Fourteenth Amendment right to a jury trial."[4] Because the Massachusetts system undeniably provided the accused with the opportunity for a jury trial, the real question according to the Court was whether the provision of that opportunity only at the second tier "unconstitutionally burden[ed] the exercise of that right."[5] The Massachusetts system did not impose such an unconstitutional burden, the Court concluded, because the procedure for admitting factual findings at the first tier allowed the accused to mitigate the increased financial costs and "psychological and physical hardships" of two trials.[6] The post-*Duncan* context also appeared to influence the decision: the *Ludwig* Court, like the *Williams* and *Apodaca* Courts, emphasized the need to afford the states flexibility in their manner of administering a jury trial system.[7]

Amdt6.4.5 Right to Impartial Jury

Amdt6.4.5.1 A Jury Selected from a Representative Cross-Section of the Community

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

[1] 427 U.S. 618, 630 (1976).

[2] *Id*. at 620 ("Massachusetts is one of several States having a two-tier system of trial courts for criminal cases.").

[3] *Id*. at 621.

[4] *Id*. at 626. The Court construed the defendant's claim as being that the Massachusetts system violated his jury trial right and based its decision largely on Sixth Amendment precedent. *Id*. at 624–26. The Court refrained from expressly tying its holding to the Sixth Amendment right to jury trial, however, presumably to retain Justice Powell's vote in the five-justice majority. *See id*. at 632 (Powell, J., concurring) ("I join the opinion of the Court, as I understand it to be consistent with my view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment.").

[5] *Id*. at 626.

[6] *Id*. at 626–27, 628–29. The Court also rejected the argument that the "possibility of a harsher sentence at the second tier" unduly burdened exercise of the jury trial right, relying on due process cases for the proposition that the Constitution prohibits only "the vindictive imposition of an increased sentence." *Id*. at 627.

[7] *Ludwig*, 427 U.S. at 630 ("The modes of exercising federal constitutional rights have traditionally been left, within limits, to state specification. In this case, Massachusetts absolutely guarantees trial by jury to persons accused of serious crimes, and the manner it has specified for exercising this right is fair and not unduly burdensome.").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment guarantee of the right to a trial "by an impartial jury" applies in both state and federal court.[1] Other constitutional provisions, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment, also bear upon impartiality. Before the Court extended the right to a jury trial to state courts in the 1968 case *Duncan v. Louisiana*,[2] the Court had established that, if a state chose to provide juries, due process required them to be impartial.[3] In the post-*Duncan* era, the Supreme Court has continued to ground the right to an impartial jury in both the Sixth Amendment and due process.[4] In addition, equal protection prohibits certain forms of discrimination in jury selection.[5]

Impartiality is a two-part requirement: the jury must be selected from a pool that represents a fair cross-section of the community[6] and the jurors must be unbiased.[7] First, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[8] This "fair cross-section" requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[9] Describing the test for whether a prima facie violation of the fair-cross-section requirement had occurred, the Supreme Court stated:

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[1] Taylor v. Louisiana, 419 U.S. 522, 526–528 (1975); *see* Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. Apr. 20, 2020) (reviewing incorporation precedents concerning the Sixth Amendment right to jury trial).

[2] 391 U.S. 145, 149–50 (1968).

[3] Peters v. Kiff, 407 U.S. 493, 501–02 (1972) ("Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law."); Turner v. Louisiana, 379 U.S. 466, 471 (1965); Irvin v. Dowd, 366 U.S. 717, 722–23 (1961) (overturning conviction on due process principles for lack of impartial jury); *see also* Gonzales v. Beto, 405 U.S. 1052, 1506 n.4 (1972) (Stewart, J., concurring in judgment) (describing "established case law holding that due process of law requires an impartial jury.").

[4] *See* Skilling v. United States, 561 U.S. 358, 377–78 (2010) (noting that the "Sixth Amendment secures to criminal defendants the right to trial by an impartial jury" before declaring that due process requires the trier of fact to judge a case "impartially, unswayed by outside influence"); Turner v. Murray, 476 U.S. 28, 36 n.9 (1986) ("The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process."); Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976) ("A criminal defendant in a state court is guaranteed an 'impartial jury' by the Sixth Amendment as applicable to the States through the Fourteenth Amendment. Principles of due process also guarantee a defendant an impartial jury."); *see also* Dietz v. Bouldin, 579 U.S. 40, 48 (2016) ("[T]he guarantee of an impartial jury . . . is vital to the fair administration of justice.").

[5] *See, e.g.,* Batson v. Kentucky, 476 U.S. 79, 85 (1986) ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.") (citations omitted); Castaneda v. Partida, 430 U.S. 482, 494 (1977) ("[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."); *see* Amdt14.S1.8.1.8 Peremptory Challenges.

[6] See *Taylor*, 419 U.S. at 530 ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . .") (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

[7] See *id.* The requirement that jurors be unbiased is discussed at Amdt6.4.2 Right to a Jury Free From Bias

[8] Taylor v. Louisiana, 419 U.S. 522, 528 (1975); *see* Glasser v. United States, 315 U.S. 60, 86 (1942) (reasoning that officials charged with choosing federal jurors "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community"); *see also* Brown v. Allen, 344 U.S. 443, 474 (1953) (discussing fair cross-section concept in analyzing due process challenge to jury lists used in state trial, fifteen years before Duncan made the jury trial right applicable against the states).

[9] Holland v. Illinois, 493 U.S. 474, 480–81 (1990); Lockhart v. McCree, 476 U.S. 162, 173–74 (1986) ("The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury . . . .").

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[10]

The defendant may bring a challenge under this test even if he or she does not belong to the excluded group.[11] Once the defendant demonstrates a prima facie violation, the government faces a formidable burden: the jury selection process may be sustained under the Sixth Amendment only if those aspects of the process that result in the disproportionate exclusion of a distinctive group, such as exemption criteria, "manifestly and primarily" advance a "significant state interest."[12] Applying these standards, the Court invalidated a state selection system granting women an automatic exemption from jury service upon request.[13] In an earlier case, it voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service.[14]

Amdt6.4.5.2 Jury Free from Bias

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

In addition to requiring that a petit jury be selected from a representative cross section of the community,[1] the Supreme Court has interpreted the Sixth Amendment to require assurance that the jurors chosen are unbiased—that is, the jurors must be willing to decide the

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[10] Duren v. Missouri, 439 U.S. 357, 364 (1979); *see also* Berghuis v. Smith, 559 U.S. 314, 330–32 (2010) (affirming, on habeas review, state court decision that rejected a fair cross-section claim for failure to prove systematic exclusion with particularity).

[11] *Taylor*, 419 U.S. at 526 (holding that male defendant had standing to challenge exclusion of female jurors); Peters v. Kiff, 407 U.S. 493, 500–05 (1972) (holding that White defendant had standing to bring due process challenge against exclusion of African American jurors and reasoning that "if the Sixth Amendment were applicable here, and petitioner were challenging a post-Duncan petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service").

[12] *Duren*, 439 U.S. at 367–68.

[13] *Id*. at 359–60.

[14] Taylor v. Louisiana, 419 U.S. 522, 526–31 (1975); see also Ballard v. United States, 329 U.S. 187, 193 (1946) ("We conclude that the purposeful and systematic exclusion of women from the [federal jury] panel in this case was a departure from the scheme of jury selection which Congress adopted . . . ."); Thiel v. S. Pac. Co., 328 U.S. 217, 224–25 (1946) (exercising supervisory power over administration of justice in federal courts to grant a new trial in a civil case where day laborers were excluded from the jury lists). Before the Supreme Court held in 1968 that the Sixth Amendment right to jury trial applied against the states, the Court had rejected, in 5-to-4 decisions, Fourteenth Amendment challenges to state use of "blue ribbon" jury lists that tended to exclude women and laborers. See Fay v. New York, 332 U.S. 261, 290–93 (1947) (reasoning that not even systematic or purposeful underrepresentation of women or occupational groups violated the Fourteenth Amendment); Moore v. New York, 333 U.S. 565, 566–68 (1948) (reaffirming Fay but reasoning that the evidence did not show the systematic exclusion of African Americans from the jury lists).

[1] See Amdt6.4.2 A Jury Selected from a Representative Cross Section of the Community

case on the basis of the evidence presented.[2] The Court has held that absent a showing of actual bias, a juror's employment by the government that is prosecuting the case does not require disqualification for implicit bias.[3] By extension, absent a showing of actual bias, a federal petit jury may consist entirely of federal government employees without offending the right to an impartial jury.[4] A violation of a defendant's right to an impartial jury does occur, however, when the jury or any of its members is subjected to pressure or influence which could impair freedom of action; the trial judge should conduct a hearing in which the defense participates to determine whether impartiality has been undermined.[5] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and require judicial inquiry.[6] Similarly, a trial court should not condone private communications, contact, or tampering with a jury, or the creation of circumstances raising the dangers thereof.[7] When the locality of the trial has been saturated with publicity about a defendant, so that it is unlikely that he can obtain a disinterested jury, he is constitutionally entitled to a change of venue.[8] Subjecting a defendant to trial in an atmosphere of actual or threatened mob domination also violates the right to an impartial jury.[9]

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[2] Skilling v. United States, 561 U.S. 358, 378 (2010).

[3] Dennis v. United States, 339 U.S. 162, 171–72 (1950); *see generally* United States v. Wood, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.").

[4] Frazier v. United States, 335 U.S. 497, 509–11 (1948) ("Government employees [are] subject, as are all other persons and in the same manner, to challenge for 'actual bias' and under all ordinary circumstances only to such challenge. In that view, absent any basis for such challenge, we do not see how a right to challenge the panel as a whole can arise from the mere fact that the jury chosen by proper procedures from a properly selected panel turns out to be composed wholly of Government employees or, a fortiori, of persons in private employment."). On common-law grounds, the Court in Crawford v. United States, 212 U.S. 183 (1909), disqualified federal employees, but the Court sustained a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia in United States v. Wood, 299 U.S. 123 (1936).

[5] Smith v. Phillips, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); Remmer v. United States, 350 U.S. 377, 381–82 (1956) (granting new trial where hearing established that a juror was "disturbed and troubled" after having been offered a bribe and interviewed by the FBI about the incident).

[6] *E.g.*, Sheppard v. Maxwell, 384 U.S. 333, 350–51, 357 (1966); Irvin v. Dowd, 366 U.S. 717, 723–24 (1961). Exposure of the jurors to knowledge about the defendant's prior criminal record and activities is not alone sufficient to establish a presumption of reversible prejudice, but on voir dire jurors should be questioned about their ability to judge impartially. Murphy v. Florida, 421 U.S. 794, 799–800 (1975). The Court indicated that under the same circumstances in a federal trial it may have overturned the conviction pursuant to its supervisory power. *Id.* at 797–98 (citing Marshall v. United States, 360 U.S. 310 (1959)) . Essentially, the defendant must make a showing of prejudice into which the court may then inquire. Chandler v. Florida, 449 U.S. 560 (1981); *Smith*, 455 U.S. at 215–18; Patton v. Yount, 467 U.S. 1025, 1031–33 (1984).

[7] Remmer v. United States, 347 U.S. 227, 229 (1954); *see* Turner v. Louisiana, 379 U.S. 466, 473–74 (1965) (placing jury in charge of two deputy sheriffs who were principal prosecution witnesses at defendant's trial denied him his right to an impartial jury); Parker v. Gladden, 385 U.S. 363, 363–65 (1966) (influence on jury by prejudiced bailiff).

[8] Irvin v. Dowd, 366 U.S. 717, 727–28 (1961) (felony); Rideau v. Louisiana, 373 U.S. 723, 725–26 (1963) (felony); Groppi v. Wisconsin, 400 U.S. 505, 507–09 (1971) (misdemeanor). Important factors to be considered, however, include the size and characteristics of the community in which the crime occurred; whether the publicity was blatantly prejudicial; the time elapsed between the publicity and the trial; and whether the jurors' verdict supported the theory of prejudice. Skilling v. United States, 561 U.S. 358, 381–84 (2010).

[9] Frank v. Mangum, 237 U.S. 309, 335 (1915) ("We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term."); *see also Sheppard*, 384 U.S. at 362 (recognizing, in case where media activity inside the courtroom created a "carnival atmosphere at trial," that "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences"); *Irvin*, 366 U.S. at 728 ("With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.").

There are limits on the extent to which an inquiry can be made into whether a criminal defendant's right to a jury trial has been denied by a biased jury. The federal rules of evidence[10] and the vast majority of the states[11] forbid the "impeachment" or questioning of a verdict by inquiring into the internal deliberations of the jury—a rule of evidence that originated in English common law.[12] This "no impeachment" rule, which aims to promote "full and vigorous discussion" by jurors and to preserve the "stability" of jury verdicts, has limited the ability of criminal defendants to argue in post-conviction proceedings that a jury's internal deliberations demonstrated bias amounting to a deprivation of the right to a jury trial.[13] Indeed, the Court has held that the Sixth Amendment justifies an exception to the no impeachment rule in only the "gravest and most important cases."[14] As a result, the Court has rejected a Sixth Amendment exception to the rule when evidence existed that jurors were under the influence of alcohol and drugs during the trial.[15] In the Court's view, three safeguards—(1) the voir dire (jury selection) process, (2) the ability for the court and counsel to observe the jury during trial, and (3) the potential for jurors to report untoward behavior to the court before rendering a verdict—adequately protect Sixth Amendment interests while preserving the values underlying the no impeachment rule.[16]

In *Pena-Rodriguez v. Colorado*, the Court for the first time recognized a Sixth Amendment exception to the no impeachment rule.[17] In that case, a criminal defendant contended that his conviction by a Colorado jury for harassment and unlawful sexual contact should be overturned on constitutional grounds because evidence from two jurors revealed that a fellow juror had expressed anti-Hispanic bias toward the petitioner and his alibi witness during deliberations.[18] The Court agreed, concluding that where a juror makes a "clear statement" indicating that he relied on "racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way . . . ."[19] In so holding, the Court emphasized the "imperative to purge racial prejudice from the administration of justice" that underlies the Fourteenth Amendment, which, in turn, makes the Sixth Amendment applicable to the states.[20] Contrasting the instant case from earlier rulings that involved "anomalous behavior from a single jury—or juror—gone off course,"[21] the Court noted that racial bias in the judicial system was a "familiar and recurring evil"[22] that required the

[10] *See* FED. R. Evid. 606(b)(1) ("During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment.").

[11] *See* Peña-Rodriguez v. Colorado, No. 15–606, slip op. at 9 (U.S. May 6, 2017) (noting that 42 jurisdictions follow the federal rule).

[12] *Id*. at 2. The no-impeachment rule does have three central exceptions, allowing a juror to testify about (1) extraneous prejudicial information improperly brought to the jury's attention; (2) outside influences brought to bear on any juror; and (3) a mistake made in entering the verdict on the verdict form. *See* FED. R. Evid. 606(b)(2); *Peña-Rodriguez*, slip op. at 7–9.

[13] *See Peña-Rodriguez*, slip op. at 9.

[14] *Id*. at 8 (quoting McDonald v. Pless, 238 U.S. 264, 269 (1915)).

[15] *See* Tanner v. United States, 483 U.S. 107, 127 (1987); *see also* Warger v. Shauers, 574 U.S. 40, 44–45 (2014) (holding, in a civil case, that the no-impeachment rule barred the introduction of evidence that a juror lied during jury selection about bias against one party).

[16] *See Tanner*, 483 U.S. at 127. In addition, while the no-impeachment rule, by its very nature, prohibits testimony by jurors, evidence of misconduct *other than juror testimony* can be used to impeach the verdict. *Id.*

[17] *See* Peña-Rodriguez v. Colorado, No. 15–606, slip op. (U.S. May 6, 2017).

[18] *Id* at 3.

[19] *Id.* at 17.

[20] *Id.* at 13.

[21] *Id.* at 15.

[22] *Id.*

judiciary to prevent "systemic injury to the administration of justice."[23] Moreover, the Court emphasized "pragmatic" rationales for its holding, noting that other checks on jury bias would be unlikely to reveal racial bias.[24]

Amdt6.4.5.3 Death Penalty and Requirement of Impartial Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Inquiries into jury bias have arisen in the context of the imposition of the death penalty. In *Witherspoon v. Illinois*,[1] the Court held that the exclusion in capital cases of jurors conscientiously opposed to capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant's constitutional right to an impartial jury. The Supreme Court stated: "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror."[2] A jury, the Court further wrote, must "express the conscience of the community on the ultimate question of life or death," and the automatic exclusion of all with generalized objections to the death penalty "stacked the deck" and made of the jury a tribunal "organized to return a verdict of death."[3] The Court has also held that a court may not refuse a defendant's request to examine potential jurors to determine whether they would vote automatically to impose the death penalty; general questions about fairness and willingness to follow the law are inadequate.[4]

In *Wainwright v. Witt*, the Court held that the proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[5] Thus, to be excluded, a juror need not indicate that he would "automatic[ally]" vote against the death penalty, nor need his "bias be proved with 'unmistakable clarity.'"[6] Instead, a juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully

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[23] *Id.* at 16.

[24] *Id.* ("[T]his Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire* . . . The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the court of juror deliberations.").

[1] 391 U.S. 510 (1968).

[2] *Id*. at 519.

[3] *Id*. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death-scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Id*. at 517–18; *cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968). *Witherspoon* was given added significance when, in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. *See also* Adams v. Texas, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

[4] Morgan v. Illinois, 504 U.S. 719, 734–36 (1992).

[5] 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[6] 469 U.S. at 424; *see also* Darden v. Wainwright, 477 U.S. 168 (1986) (appropriateness of exclusion should be determined by context, such as excluded juror's understanding based on previous questioning of other jurors).

and impartially apply the law."[7] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[8] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this argument, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints."[9] Moreover, the Court noted, the state has an "entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate evidence for the two distinct but interrelated functions.[10] For the same reasons, the Court has held that there is no violation of the right to an impartial jury if a defendant for whom capital charges have been dropped is tried, along with a codefendant still facing capital charges, before a "death qualified" jury.[11]

In *Uttecht v. Brown*,[12] the Court summed up four principles that it derived from *Witherspoon* and *Witt*:

> First a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.[13]

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion is not subject to harmless error analysis.[14] However, a court's error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an impartial jury if he is able to exclude the juror through exercise of a peremptory challenge.[15] The relevant inquiry "must focus . . . on the jurors who ultimately sat," the Court declared, declining to extend the rule from cases concerning the

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[7] *Witt*, 469 U.S. at 425–26.

[8] Lockhart v. McCree, 476 U.S. 162, 165 (1986).

[9] *Id*. at 183.

[10] *Id*. at 180.

[11] Buchanan v. Kentucky, 483 U.S. 402, 420 (1987).

[12] 551 U.S. 1 (2007).

[13] *Id.* at 9 (citations omitted). In *Uttecht*, the Court reasoned that deference was owed to trial courts because the lower court is in a "superior position to determine the demeanor and qualifications of a potential juror." *See id.* at 22. In *White v. Wheeler*, the Court recognized that a trial judge's decision to excuse a prospective juror in a death penalty case was entitled to deference even when the judge does not make the decision to excuse the juror contemporaneously with jury selection (voir dire). *See* 577 U.S. 73, 78–80 (2015) (per curiam). The Court explained that the deference due under *Uttecht* to a trial judge's decision was not limited to the judge's evaluation of a juror's demeanor, but extended to a trial judge's consideration of "the substance of a juror's response." *See id.* at 80. When a trial judge "chooses to reflect and deliberate" over the record regarding whether to excuse a juror for a day following the questioning of the prospective juror, that judge's decision should be "commended" and is entitled to substantial deference. *See id.*

[14] Gray v. Mississippi, 481 U.S. 648, 668 (1987) ("Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply.") (citation omitted).

[15] Ross v. Oklahoma, 487 U.S. 81, 88 (1987) ("[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. . . . So long as the jury that sits is impartial, the

erroneous exclusion of jurors opposed to the death penalty that the focus instead should be on "'whether the composition of the *jury panel as a whole* could have been affected by the trial court's error.'"[16]

Amdt6.4.5.4 Voir Dire and Peremptory Challenges

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

It is the function of voir dire to give the defense and the prosecution the opportunity to inquire into, or have the trial judge inquire into, possible grounds of bias or prejudice that potential jurors may have, and to acquaint the parties with the potential jurors.[1] Not every opinion which a juror may entertain about a case necessarily disqualifies him.[2] The judge must determine "whether the nature and strength of the opinion . . . raise the presumption of partiality."[3] It suffices for the judge to question potential jurors about their ability to put aside what they had heard or read about the case, listen to the evidence with an open mind, and render an impartial verdict; the judge's refusal to go further and question jurors about the contents of news reports to which they had been exposed does not violate the right to an impartial jury.[4]

Under some circumstances, the Constitution may require the trial court to ask jurors whether they harbor racial bias, although the Supreme Court has sometimes grounded this requirement in "the essential fairness required by the Due Process Clause of the Fourteenth Amendment" rather than in the right to an impartial jury specifically.[5] Thus, in a situation in which a Black defendant alleged that he was being prosecuted on false charges because of his civil rights activities, the Court held that due process required the trial court to ask prospective jurors about racial prejudice. A similar rule applies in some capital trials, where the risk of racial prejudice "is especially serious in light of the complete finality of the death sentence."[6] The right to an impartial jury entitles a defendant accused of an interracial capital offense to have prospective jurors informed of the victim's race and questioned as to racial bias.[7] But in circumstances not suggesting a significant likelihood of racial prejudice infecting

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fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."); *see also* United States v. Martinez-Salazar, 528 U.S. 304, 308 (2000) (applying the same principle in a federal criminal case).

[16] 487 U.S. at 86, 87 (quoting and distinguishing *Gray*, 481 U.S. at 665 (emphasis in original)).

[1] *See* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981); Pointer v. United States, 151 U.S. 396, 408–09 (1894); Lewis v. United States, 146 U.S. 370, 377 (1892).

[2] Witherspoon v. Illinois, 391 U.S. 510, 520–21, 522 n.21 (1968).

[3] Reynolds v. United States, 98 U.S. 145, 155 (1879); *see Witherspoon*, 391 U.S. at 520–21, 522 n.21.

[4] Mu'Min v. Virginia, 500 U.S. 415, 431–32 (1991).

[5] Ham v. South Carolina, 409 U.S. 524, 527 (1973).

[6] Turner v. Murray, 476 U.S. 28, 35 (1986).

[7] *Id.* at 36–37.

a trial, as when the facts are merely that the defendant is Black and the victim White in a non-capital case, the Constitution is satisfied by a more generalized but thorough inquiry into impartiality.[8]

Although the government is not constitutionally obligated to allow peremptory challenges,[9] criminal trials typically provide for a system of peremptory challenges in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.[10] Although racially discriminatory use of peremptory challenges violates the Equal Protection Clause under the standard of proof set forth in *Batson v. Kentucky*,[11] it does not violate the Sixth Amendment, the Court ruled in *Holland v. Illinois*.[12] The Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics."[13] To rule otherwise, the Court reasoned, "would cripple the device of peremptory challenge" and thereby undermine the Amendment's goal of "impartiality with respect to both contestants."[14]

Amdt6.4.6 Right to Local Jury

Amdt6.4.6.1 Historical Background on Local Jury Requirement

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Article III, § 2 requires that federal criminal cases be tried by jury in the state in which the offense was committed,[1] but much criticism arose over the absence of any guarantee in the

[8] Ristaino v. Ross, 424 U.S. 589, 597 (1976); *see Turner*, 476 U.S. at 33 ("[U]nder *Ristaino*, the mere fact that petitioner is black and his victim white does not constitute a 'special circumstance' of constitutional proportions. What sets this case apart from *Ristaino*, however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a capital offense."). In *Ristaino*, the Court noted that under its supervisory power it would require a federal court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. *Ristaino*, 424 U.S. at 597 n.9; *see* Aldridge v. United States, 283 U.S. 308, 311 (1931). *But see* Rosales-Lopez v. United States, 451 U.S. 182 (1981), in which the trial judge refused a defense request to inquire about possible bias against Mexicans. A plurality apparently adopted a rule that, all else being equal, the judge should necessarily inquire about racial or ethnic prejudice only in cases of violent crimes in which the defendant and victim are members of different racial or ethnic groups, *id.* at 192, a rule rejected by two concurring Justices. *Id.* at 194. Three dissenting Justices thought the judge must always ask when defendant so requested. *Id.* at 195.

[9] The Supreme Court stated: "This Court has long recognized that peremptory challenges are not of federal constitutional dimension." Rivera v. Illinois, 556 U.S. 148, 151–52 (2009) (internal quotation marks omitted) (state trial court's erroneous denial of a defendant's peremptory challenge does not warrant reversal of conviction if all seated jurors were qualified and unbiased).

[10] United States v. Martinez-Salazar, 528 U.S. 304, 311–12 (2000); *cf.* Stilson v. United States, 250 U.S. 583, 586 (1919) (holding that it is no violation of the guarantee of jury impartiality to limit the number of peremptory challenges to each defendant in a multi-party trial).

[11] 76 U.S. 79 (1986); *see* Amdt14.S1.8.1.8 Peremptory Challenges.

[12] 493 U.S. 474 (1990).

[13] *Id*. at 487.

[14] *Id*. at 484.

[1] U.S. Const. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.")

original Constitution that the jury be drawn from the "vicinage" or neighborhood of the crime.[2] James Madison's efforts to write into the Bill of Rights an express vicinage provision were rebuffed by the Senate, and the present language was adopted as a compromise.[3]

Amdt6.4.6.2 Local Juries and Vicinage Requirement

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

To date, the Supreme Court has applied the Sixth Amendment right to a trial before a jury of "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law"—known as the vicinage requirement[1]—in federal prosecutions only.[2] The Court has not considered whether the requirement applies to state-level prosecutions via the Due Process Clause of the Fourteenth Amendment.[3]

Under the vicinage requirement, the "location of the commission of the criminal acts" determines the propriety of the trial venue.[4] The defendant cannot be tried in a federal district if the charged offense was not committed there.[5] Thus, a defendant could not be tried in Missouri for money-laundering when the financial transactions that constituted the charged offenses occurred entirely in Florida.[6] Although the drug trafficking activity that generated the illicit funds occurred in Missouri, the defendant was charged only in connection with the money laundering, and venue was therefore proper only in Florida.[7]

If the charged criminal acts occur in multiple districts, the trial may occur in any one of those districts.[8] In a prosecution for conspiracy, the accused may be tried in the district where

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[2] Francis H. Heller, The Sixth Amendment 25–26 (1951); *see* Williams v. Florida, 399 U.S. 78, 93 n.35 (1970) ("'[V]icinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county.").

[3] *Williams*, 399 U.S. at 96 (explaining that, in the final version of the Sixth Amendment, "the 'vicinage' requirement itself had been replaced by wording that reflected a compromise between broad and narrow definitions of that term, and that left Congress the power to determine the actual size of the 'vicinage' by its creation of judicial districts.")

[1] *See* Williams v. Florida, 399 U.S. 78, 93 n.35 (1970) ("'[V]icinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county.").

[2] *See, e.g.* United States v. Cabrales, 524 U.S. 1, 6 (1998); Johnston v. United States, 351 U.S. 215, 220–21 (1956); *see generally* 1 Wayne R. LaFave et al., Criminal Procedure § 2.6(b) (4th ed. 2015) (explaining that Supreme Court precedent has not "addressed the incorporation of the Sixth Amendment's vicinage requirements" and reviewing various strains of lower court caselaw on the issue).

[3] *See* Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004); LaFave, *supra* note 2, at § 2.6(b); *cf.* Nashville, Chicago & St. Louis Ry. v. Alabama, 128 U.S. 96, 101 (1888) (holding that the Article III, § 2 provision requiring that a criminal jury trial "shall be held in the State where the said Crimes shall have been committed" applies only in federal courts).

[4] United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); *Cabrales*, 524 U.S. at 6–7; United States v. Cores, 356 U.S. 405, 407 (1958); Johnston v. United States, 351 U.S. 215 (1956).

[5] Salinger v. Loisel, 265 U.S. 224, 232 (1924).

[6] *Cabrales*, 524 U.S. at 3–4.

[7] *Id*. at 7.

[8] *Rodriguez-Moreno*, 526 U.S. at 281–82; United States v. Lombardo, 241 U.S. 73, 77 (1916) ("Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done . . . ."); Palliser v. United States, 136 U.S. 257, 266 (1890) ("Where a crime is committed partly in one

the conspiracy was formed[9] or, more broadly, in any district where the accused or a co-conspirator carried out an overt act.[10] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates may be tried in any district through which the forbidden transportation is conducted.[11] Similarly, where an offense consists of sending illicit material through the mail, the Sixth Amendment permits the trial to take place in any district through which the material passes, although for policy reasons Congress may limit this range of permissible venues by statute.[12]

The Sixth Amendment does not entitle the accused to a preliminary hearing before being removed for trial to the federal district in which the charged offenses are alleged to have occurred.[13] The assignment of a district judge from one district to another, pursuant to statute, does not violate the vicinage requirement—that is, such assignment does not create a new judicial district whose boundaries are undefined or subject the accused to trial in a district not established when the offense with which he is charged was committed.[14]

For offenses against federal laws not committed within any state, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.[15] The place of trial may be designated by statute after the offense has been committed.[16]

Amdt6.4.7 Notice of Accusation

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment right to be "informed of the nature and cause of the accusation" guarantees criminal defendants "adequate notice of the charges against [them]."[1] To satisfy

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district and partly in another it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate . . . ."); *see also* Hagner v. United States, 285 U.S. 427, 429 (1932) (reasoning that offense of scheming to defraud a corporation by mail is committed both in the place where the letter is mailed and, by virtue of a delivery presumption, also in the place to which the letter is addressed).

[9] Burton v. United States, 202 U.S. 344, 388–89 (1906).

[10] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252–53 (1940); Brown v. Elliott, 225 U.S. 392, 401–02 (1912); Hyde v. United States, 225 U.S. 347, 367 (1912); Haas v. Henkel, 216 U.S. 462, 474 (1910).

[11] Armour Packing Co. v. United States, 209 U.S. 56, 76–77 (1908).

[12] United States v. Johnson, 323 U.S. 273, 274 (1944) ("Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported.").

[13] United States ex rel. Hughes v. Gault, 271 U.S. 142, 149 (1926); *see also* Beavers v. Henkel, 194 U.S. 73, 84–85 (1904) (reasoning that the sufficiency of an indictment may be challenged in the trial venue but generally not prior to removal to that venue); *cf.* Tinsley v. Treat, 205 U.S. 20 (1907) (distinguishing *Beavers* and holding that the federal removal statute entitled the accused to at least offer evidence as to lack of probable cause).

[14] Lamar v. United States, 241 U.S. 103, 117–118 (1916).

[15] Jones v. United States, 137 U.S. 202, 211 (1890); United States v. Dawson, 56 U.S. (15 How.) 467, 488 (1853).

[16] Cook v. United States, 138 U.S. 157, 181–83 (1891) (holding that retroactive designation of the trial venue for a crime committed in federal territory did not violate the Sixth Amendment vicinage requirement, the Article III jury trial provision, or the *ex post facto* clause).

[1] Lopez v. Smith, 574 U.S. 1, 5–6 (2014). Principles of procedural due process also guarantee the accused's right to notice of the charges. *Id*. at 4 (referring to the accused's "Sixth Amendment and due process right to notice"); *see* Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that

the Sixth Amendment requirement, the notice that the government provides must be specific enough to enable the defendant to prepare a defense and to protect himself or herself after judgment against a subsequent prosecution on the same charge.[2] Thus, in the prosecution of a witness for the crime of refusing to answer the questions of a congressional subcommittee about a topic that the subcommittee was investigating, the government violated the Sixth Amendment right by failing to identify the topic of the investigation.[3] Because criminal liability could attach only if the questions that the witness refused to answer related to the topic of the congressional investigation, the Court reasoned that the prosecution's failure to identify the topic left the "chief issue undefined" and therefore violated the defendant's right to know "the nature of the accusation against him."[4]

The Court has cautioned, however, that its limited precedents interpreting this constitutional provision "stand for nothing more than the general proposition" that the government must notify the defendant of the nature of the charges.[5] The Court has not established "specific rule[s]" about how this notice requirement applies in practice.[6] For example, it has not resolved whether a prosecutorial decision to switch theories of liability towards the end of trial vitiates otherwise adequate notice provided in the pleadings.[7] Federal and state rules of criminal procedure contain more detailed notice requirements.[8] The Sixth Amendment right to notice of accusation applies to the states via the Due Process Clause of the Fourteenth Amendment.[9]

Amdt6.5 Confrontation Clause

Amdt6.5.1 Early Confrontation Clause Cases

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.").

[2] Bartell v. United States, 227 U.S. 427, 431 (1913) ("It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him, in order that he may meet the accusation and prepare for his trial, and that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense."); Burton v. United States, 202 U.S. 344, 372 (1906); United States v. Simmons, 96 U.S. 360, 362 (1878); United States v. Cruikshank, 92 U.S. 542, 544, 558 (1876); *cf.* United States v. Van Duzee, 140 U.S. 169, 173 (reasoning that the Sixth Amendment does not require the government to proactively give a copy of the indictment to the accused, because the accused may always request a copy from the court at government expense and often "the defendant does not desire a copy, or pleads guilty to the indictment upon its being read to him; and in such cases there in no propriety in forcing a copy upon him and charging the government with the expense").

[3] Russell v. United State, 369 U.S. 749, 766 (1962).

[4] *Id*. at 767–68.

[5] *Lopez*, 574 U.S. at 5–6.

[6] *Id*. at 6.

[7] *Id*.

[8] *See* Fed. R. Crim. P. 7(c) (governing the "nature and contents" of charging documents in federal criminal cases); 5 Wayne R. LaFave et al., Criminal Procedure § 19.2(c) (4th ed. 2020) (discussing notice requirements imposed by Rule 7 and counterpart state provisions that are more robust than Sixth Amendment requirements).

[9] *See* Gannett Company, Inc. v. DePasquale, 443 U.S. 368, 379 (1979) ("The Sixth Amendment, applicable to the States through the Fourteenth, surrounds a criminal trial with guarantees such as the rights to notice, confrontation, and compulsory process that have as their overriding purpose the protection of the accused from prosecutorial and judicial abuses."); *Lopez*, 574 U.S. at 5–6 (analyzing Sixth Amendment notice claim on collateral review of state court conviction).

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." The Clause's "primary object[ive] . . . was to prevent depositions or ex parte affidavits . . . being used against" the defendant, giving the defendant the opportunity of "testing the recollection and sifting the conscience of the witness."[1] Although the Supreme Court has long recognized this Sixth Amendment right to confront witnesses in criminal proceedings as "[o]ne of the fundamental guaranties of life and liberty,"[2] until 1965, the Court construed the right as limited to federal court proceedings.[3] As a result, in its early doctrine, the Court rejected Confrontation Clause challenges to state court proceedings.[4]

The Confrontation Clause's text, which grants the accused a right to confront the "witnesses against" him, generally is addressed to individuals who give formal testimony or its functional equivalent in a criminal proceeding.[5] The Court held that the purpose of the Sixth Amendment was "to continue and preserve" a common-law right of confrontation "having recognized exceptions."[6] For example, the Court in *Kirby v. United States* described the operation of the Clause as mandating that "a fact which can be primarily established only by witnesses" must allow the defendant to confront those witnesses "at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."[7] Similarly, in 1911, the Court interpreted the Confrontation Clause as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination."[8]

In a number of early cases, the Court examined the reach and limits of the Confrontation Clause in challenges to federal court proceedings. For example, in *Delaney v. United States*,[9] the Court considered the relationship between the Confrontation Clause and the rule against hearsay evidence[10] out-of-court statements offered at trial in support of the matter they

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[1] Mattox v. United States, 156 U.S. 237, 242 (1895).

[2] Kirby v. United States, 174 U.S. 47, 55 (1899).

[3] *See* Stein v. People of State of New York, 346 U.S. 156, 195 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964) (rejecting argument that right to confront witnesses is incorporated against the states via the Fourteenth Amendment); West v. State of Louisiana, 194 U.S. 258, 261–62 (1904), *overruled in part by* Pointer v. Texas, 380 U.S. 400 (1965) ("As to the Federal Constitution, it will be observed that there is no specific provision therein which makes it necessary in a state court that the defendant should be confronted with the witnesses against him in criminal trials. The 6th Amendment does not apply to proceedings in state courts."). In 1965, the Supreme Court overturned this rule and held that the Confrontation Clause also applies in the context of state criminal proceedings (as discussed later). *Pointer*, 380 U.S. at 403.

[4] *E.g.*, *Stein*, 346 U.S. at 195; *West*, 194 U.S. at 261–62.

[5] See, e.g., Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

[6] Salinger v. United States, 272 U.S. 542, 548 (1926).

[7] Kirby v. United States, 174 U.S. 47, 55 (1899).

[8] Dowdell v. United States, 221 U.S. 325, 330 (1911)

[9] 263 U.S. 586 (1924).

[10] *Id.* at 590. In its early doctrine, the Court sometimes examined the admissibility of out of court statements without expressly deciding whether they amounted to "hearsay." S. Ry. v. Gray, 241 U.S. 333, 337 (1916) (evaluating admissibility of prior contradictory statements); Hickory v. United States, 151 U.S. 303, 309 (1894) (similar).

assert.[11] The *Delaney* Court concluded that the co-conspirator exception to the hearsay ban-which permits the admission of the acts or statement of one conspirator against a codefendant if made "during and in furtherance of the conspiracy"[12]-was consistent with the Confrontation Clause and allowed for the admission of a dead co-conspirator's out-of-court statement.[13]

The Court recognized a number of other exceptions to the Confrontation Clause in its early doctrine. For instance, the Court concluded that the right to confront witnesses does not bar the admission of dying declarations[14]-out-of-court statements by a declarant "made under a sense of impending death."[15] In addition, the Court held that an accused forfeits the right to confront witnesses who are "absent by his own wrongful procurement" and "which he has kept away."[16] However, according to the Court, if the witness was absent due "to the negligence of the prosecution," then the Confrontation Clause prohibited the admission of "the deposition or statement of" that "absent witness."[17]

Other early cases involved the extent to which the Confrontation Clause barred the use of information from one proceeding in a separate proceeding. For instance, in an 1899 opinion, the Court concluded that the Confrontation Clause bars the admission of the conviction of a defendant in one proceeding against a different defendant in a separate proceeding when used to establish material facts.[18]

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[11] *See* Krulewitch v. United States, 336 U.S. 440, 442–43 (1949) (describing as hearsay "an unsworn, out-of-court declaration of petitioner's guilt"); Bridges v. Wixon, 326 U.S. 135, 153–54 (1945) (holding that out-of-court statements offered as substantive evidence were hearsay and therefore inadmissible); *accord Hearsay*, Black's Law Dictionary (11th ed. 2019) ("In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

[12] *Coconspirators Exception*, Black's Law Dictionary (11th ed. 2019).

[13] *Delaney*, 263 U.S. at 590. In subsequent cases, the Court further outlined the co-conspirator exception. *See* Lutwak v. United States, 344 U.S. 604, 617–18 (1953) (concluding that co-conspirator hearsay exception does not apply to statements made after conspiracy concludes); *Krulewitch*, 336 U.S. at 442–43 (determining that "hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking" where conspiracy had ended when statement was made). These subsequent cases generally arose not as Confrontation Clause questions, but rather evidentiary determinations regarding hearsay. *See Lutwak v. United States*, 344 U.S. at 617–18; *Krulewitch*, 336 U.S. at 442–43; *see also* Dutton v. Evans, 400 U.S. 74, 82 (1970) (plurality opinion) (explaining how the federal hearsay exception for coconspirator statements derived from the Court's "exercise of its rule-making power in the area of the federal law of evidence").

[14] Kirby v. United States, 174 U.S. 47, 61 (1899); Mattox v. United States, 156 U.S. 237, 243–44 (1895); *see also* Snyder v. Com. of Mass., 291 U.S. 97, 107 (1934) ("[T]he privilege of confrontation [has not] at any time been without recognized exceptions, as, for instance, dying declarations."); Robertson v. Baldwin, 165 U.S. 275, 282 (1897) ("[T]he provision that an accused person shall be confronted with the witnesses against him [does not] prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.").

[15] Mattox v. United States, 146 U.S. 140, 151 (1892).

[16] Reynolds v. United States, 98 U.S. 145, 158 (1878). Elsewhere, the Court noted that the right to confrontation does not prohibit the admission of "the notes of testimony of [a] deceased witness," at least where "the accused has had the right of cross-examination in a former trial." Dowdell v. United States, 221 U.S. 325, 330 (1911). According to the Court, "[t]o say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent." *Mattox*, 156 U.S. at 243.

[17] Motes v. United States, 178 U.S. 458, 474 (1900).

[18] *Kirby*, 174 U.S. at 55. However, early Confrontation Clause doctrine suggested that the admission of information from one proceeding in a separate proceeding will not always violate the right to confront witnesses. *See Dowdell*, 221 U.S. at 330–31 (considering the right to confront witnesses under the Constitution of the Philippines and concluding that an appellate court did not infringe on that right by requiring lower courts to certify "certain facts regarding the course" of the underlying trial when that certification is not testimony concerning the defendant's culpability).

Amdt6.5.2 Confrontation Clause Cases During the 1960s through 1990s

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

In 1965, the Supreme Court broke from its early doctrine limiting Confrontation Clause protections to federal court proceedings and held that the right to confrontation is "fundamental" and "made obligatory on the States by the Fourteenth Amendment."[1] Alongside that pronouncement, and in the years immediately following, the Court's opinions further discussed the relationship between the confrontation right and the bar on hearsay evidence.[2] The Court seemingly associated the two concepts, concluding that a key purpose of the right to confrontation is to give criminal defendants "an opportunity to cross-examine the witnesses against him," absent an applicable hearsay exception.[3] In *Pointer v. Texas*,[4] the Court rejected the admission of testimony from a prior preliminary hearing on confrontation grounds, because no exception to the hearsay rule applied, and the testimony was taken in circumstances insufficient to secure "an adequate opportunity to cross-examine" the witness through counsel.[5] The Court further emphasized the importance of cross examination in satisfying the confrontation right in *Douglas v. Alabama*,[6] concluding that the Confrontation Clause barred the admission of the confession of an alleged accomplice who invoked his Fifth Amendment right to avoid self-incrimination, leaving the defendant unable to "cross-examine [the witness] as to the alleged confession."[7] Three years later, cross-examination was again

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[1] Pointer v. Texas, 380 U.S. 400, 403 (1965).

[2] Hearsay is "a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay, Black's Law Dictionary (11th ed. 2019)

[3] *See Pointer*, 380 U.S. at 406–07 (explaining that although the confrontation right generally requires cross-examination, there are recognized exceptions such as dying declarations and "testimony of a deceased witness who has testified at a former trial").

[4] 380 U.S. 400, 403 (1965).

[5] *Id.* at 407.

[6] 380 U.S. 415 (1965).

[7] *Id.* at 419–20; *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality opinion) ("The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."); Barber v. Page, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."). The Court has given weight to the importance of cross-examination for confrontation purposes in a number of other opinions. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause."); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) ("Since there was an adequate opportunity to cross-examine [the witness] at the first trial, and counsel . . . availed himself of that opportunity, the transcript of [the witness'] testimony in the first trial bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion)); Smith v. State of Illinois, 390 U.S. 129, 131 (1968) (concluding that trial court's refusal to permit defendant to cross-examine the "principal prosecution witness" on "either his name or where he lived" was "effectively to emasculate the right of cross-examination itself"). Notably, the Supreme Court has also observed the importance of cross-examination in the context of Constitutional due process rights. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that a defendant's due process rights had been

integral to the Court's Confrontation Clause analysis in *Bruton v. United States*.[8] In *Bruton*, the Court concluded that the Confrontation Clause barred the admission of the confession of a non-testifying co-defendant in a joint jury trial, where that confession implicated another defendant.[9] According to the Court, introduction of that confession added "substantial, perhaps even critical, weight to the Government's case in a form *not subject to cross-examination*."[10]

In 1970, the Court again reexamined the relationship between the Confrontation Clause and the hearsay rule, holding that they "are generally designed to protect similar values," but that the "overlap is [not] complete" and that the Confrontation Clause is more "than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[11] According to the Court, the Confrontation Clause may be violated even when the hearsay rule is not and, conversely, "evidence . . . admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."[12] Thus, in *California v. Green*,[13] the Court held that the admission of prior statements made by a witness while in custody and in a preliminary hearing did not violate a defendant's confrontation rights, even though the statements would have been hearsay in some jurisdictions.[14] The Court reasoned that the witness was available for "full cross-examination

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violated where his ability to cross-examine witnesses on key points had been barred by state hearsay and common-law trial rules); In re *Oliver*, 333 U.S. 257, 259 (1948); Alford v. United States, 282 U.S. 687, 691 (1931) ("Cross-examination of a witness is a matter of right.").

[8] 391 U.S. 123 (1968).

[9] *Id.* In a subsequent opinion, the Court held that *Bruton* applies retroactively. Roberts v. Russell, 392 U.S. 293, 293 (1968) (per curiam). Depending on the details, the Court has reached different outcomes on the extent to which *redacted* codefendant confessions violate *Bruton*. *Compare* Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."), *with* Gray v. Maryland, 523 U.S. 185, 188 (1998) (holding that "*Bruton's* protective rule" applied where the prosecution "redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word 'deleted.'").

[10] *Bruton*, 391 U.S. at 128 (emphasis added); *see also* Cruz v. New York, 481 U.S. 186, 193 (1987), *abrogating* Parker v. Randolph, 442 U.S. 62 (1979)("We hold that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant" the "Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him"); Lee v. Illinois, 476 U.S. 530, 539 (1986) (concluding that "confession of an accomplice" "was presumptively unreliable and . . . did not bear sufficient independent 'indicia of reliability' to overcome that presumption"); *but see* Tennessee v. Street, 471 U.S. 409, 410 (1985) (holding that admission of accomplice confession was permissible for "the nonhearsay purpose of rebutting respondent's testimony that his own confession was coercively derived from the accomplice's statement"); Nelson v. O'Neil, 402 U.S. 622, 629–30 (1971) ("We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments."). In some cases, the Court concluded that *Bruton* violations amounted to harmless error where other evidence of guilt was overwhelming. *See* Schneble v. Fla., 405 U.S. 427, 432 (1972); Harrington v. California, 395 U.S. 250, 254 (1969). Under current doctrine, the confession of a non-testifying co-defendant "in a jury trial" may still be inadmissible on confrontation grounds in federal courts "if it implicates the defendant." United States v. King, 910 F.3d 320, 328 (7th Cir. 2018). However, pursuant to subsequent Supreme Court doctrine, as a threshold matter the confession must be testimonial in nature before its admission implicates the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 51 (2004); *accord* United States v. Dale, 614 F.3d 942, 956 (8th Cir. 2010) (holding that the "out-of-court statement of a co-defendant made unknowingly to a government agent is not 'testimonial'" and therefore not barred by the Confrontation Clause); United States v. Smalls, 605 F.3d 765, 768 n.2 (10th Cir. 2010) ("[T]he *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.").

[11] California v. Green, 399 U.S. 149, 155 (1970); *see also Dutton*, 400 U.S. at 80 ("It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. That the two evidentiary rules are not identical must be readily conceded.").

[12] *Green*, 399 U.S. at 156.

[13] *Id.*

[14] *Id.* at 164.

at trial," including for questioning into inconsistencies between his prior statement and "his present version of the events in question."[15] Similarly, in *Dutton v. Evans*,[16] a plurality of four Justices held that the admission of an out-of-court statement pursuant to Georgia's coconspirator hearsay exception did not violate the Confrontation Clause, even though the same statement would have been inadmissible hearsay under the federal rules of evidence.[17] The Court reasoned that the "limited contours" of the federal hearsay exception in conspiracy trials are not "required by the Sixth Amendment's Confrontation Clause" but rather a product of the Court's "rule-making power in the area of the federal law of evidence."[18]

Then, in its 1980 opinion *Ohio v. Roberts*, the Supreme Court again revisited the "relationship between the Confrontation Clause and the hearsay rule with its many exceptions."[19] In *Roberts*, the Court explained that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay."[20] First, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable."[21] Second, if unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.'"[22] Indicia of reliability, according to the Court, could "be inferred . . . in a case where the evidence falls within a firmly rooted hearsay exception."[23] Otherwise, reliability would require "a showing of particularized guarantees of trustworthiness."[24] The Court's focus in *Roberts* on reliability or trustworthiness became the primary lens through which the Court examined Confrontation Clause challenges involving extrajudicial statements until 2004, when the Court again changed course.[25]

Amdt6.5.3 Modern Doctrine

Amdt6.5.3.1 Admissibility of Testimonial Statements

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[15] *Id.* at 164. The Court also observed that the witnesses' preliminary hearing testimony would have been admissible on confrontation grounds even without "opportunity for confrontation at the subsequent trial." *Id.* at 165. According to the Court, at the preliminary hearing the witness "was under oath" and the defendant "was represented by counsel-the same counsel in fact who later represented him at the trial." *Id.* Thus, the Court noted that "respondent had every opportunity to cross-examine [witness] as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings." *Id.*

[16] 400 U.S. at 74.

[17] *Id.* at 81. The statement was made during the concealment stage of the conspiracy, which would place it beyond the co-conspirator exception in federal courts. *Id.* at 78–79, 81.

[18] *Id.* at 82.

[19] Ohio v. Roberts, 448 U.S. 56, 62 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

[20] *Id.* at 65.

[21] *Id.* at 66; *but see* United States v. Inadi, 475 U.S. 387, 394 (1986) ("Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.").

[22] *Id.*

[23] *Roberts*, 448 U.S. at 66; *see also* Bourjaily v. United States, 483 U.S. 171, 183 (1987) ("We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements.").

[24] *Roberts*, 448 U.S. at 66.

[25] Amdt6.5.3.1 Admissibility of Testimonial Statements.

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the years following *Ohio v. Roberts*,[1] the Supreme Court applied, revisited, and narrowed the Confrontation Clause standard that *Roberts* had set forth,[2] which generally permitted the admission of out-of-court statements only if the declarant was unavailable and the statement was sufficiently reliable.[3] In 2004 the Court in *Crawford v. Washington*[4] overruled *Roberts* and introduced a new standard for determining whether an out-of-court statement implicates the Confrontation Clause.[5]

Under *Crawford*, the key to whether evidence implicates the Confrontation Clause is not its reliability, but rather whether it is *testimonial*.[6] Pursuant to *Crawford*, non-testimonial evidence does not implicate the Confrontation Clause.[7] In contrast, testimonial evidence may only be admitted consistently with the Confrontation Clause in limited circumstances.[8] Testimonial evidence may be admitted if the declarant: is available at trial for cross examination,[9] or is unavailable but the defendant previously had opportunity to cross-examine the declarant about the statement.[10] The Court in *Crawford* also recognized the existence of two common law Confrontation Clause exceptions that historically permitted the admission of testimonial statements[11]—but it did not expressly approve or disapprove of either.[12]

The *Crawford* Court expressly declined to provide a "comprehensive definition" of "testimonial."[13] However, drawing from a variety of sources, the Court offered several possible formulations of "core" testimonial statements, including "ex parte in-court testimony or its

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[1] 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

[2] *See* Lilly v. Virginia, 527 U.S. 116, 133 (1999) ("[O]ur cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of" reliable hearsay exceptions); White v. Illinois, 502 U.S. 346, 354 (1992) (holding that unavailability "is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding"); Idaho v. Wright, 497 U.S. 805, 827 (1990) (determining that the out-of-court statements of a child to an examining pediatrician were insufficiently reliable under *Roberts* when admitted under a state's residual hearsay exception); United States v. Inadi, 475 U.S. 387, 394, 400 (1986) (affirming "the validity of the use of co-conspirator statements" and rejecting a broad reading of *Roberts* that would prohibit introduction by the government of any such "out-of-court statement[s]" absent "a showing that the declarant is unavailable"); Lee v. Illinois, 476 U.S. 530, 546 (1986) (concluding that a codefendant confession was insufficiently reliable "to overcome the weighty presumption against the admission of such uncross-examined evidence," although its content largely "interlocked" or overlapped with the defendant's own confession).

[3] *Roberts*, 448 U.S. at 66.

[4] 541 U.S. 36 (2004).

[5] *Id.* at 54, 60. In a subsequent opinion, the Court held that *Crawford* is not "retroactive to cases already final on direct review." Whorton v. Bockting, 549 U.S. 406, 409 (2007).

[6] *Crawford*, 541 U.S. at 51; *see also* Hemphill v. New York, No. 20-637, slip op. at 10–11 (U.S. Jan. 20, 2022) (explaining that if "*Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees"-cross-examination).

[7] *Crawford*, 541 U.S. at 68.

[8] *Id.* at 68–69.

[9] *Id.*

[10] *Id.* Further, *Crawford* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id*. at 59 n.9.

[11] The two potential exceptions—dying declarations and forfeiture by wrongdoing—are discussed in Amdt6.5.3.3 Dying Declarations and Forfeiture by Wrongdoing.

[12] *Crawford*, 541 U.S. at 56, n.6, 62 (recognizing the dying declarations and forfeiture by wrongdoing exceptions to the Confrontation Clause but declining to expressly adopt either).

[13] *See id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

functional equivalent" such as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[14] As additional possible formulations of "testimonial," the Court listed "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[15] Regardless of the exact formulation of "testimonial" the Court in *Crawford* specified that at a minimum, "testimonial" includes police interrogations and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[16]

In subsequent opinions, the Court has further examined what it means for evidence to be "testimonial" for Confrontation Clause purposes-particularly in the context of forensic laboratory reports and analysis. For example, in *Melendez-Diaz v. Massachusetts*[17] the Court held that the admission of forensic lab analysts' affidavits—reporting that material seized from the defendant was cocaine-violated the Confrontation Clause because affidavits were testimonial and the "analysts were 'witnesses' for purposes of the Sixth Amendment."[18] In *Bullcoming v. New Mexico*[19] the Court clarified that when the government seeks to introduce laboratory reports containing testimonial certifications "made for the purpose of proving a particular fact," the "accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."[20] Testimony by a surrogate witness who is familiar with general laboratory procedures, but otherwise uninvolved in the relevant certification, is insufficient to satisfy a defendant's constitutional right.[21]

In its 2012 opinion *Williams v. Illinois*,[22] the Court again revisited the relationship between the Confrontation Clause and laboratory analysis.[23] In *Williams*, an expert witness testified at trial regarding conclusions she drew by comparing DNA profiles, including one from an outside-laboratory that she had not participated in creating and therefore lacked personal knowledge about.[24] In her testimony and on cross-examination, the expert witness identified the source material for that outside-laboratory's DNA profile.[25] The defendant argued that by allowing the substance of a testimonial forensic laboratory report through the trial testimony of an expert witness (who took no part in the reported forensic analysis), the prosecution violated the Confrontation Clause.[26] A plurality of four Justices disagreed, and rejected the argument that because the expert was not involved in performing, observing, or certifying the creation of the outside-laboratory's DNA profile, the testimony regarding the

[14] *Id.* at 51 (citations omitted), *cited with approval in* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).

[15] *Id.* at 52 (citations omitted), *cited with approval in* Melendez-Diaz, 557 U.S. at 310.

[16] *Id.* at 68.

[17] 557 U.S. 305 (2009).

[18] *Id.* at 308, 311.

[19] 564 U.S. 647 (2011).

[20] *Id.* at 652.

[21] *Id.*

[22] 567 U.S. 50 (2012) (plurality opinion).

[23] *Id.* at 56–58.

[24] *Id.* at 62.

[25] *Id.* at 61–62.

[26] *Id*. at 56–57.

source material for that profile ran afoul of *Melendez-Diaz* and *Bullcoming*.[27] According to the plurality, the Confrontation Clause "has no application to out-of-court statements that are not offered to prove the truth of the matter asserted."[28] The plurality concluded that the underlying DNA results were "[o]ut-of-court statements . . . related by the expert solely for the purpose of explaining" her underlying assumptions, rather than statements "offered for their truth."[29] As a result, the testimony regarding the source material of the outside-laboratory's DNA profile fell "outside the scope of the Confrontation Clause."[30]

Amdt6.5.3.2 Ongoing Emergencies and Confrontation Clause

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Statements made to police during interrogation are nontestimonial—and therefore outside the scope of the Confrontation Clause—when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[1] In contrast, "[t]hey *are* testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[2] One relevant factor in determining whether a statement occurred during an ongoing emergency is whether the statements are made "about events as they [are] actually happening," and necessary to resolve a "present emergency, rather than simply to learn . . . what had happened in the past."[3] In *Davis v. Washington*,[4] the Court concluded that out of court statements made by the victim of domestic violence to a 911 operator were nontestimonial as they were "plainly a call for help against [a] bona fide physical threat" by someone "facing an ongoing emergency."[5] The statements' lack of formality also influenced the Court in *Davis*, as the Court emphasized that the statements were "frantic" and "provided over

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[27] *Id.* at 79–80.

[28] *Id.* at 57–58.

[29] *Id.* at 58.

[30] *Id*. The plurality in *Williams* also appeared to give weight to the fact that the underlying proceedings involved a bench trial, rather than a jury trial, and "assumed that the trial judge understood" the admissibility limits of the expert witness' testimony. *Id.* at 72–73. Further, according to the plurality, "even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation" because it was "produced before any suspect was identified," sought "not for the purpose of obtaining evidence to be used against petitioner . . . but for the purpose of finding a rapist who was on the loose," and was not "inherently inculpatory." *Id.* at 58.

[1] Davis v. Washington, 547 U.S. 813, 822 (2006).

[2] *Id.* (emphasis added).

[3] *Id.* at 827 (emphasis omitted).

[4] 547 U.S. 813 (2006).

[5] *Id.* at 827; see *id.* at 822 (holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimoninal when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

the phone," in an unsafe, turbulent environment.[6] However, based on similar considerations, the *Davis* Court concluded that statements made to responding officers during a separate domestic violence incident *were* testimonial.[7] The difference, according to the Court, was that the testimonial statements were made with "no emergency in progress" and "no immediate threat" to the defendant, and were instead "part of an investigation into possibly criminal past conduct."[8]

In *Michigan v. Bryant*,[9] the Court held that the ongoing emergency exception encompassed the statements of a mortally wounded man to police, identifying the eventual defendant as the person who shot him.[10] According to the Court, to determine whether an interrogation fits within the ongoing emergency exception, a court should objectively evaluate the circumstances "and the statements and actions of the parties."[11] In *Bryant*, factors considered by the Court in making this assessment included the dangerousness of the weapon involved (a gun), and the possibility of additional shootings—both of which weighed in favor of there being an ongoing emergency.[12] In addition, the Court emphasized the "informality of the situation and the interrogation," noting the "fluid and somewhat confused" nature of the questioning, which indicated that the "interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency."[13]

In *Ohio v. Clark*,[14] the Court examined the contours of the ongoing emergency exception outside of the context of police interrogations.[15] *Clark* involved statements made by a child abuse victim to teachers, in which he identified the defendant as his abuser.[16] The Court held that the admission of these statements without opportunity for cross-examination did not violate the Sixth Amendment as "neither the child nor his teachers had the primary purpose of assisting in [the defendant's] prosecution."[17] According to the Court, the "statements occurred in the context of an ongoing emergency involving suspected child abuse."[18] In addition, the Court noted that the statements were made by a child, and that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause."[19] Further, the Court seemingly gave weight to the fact that the statements were made to teachers as opposed to police, although the Court declined to "adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment."[20]

[6] *Id.*
[7] *Id.* at 829–30.
[8] *Id.* at 829.
[9] Michigan v. Bryant, 562 U.S. 344 (2011).
[10] *Id.* at 349–50.
[11] *Id.* at 359.
[12] *Id.* at 372–77.
[13] *Id.* at 377.
[14] 576 U.S. 237 (2015).
[15] *Id.* at 240.
[16] *Id.* at 240–42.
[17] *Id.* at 240.
[18] *Id.* at 246.
[19] *Id.* at 247–48.
[20] *Id.* at 249.

Amdt6.5.3.3 Dying Declarations and Forfeiture by Wrongdoing

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Conceptually, the ongoing emergency exception (discussed above) places qualifying statements outside the Confrontation Clause, because they are *not* testimonial.[1] With respect to *testimonial* statements, the Court has stated that the only exceptions to Confrontation Clause requirements are those "established at the time of the founding,"[2] and "acknowledged" two such exceptions.[3] The first Confrontation Clause exception encompasses dying declarations—"declarations made by a speaker who was both on the brink of death and aware that he was dying."[4] The second exception involves statements subject to "forfeiture by wrongdoing."[5] It permits "the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[6] The forfeiture by wrongdoing exception applies only to "deliberate witness tampering" where "the defendant engaged in conduct *designed* to prevent the witness from testifying."[7] In *Giles v. California*,[8] the Court examined the limits of this exception, and rejected its applicability to statements made by a victim to police three weeks before she was killed by the defendant (who claimed self-defense at trial).[9] The Court concluded that the defendant did not forfeit his right to confront the witness's statements even though she was "unavailable to testify" as a result of her "murder for which [the defendant] was on trial," absent evidence that the defendant "intended to prevent [her] from testifying."[10]

Amdt6.5.3.4 Right to Confront Witnesses Face-to-Face

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

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[1] Davis v. Washington, 547 U.S. 813, 822 (2006).

[2] Giles v. California, 554 U.S. 353, 358 (2008) (quoting Crawford v. Washington, 541 U.S. 36, 54 (2004)).

[3] *Id.* In *Hemphill v. New York*, the Supreme Court rejected a New York state evidentiary rule that permitted admission of evidence otherwise barred by the Confrontation Clause in order to correct a misleading impression created by the defendant, where the state conceded that its evidentiary rule was not "an exception to the right to confrontation at common law." No. 20-637, slip op. at 9 (U.S. Jan. 20, 2022).

[4] *Giles*, 554 U.S. at 358.

[5] *Id.* at 359.

[6] *Id.*

[7] *Id.* at 359, 366.

[8] 554 U.S. 353 (2008).

[9] *Id.* at 356, 377.

[10] *Id.* at 357, 361.

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Although much of the Court's Confrontation Clause doctrine has focused on the admissibility of extra-judicial evidence such as out-of-court statements or lab results,[1] in several opinions the Court has examined the extent to which the Sixth Amendment affords a right to confront witnesses in person or face-to-face. In one case, the Court considered whether the Confrontation Clause gave the defendant a right to be present for the competency hearing of two child witnesses.[2] The Court seemingly construed the issue not as one of the defendant's right to confront witnesses face-to-face, but rather to obtain effective cross-examination.[3] According to the Court, the Sixth Amendment did not require the defendant's presence in the competency hearing, because "[a]fter the trial court determined that the two children were competent to testify, they appeared and testified in open court" where they were "subject to full and complete cross-examination."[4] The next year, in *Coy v. Iowa*,[5] the Court emphasized that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[6] Therefore, the Court held that the Confrontation Clause barred the use of a "specifically designed" screen that blocked the defendant from the complaining witness's view as it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[7] However, two years later, the Court held that the Confrontation Clause permitted the testimony, examination, and cross-examination of a child witness by "one-way closed circuit television" from a separate room.[8] Although, the child witness could not see the defendant, the Court noted the "important state interest" in protecting the child witness and observed that the closed-circuit testimony "preserve[d] all of the other elements of the confrontation right" such as "contemporaneous cross-examination" and the ability of the "judge, jury, and defendant" to view and assess the "witness as he or she testifies."[9] In addition, the Court emphasized that the judge made "individualized findings" that testifying face-to-face would cause the child witness serious emotional distress.[10]

Amdt6.5.3.5 Confrontation of Witnesses Lacking Memory

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

[1] *Supra* Amdt6.5.3.1 Admissibility of Testimonial Statements.

[2] Kentucky v. Stincer, 482 U.S. 730, 732 (1987).

[3] *See id.* at 740 ("Instead of attempting to characterize a competency hearing as a trial or pretrial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination.").

[4] *Id.*

[5] 487 U.S. 1012 (1988).

[6] *Id.* at 1016. A face-to-face encounter with the witness, in and of itself, may not be fully sufficient to satisfy a defendant's right to confrontation, however, if the defendant is deprived adequate cross-examination. *See* Davis v. Alaska, 415 U.S. 308, 309, 315, 317 (1974) (concluding that trial court infringed on defendant's confrontation rights where it restricted cross examination regarding the juvenile criminal record of a witness pursuant to a protective order issued under state law, where that criminal record was relevant to the defense theory of bias on the part of the witness). The right to confront witnesses face-to-face does not shield the defendant from having his presence-and his resulting availability to "fabricate" his testimony in light of preceding witnesses-noted by the prosecution. *See* Portuondo v. Agard, 529 U.S. 61, 65 (2000).

[7] *Coy*, 487 U.S. at 1020.

[8] Maryland v. Craig, 497 U.S. 836, 851, 852 (1990).

[9] *Id.*

[10] *Id.* at 840–42.

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In one vein of cases, the Court has examined the degree to which lack of memory on the part of a testifying witness implicates the Confrontation Clause.[1] For instance, in *Delaware v. Fensterer*,[2] the Court disagreed that a defendant's confrontation rights had been violated when an expert witnesses testified but could not remember the basis of his theory, which the defendant argued deprived him of an adequate opportunity for cross-examination.[3] The Court explained that in general, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[4] The Court noted that the defendant had an opportunity to effectively cross-examine the expert witness, including into his lack of recollection.[5] In addition, according to the Court, the Confrontation Clause "includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion."[6] The Court reached a similar conclusion three years later when it rejected a Confrontation Clause challenge to testimony of a complaining witness concerning his prior identification of the defendant—the details of which he could not remember due to memory loss.[7] Citing to *Fensterer*, the Court explained that "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory."[8]

Amdt6.5.3.6 Evidence Introduced by Defendant

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Court's Sixth Amendment jurisprudence illustrates that the right to confront witnesses does not amount to a right to confront witnesses with all available evidence.[1] For instance, a defendant did not have a right to confront a rape victim with evidence of a prior sexual relationship where the defendant failed to comply with a state law conditioning

[1] In *California v. Green*, however, the Court expressly declined to consider whether the Confrontation Clause barred the introduction of prior out-of-court statements by a witness concerning events "that he could not remember" at trial. 399 U.S. at 168–69.

[2] 474 U.S. 15 (1985).

[3] *Id.* at 20–22.

[4] *Id.* at 20.

[5] *Id.* at 20.

[6] *Id.* at 21–22.

[7] United States v. Owens, 484 U.S. 564 (1988).

[8] *Id.* at 559 (citation omitted).

[1] *See* Michigan v. Lucas, 500 U.S. 145, 151 (1991) ("We have indicated that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule.").

admission of such evidence on notice and hearing requirements.[2] The Court concluded that "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay."[3]

Amdt6.5.4 Right to Compulsory Process

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment guarantees a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor."[1] Two early nineteenth century cases illustrate the initial conceptions of the Compulsory Process Clause. Although neither is a Supreme Court case, both are notable in that they feature the analyses of then-Supreme Court Justices sitting on lower federal courts. In the first case, Justice Samuel Chase stated in the 1800 case *United States v. Cooper* that the "constitution gives to every man, charged with an offence, the benefit, of compulsory process, to secure the attendance of his witnesses."[2] In the second case, Chief Justice John Marshall "presided as trial judge" over the "treason and misdemeanor trials of Aaron Burr."[3] In an 1807 opinion subsequently described by the Supreme Court as the "first and most celebrated analysis" of compulsory process, Marshall "ruled that Burr's compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence."[4] In addition to these two cases, another early insight into the Compulsory Process Clause may be gleaned from an 1833 treatise that suggests an apparent purpose of the provision was to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense.[5]

The Supreme Court has since characterized the Compulsory Process Clause as one of several constitutional provisions guaranteeing defendants "a meaningful opportunity to present a complete defense."[6] There is little Supreme Court precedent examining the contours

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[2] *Id.* at 152–53.

[3] *Id.*

[1] U.S. Const. amend. VI.

[2] *U.S. v. Cooper*, 4 U.S. 341 (C.C.D. Pa. 1800).

[3] Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987); U.S. v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807).

[4] *Ritchie*, 480 U.S. at 55 (discussing *Burr*, 25 F. Cas. at 35; *see also Burr*, 25 F. Cas. at 34 (holding that the right to the accused "to the compulsory process of the court" contains "no exception whatever").

[5] 3 J. Story, Commentaries On The Constitution Of The United States 1786 (1833). In the 1851 case *United States v. Reid*, the Supreme Court concluded that a defendant was not entitled to a new trial after his witness had been barred from testifying under state law on the grounds that the witness had been tried separately for the same crime as the defendant. 53 U.S. 361, 366 (1851). In the 1918 case *Rosen v. United States*, the Court overruled *Reid*. 245 U.S. 467, 472 (1918). Although *Rosen* "rested on nonconstitutional grounds," the Court subsequently explained that "its reasoning was required by the Sixth Amendment." Washington v. Texas, 388 U.S. 14, 22 (1967). "In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law." *Id.*

[6] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)); *accord* Faretta v. California, 422 U.S. 806, 818 (1975) ("The rights to

of the Compulsory Process Clause,[7] because the Court has generally analyzed issues involving a defendant's right to "obtain[ ] witnesses in his favor"[8] through a Due Process framework.[9] For instance, in the 1987 case *Pennsylvania v. Ritchie*, the Court indicated that requests to compel the government to reveal the identity of witnesses or produce exculpatory evidence should be evaluated under due process rather than compulsory process analysis, adding that "compulsory process provides no *greater* protections in this area than due process."[10] Thus, compulsory process rights such as the right to testify are also secured by the Due Process Clause.[11]

Despite the limited precedent, there are a few Supreme Court cases that offer insights into the Compulsory Process Clause.[12] In the 1967 case *Washington v. Texas*, the Court observed that the "right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights" and that the right amounts "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."[13] The Court in *Washington* further held that "[t]his right is a fundamental element of due process of law," applicable to states by way of the Fourteenth Amendment, and the right is violated by a state law that provides that co-participants in the same crime could not testify for one another.[14] As the Court explained, it is a violation of the Compulsory Process Clause if the state "arbitrarily denied [a defendant] the right to put on the stand a witness who was

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notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

[7] *See Ritchie*, 480 U.S. at 55 ("This Court has had little occasion to discuss the contours of the Compulsory Process Clause.").

[8] U.S. CONST. amend. VI. One Supreme Court case suggests that the Compulsory Process Clause may also "require the production of evidence." *See Ritchie*, 480 U.S. at 56 (discussing United States v. Nixon, 418 U.S. 683, 709 (1974)).

[9] *See* Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); Webb v. Texas, 409 U.S. 95, 98 (1972) ("In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."); In re *Oliver*, 333 U.S. 257, 275 (1948) ("Except for a narrowly limited category of contempts, due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.").

[10] 480 U.S. at 56 (explaining that "the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence" had traditionally been evaluated under the Due Process Clause of the Fourteenth Amendment, and that it need not decide "whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment").

[11] *See* Rock v. Arkansas, 483 U.S. 44, 51–53 (1987) (explaining that the right to testify is grounded in the Compulsory Process Clause and the Due Process Clause, and is also a "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony"); *see generally* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[12] *Ritchie*, 480 U.S. 39, 55 (1987) ("Despite the implications of the *Burr* decision for federal criminal procedure, the Compulsory Process Clause rarely was a factor in this Court's decisions during the next 160 years."). The Court has identified a number of "pre-1967 cases that mention compulsory process" but that "do not provide an extensive analysis of the Clause." *Id*. at 55 n.12 (citing Pate v. Robinson, 383 U.S. 375, 378, n. 1 (1966); Blackmer v. United States, 284 U.S. 421, 442 (1932); United States v. Van Duzee, 140 U.S. 169, 173 (1891); Ex parte Harding, 120 U.S. 782, 7 S.Ct. 780 (1887)),

[13] 388 U.S. 14, 18–19 (1967).

[14] *Id.* at 17–19, 23.

physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[15] The Court has also held that under the Compulsory Process Clause is "the accused's right . . . to testify himself, should he decide it is in his favor to do so."[16] The right to present witnesses is not absolute, however; a court may refuse to allow a defense witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pretrial discovery request and thereby attempted to gain a tactical advantage.[17] In addition, a defendant "cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation" of potential witnesses "deprived him of their testimony"; rather "[h]e must at least make some plausible showing of how their testimony would have been both material and favorable to his defense."[18]

Amdt6.6 Right to Counsel

Amdt6.6.1 Historical Background on Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The records of neither the Congress that proposed what became the Sixth Amendment nor the state ratifying conventions elucidate the language on assistance of counsel. The development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel, while the right was afforded in misdemeanor cases. This rule was ameliorated in practice, however, by the judicial practice of allowing counsel to argue points of law and then generously interpreting the limits of "legal questions." Colonial and early state practice varied, ranging from the existent English practice to appointment of counsel in a few states where needed counsel could not be retained.[1] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions that seemed to indicate an understanding that the Sixth Amendment guarantee extended only to retained counsel by a defendant wishing and able to afford assistance.[2]

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[15] *Id.* at 23.

[16] *Rock*, 483 U.S. at 52.

[17] Taylor v. Illinois, 484 U.S. 400, 415 (1988); *see also* Melendez-Diaz v. Mass., 557 U.S. 305, 327 (2009) ("It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses."); United States v. Nobles, 422 U.S. 225, 241 (1975) ("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."). There also appear to be limits on the extent to which a party has a right to introduce other types of evidence under the Compulsory Process Clause. *See* United States v. Scheffer, 523 U.S. 303, 315 (1998) ("*Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi*, do not support a right to introduce polygraph evidence, even in very narrow circumstances.").

[18] United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

[1] W. Beaney, The Right to Counsel in American Courts 8–26 (1955).

[2] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that parties in federal courts could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. The Act of April 30, 1790, ch. 9, 1 Stat. 118, provided: "Every person who is indicted of treason or other capital crime, shall be allowed

Amdt6.6.2 Right to Have Counsel Appointed

Amdt6.6.2.1 Early Doctrine on Right to Have Counsel Appointed

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Court began to develop its doctrine on the right to have counsel in *Powell v. Alabama*,[1] a 1932 opinion in which the Court set aside the convictions of eight Black youths sentenced to death in a hastily carried-out trial without benefit of counsel.[2] The failure to afford the defendants an opportunity to retain counsel violated due process, but the Court acknowledged that as indigents the youths could not have retained counsel.[3] Noting circumstances including the "ignorance," "illiteracy," and youth of the defendants; their lack of access to friends and family; the consequences they faced; and the "public hostility" surrounding the trial, the Court concluded that the trial court's failure to make an effective appointment of counsel was "a denial of due process within the meaning of the Fourteenth Amendment."[4]

The holding in *Powell* was narrow. The Court stated that in a case in which the defendant faces the death penalty; does not have a lawyer; and is unable to mount his own defense because of intellectual disability, illiteracy, or a similar condition, "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."[5] Despite this narrow scope, the Court in *Powell* made some more general statements about the importance of the right to counsel. Due process, the Court said, always requires observance of certain fundamental personal rights associated with a hearing, and "the right to the aid of counsel is of this fundamental character."[6] In addition, noting the limited legal skill and training of even "the intelligent and educated layman," the Court observed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[7] Without the "guiding hand of counsel at every step in the proceedings against him," the Court noted, even an innocent defendant "faces the danger of conviction because he does not know how to establish his innocence."[8]

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to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours."

[1] *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," the "Sixth Amendment right to choose one's own counsel is circumscribed in several important respects").

[2] 486 U.S. 153 (1988).

[3] *Id.* at 159.

[4] *Id.*

[5] *Id.*

[6] 491 U.S. 617, 619, 626 (1989).

[7] 21 U.S.C. §§ 848, 853.

[8] *Caplin & Drysdale*, 491 U.S. at 626.

Amdt6.6.2.1
Early Doctrine on Right to Have Counsel Appointed

In 1938, the Court expanded its jurisprudence on the right to have counsel appointed in *Johnson v. Zerbst*.[9] In *Zerbst*, the Court announced an absolute rule requiring appointment of counsel for federal criminal defendants who could not afford to retain a lawyer.[10] According to the *Zerbst* Court, the right to assistance of counsel, "is necessary to insure fundamental human rights of life and liberty."[11] Without distinguishing between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Court quoted *Powell's* invocation of the necessity of legal counsel for even the intelligent and educated layman. The Court stated: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[12] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[13]

In the 1942 case *Betts v. Brady*, the Supreme Court rebuffed an effort to obtain the same rule in the state courts in all criminal proceedings.[14] The Court observed that the Sixth Amendment applied only to trials in federal courts.[15] In state courts, the Due Process Clause of the Fourteenth Amendment "formulates a concept less rigid and more fluid" than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of

[9] The statute was interpreted in United States v. Monsanto, 491 U.S. 600, 602, 607 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.

[10] *See Caplin & Drysdale*, 491 U.S. at 628 ("There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right.").

[11] *Monsanto*, 491 U.S. at 615 ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that . . . the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."). A subsequent case held that where a grand jury had returned an indictment based on probable cause, that conclusion was binding on a court during forfeiture proceedings and the defendants do not have a right to have such a conclusion re-examined in a separate judicial hearing in order to unfreeze the assets to pay for their counsel.

[12] 578 U.S. 5, 8–9, 12–13 (2016) (plurality opinion). The Court in *Luis* split as to the reasoning for holding that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. Four Justices employed a balancing test, weighing the government's contingent future interest in the untainted assets against the interests in preserving the right to counsel—a right at the "heart of a fair, effective criminal justice system" —in concluding that the defendant had the right to use innocent property to pay a reasonable fee for assistance of counsel. *See id.* at 16–23 (Justice Stephen Breyer, joined by Chief Justice John Roberts, Justices Ruth Bader Ginsburg & Sonia Sotomayor). Justice Clarence Thomas, in providing the fifth and deciding vote, concurred in judgment only, contending that "textual understanding and history" alone suffice to "establish that the Sixth Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture." *See id.* at 25 (Thomas, J., concurring); *see also id.* at 33 ("I cannot go further and endorse the plurality's atextual balancing analysis.").

[13] United States v. Gonzalez-Lopez, 548 U.S. 140, 144–45 (2006).

[14] *Gonzalez-Lopez*, 548 U.S. at 148–50 (citing Arizona v. Fulminante, 499 U.S. 279, 282 (1991)).

[15] 422 U.S. 806, 807, 817 (1975). Although the Court acknowledged some concern by judges that *Faretta* leads to unfair trials for defendants, in *Indiana v. Edwards* the Court declined to overrule *Faretta*. 554 U.S. 164, 178 (2008). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. *See Faretta*, 422 U.S. at 834 (explaining that "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage," and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored"). A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. *Id.* at 834–35 n.46. The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9, 10 (2005) (per curiam). Related to the right of self-representation is the right to testify in one's own defense. *See* Rock v. Arkansas, 483 U.S. 44, 52, 62 (1987) (holding that per se rule excluding all hypnotically refreshed testimony violates right).

the first eight Amendments might "in certain circumstances" be a violation of due process.[16] The relevant question according to the Court was whether the Sixth Amendment right to appointment of counsel in federal courts "expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."[17] Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the Court concluded that it was the "considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[18] Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice, but this was not the general rule.[19]

Amdt6.6.2.2 Modern Doctrine on Right to Have Counsel Appointed

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Starting in 1938, the Supreme Court recognized that in *federal* courts the Sixth Amendment requires the provision of counsel absent waiver.[1] For *state* proceedings, however, the Court instead determined that the scope of the right to have counsel appointed stemmed from the Due Process Clause of the Fourteenth Amendment,[2] and the applicability of the right depended on the circumstances facing the accused in a given case.[3] The purpose behind examining the circumstances facing the accused was to afford some certainty in the determination of when failure to appoint counsel would result in a trial lacking in

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[16] *See*, *e.g.*, Godinez v. Moran, 509 U.S. 389, 396 (1993) (explaining that a criminal defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently'" (quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).

[17] The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. *Edwards*, 554 U.S. at 177–78. Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398–99 (1993).

[18] *Faretta*, 422 U.S. at 834 n.46.

[19] Martinez v. Court of App. of Cal., Fourth App. Dist., 528 U.S. 152, 154 (2000). The Sixth Amendment itself "does not include any right to appeal." *Id.* at 160.

[1] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)); *see* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) ("We have construed [the Sixth Amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."); *see also* Johnson v. United States, 352 U.S. 565, 566 (1957) (holding that a federal Court of Appeals "must, under *Johnson v. Zerbst*, afford one who challenges [the appeal certification] the aid of counsel unless he insist on being his own."); Douglas v. California, 372 U.S. 353, 356 (1963) (holding that a state must provide counsel to defendant granted a right of first appeal from a criminal conviction); *but see* Ross v. Moffitt, 417 U.S. 600, 619 (1974) (holding that defendants had no constitutional right to an appointment of counsel for discretionary appellate review); Murray v. Giarratano, 492 U.S. 1, 9–13 (1989) (holding that inmates sentenced to death do not have a constitutional right to counsel to seek postconviction relief). .

[2] Betts v. Brady, 316 U.S. 455, 461–62 (1942), *overruled by Gideon*, 372 U.S. at 342.

[3] This circumstance-dependent approach is typified by *Powell v. Alabama,* 287 U.S. 45, 71 (1932); *see also* Hawk v. Olson, 326 U.S. 271, 278 (1945) (reviewing underlying circumstances and holding that "denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment"); Tomkins v. State of Missouri, 323 U.S. 485, 488 (1945) (citing Powell and reviewing underlying

"fundamental fairness."[4] Over time, the Court developed three often-overlapping categories of circumstances that required the furnishing of assistance of counsel to satisfy due process: (1) where the personal characteristics of the defendant made it unlikely he could obtain an adequate defense of his own,[5] (2) where the charges or possible defenses to the charges were technically complex,[6] and (3) where events occurring at trial raised problems of prejudice.[7] The last characteristic especially had been used by the Court to set aside convictions occurring in the absence of counsel,[8] and the last case rejecting a claim of denial of assistance of counsel had been decided by 1950.[9]

In 1961, the Court held that in a capital case a defendant need not establish a particularized need or prejudice resulting from absence of counsel.[10] Rather, the Court concluded that assistance of counsel was a constitutional requisite in capital cases, although the Court did not expressly articulate whether its holding was based on the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.[11] Two years later, the Court expanded the right to counsel in non-capital cases as well, holding unanimously in *Gideon v. Wainwright*[12] "that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for

circumstances of prosecution to determine if accused's deprivation of counsel violated Fourteenth Amendment); Williams v. Kaiser, 323 U.S. 471, 473–76 (1945) (same). For additional discussion of Powell, see Amdt6.5.1 Early Confrontation Clause Cases.

[4] *See Betts*, 316 U.S. at 462 ("Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.").

[5] Commonly cited characteristics of the defendant demonstrating the necessity for assistance of counsel included youth and immaturity (Moore v. Michigan, 355 U.S. 155, 164 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116, 120–21 (1956); Uveges v. Pennsylvania, 335 U.S. 437, 442 (1948); Wade v. Mayo, 334 U.S. 672, 683–84 (1948); Marino v. Ragen, 332 U.S. 561, 562 (1947) (per curiam); De Meerleer v. Michigan, 329 U.S. 663, 665 (1947) (per curiam), limited education (*Moore*, 355 U.S. at 164), inexperience (*Uveges*, 335 U.S. at 442), and mental illness (Massey v. Moore, 348 U.S. 105, 108 (1954); Palmer v. Ashe, 342 U.S. 134, 136–37 (1951).

[6] *E.g.*, McNeal v. Culver, 365 U.S. 109, 114–16 (1961); *Moore*, 355 U.S. at 160; *Claudy*, 350 U.S. at 122; Williams v. Kaiser, 323 U.S. 471, 474–75 (1945); Rice v. Olson, 324 U.S. 786, 789 (1945).

[7] Commonly cited examples included the deliberate or careless overreaching by the court or the prosecutor (*Palmer*, 342 U.S. at 137; Gibbs v. Burke, 337 U.S. 773, 776–78 (1949); Townsend v. Burke, 334 U.S. 736, 739–741 (1948); White v. Ragen, 324 U.S. 760, 764 (1945) (per curiam), prejudicial developments during the trial (Cash v. Culver, 358 U.S. 633, 637–38 (1959); *Gibbs*, 337 U.S. at 776–78), and questionable proceedings at sentencing (*Townsend*, 334 U.S. at 739–741).

[8] In the 1960 case *Hudson v. North Carolina* the Court held that an unrepresented defendant had been prejudiced when his co-defendant's counsel plead his client guilty in the presence of the jury, the applicable state rules to avoid prejudice in such situation were unclear, and the defendant in any event had taken no steps to protect himself. 363 U.S. 697, 702–03 (1960). The *Hudson* Court explained that a "layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of a codefendant's plea of guilt" and would not "know the proper course to follow in order to invoke such protection." *Id.* at 1318. According to the Court, the "very uncertainty of the North Carolina law in this respect serves to underline the petitioner's need for counsel to advise him." *Id.* Two years after *Hudson*, the Court reversed a conviction because the unrepresented defendant failed to follow various advantageous procedures that a lawyer might have utilized. Carnley v. Cochran, 369 U.S. 506, 508–512 (1962). The same year, the Court found that a lawyer might have developed several defenses and adopted several tactics to defeat a charge under a state recidivist statute, and that therefore the unrepresented defendant had been prejudiced. Chewning v. Cunningham, 368 U.S. 443, 445–47 (1962).

[9] Quicksal v. Michigan, 339 U.S. 660, 666 (1950); *see also* Canizio v. New York, 327 U.S. 82, 86–7 (1946); Foster v. Illinois, 332 U.S. 134, 138–39 (1947); Gayes v. New York, 332 U.S. 145, 148–49 (1947) (plurality opinion); Bute v. Illinois, 333 U.S. 640, 675–76 (1948); Gryger v. Burke, 334 U.S. 728, 730–31 (1948); *Cf. White*, 324 U.S. at 764, 767 (1945) (acknowledging prima facie showing of constitutional violation stemming from lack of counsel but ultimately dismissing certiorari on other grounds).

[10] *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.").

[11] *Id.*

[12] 372 U.S. 335 (1963).

him."[13] In a rejection of earlier precedent,[14] the Court held that the Sixth Amendment right to assistance of counsel is "fundamental" and constitutionally required by the Fourteenth Amendment in state courts.[15] *Gideon* stemmed from a felony charge, and the Court's opinion in the case did not expressly decide whether the right to assistance of counsel could be claimed by defendants charged with misdemeanors or serious misdemeanors as well as by those charged with felonies.[16] Later, however, the Court held that the right applies to any misdemeanor case in which imprisonment is imposed-indeed, no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right.[17] The Court subsequently extended the right to cases where a suspended sentence or probationary period is imposed, on the theory that any future incarceration that occurred would be based on the original uncounseled conviction.[18]

The absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court. Consequently the Court has held that *Gideon* is fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,[19] but also may not be used subsequently either to support guilt in a new trial or to enhance punishment upon a valid conviction.[20]

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[13] *Id.* at 344.

[14] *Gideon* overruled Betts v. Brady, 316 U.S. 455 (1942). *Gideon*, 372 U.S. at 339. For a discussion of *Betts*, see *supra* Amdt6.5.1 Early Confrontation Clause Cases.

[15] 372 U.S. at 342–43, 344.

[16] *Id.* at 336, 344.

[17] In its 1979 opinion in *Scott v. Illinois*, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. 367, 373–74 (1979). In other words, the right to counsel hinges not on the possibility of imprisonment as authorized by the charging statute, but on the actual punishment imposed on the defendant. *Id.* Thus, *Scott* modified *Argersinger v. Hamlin*, 407 U.S. 25, 32–33, 37 (1972), which had held counsel required if imprisonment were possible. The Court has also extended the right of assistance of counsel to juvenile proceedings. *See* In re *Gault*, 387 U.S. 1, 36–37 (1967) ("[T]he assistance of counsel is . . . equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.").

[18] Alabama v. Shelton, 535 U.S. 654, 662 (2002).

[19] Kitchens v. Smith, 401 U.S. 847, 847, 849 (1971) (per curiam); Burgett v. Texas, 389 U.S. 109, 114 (1967); *accord* Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965) ("The rule in [*Gideon*], that counsel must be appointed to represent an indigent charged with a felony, was actually applied retrospectively in that case since Gideon had collaterally attacked the prior judgment by post-conviction remedies.").

[20] Burgett v. Texas, 389 U.S. 109, 115 (1967); *see also* Loper v. Beto, 405 U.S. 473, 474, 483 (1972) (plurality opinion) (concluding that trial court should not have permitted impeachment of counseled defendant's credibility in 1947 trial by introduction of prior uncounseled convictions in the 1930s); United States v. Tucker, 404 U.S. 443, 448–49 (1972) (holding that sentencing judge improperly relied on two previous convictions stemming from proceedings where defendant was without counsel); *but see* United States v. Bryant, 579 U.S. 140, 154–55 (2016) (holding that the use of prior, uncounseled tribal-court domestic abuse convictions as the predicates for a sentence enhancement in a subsequent conviction did not violate the Sixth Amendment right to counsel, as repeat offender laws like the one at issue penalize only the last offense committed by the defendant and because the Sixth Amendment right to counsel did not apply to the underlying tribal-court convictions); Nichols v. United States, 511 U.S. 738 (1994) (holding that "an uncounseled conviction valid under [Scott v. Illinois, 440 U.S. 367 (1979)] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment"); Lewis v. United States, 445 U.S. 55, 67 (1980) ("Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with [Court precedent].").

Amdt6.6.3 When the Right to Counsel Applies

Amdt6.6.3.1 Overview of When the Right to Counsel Applies

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

As a result of *Gideon v. Wainwright*,[1] the Sixth Amendment right to counsel applies at criminal trials, regardless of whether a given trial is federal or state, or whether the counsel is retained or appointed.[2] As the Court in *Gideon* explained, the "right of one charged with crime to counsel" is "fundamental and essential."[3] A more complicated question is the extent to which the Sixth Amendment right to counsel applies in contexts beyond the trial itself, such as preliminary criminal proceedings. As a general matter, the Court has explained that the "the Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "[4] In other words, the Sixth Amendment right to counsel does not begin until "the initiation of adversary judicial criminal proceedings."[5] Even once adversary judicial criminal proceedings begin, the Sixth Amendment right to counsel applies only to critical stages of criminal prosecutions.[6] In a number of cases, the Court has examined the

[1] 372 U.S. 335 (1963). For further discussion of *Gideon*, see Amdt6.6.2.2 Modern Doctrine on Right to Have Counsel Appointed.

[2] *See*, *e.g.*, Wheat v. United States, 486 U.S. 153, 158 (1988) ("[W]e have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime.").

[3] *Gideon*, 372 U.S. at 344.

[4] Fellers v. United States, 540 U.S. 519, 523 (2004) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)).

[5] Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

[6] *See*, *e.g.*, Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (determining whether right to counsel applied in arraignment by examining whether it amounts to a "critical stage in a criminal proceeding").

extent to which the Sixth Amendment[7] right to counsel applies in contexts including pretrial judicial proceedings,[8] custodial interrogations,[9] and lineups and other identification situations,[10] among others.[11]

Amdt6.6.3.2 Pretrial Judicial Proceedings and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

While the Supreme Court has established a right to counsel,[1] it has recognized some limitations to that right. In *Rothgery v. Gillespie County*, the Court noted that the "Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: 'it does not attach until a prosecution is commenced.'"[2] Pretrial judicial proceedings may amount to the commencement of prosecution, and in the 2008 case *Rothgery*,[3] the Court clarified that even a preliminary hearing where no government prosecutor is present can trigger the right to counsel. In determining whether the right to counsel applies to a particular pretrial judicial proceeding, the Court generally has considered whether the proceeding amounts to a "critical stage" in a criminal prosecution.[4] This inquiry may be traced back to dicta in *Powell v. Alabama*,[5] noting that "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their

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[7] The Court's pre-*Gideon* cases often spoke expansively of the right to retain counsel, but as a matter of due process rather than of the Sixth Amendment. Thus, in *Chandler v. Fretag*, when a defendant appearing in court to plead guilty to house-breaking was advised for the first time that, because of three prior convictions, he could be sentenced to life imprisonment as a habitual offender, the court's denial of his request for a continuance to consult an attorney was a violation of his Fourteenth Amendment due process rights. 348 U.S. 3, 5, 10 (1954). "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Id.* at 9, 10; *see also* Reynolds v. Cochran, 365 U.S. 525, 530 (1961) ("[W]e think it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim-that he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceeding against him."); House v. Mayo, 324 U.S. 42, 46 (1945) (per curiam) (concluding that trial court had deprived defendant of "constitutional right to a fair trial" by "forc[ing] him to plead to the information without the aid and advice of his counsel, whose presence he requested"); Hawk v. Olson, 326 U.S. 271, 278 (1945) (determining that defendant had potentially "set out a violation of the Fourteenth Amendment" in claiming that in murder trial he (1) "had no advice of counsel prior to the calling of the jury" and (2) lacked assistance of counsel in moving "for continuance to examine the charge and consult counsel").

[8] Amdt6.6.3.2 Pretrial Judicial Proceedings and Right to Counsel.

[9] Amdt6.6.3.3 Custodial Interrogation and Right to Counsel.

[10] Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel.

[11] Amdt6.6.3.6 Noncriminal and Investigatory Proceedings and Right to Counsel.

[1] Amdt6.6.3.1 Overview of When the Right to Counsel Applies.

[2] Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 198 (2008) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175, (1991)).

[3] 554 U.S. at 194–95, 198 (right to appointed counsel attaches even if no public prosecutor, as distinct from a police officer, is aware of that initial proceeding or involved in its conduct).

[4] *See*, *e.g.*, Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (determining whether right to counsel applied in arraignment by examining whether it amounts to a "critical stage in a criminal proceeding").

[5] 287 U.S. 45, 57 (1932).

trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself."

The Court expanded on this language in *Hamilton v. Alabama*,[6] where the Court noted that arraignment under Alabama state law was a "critical stage." The Court reached that conclusion because in Alabama arraignment was the stage where certain defenses, pleas, and motions had to be made.[7] In *White v. Maryland*,[8] the Court set aside a conviction obtained at a trial at which the defendant's plea of guilty, entered at a preliminary hearing at which he was without counsel, was introduced as evidence against him at trial. Citing to *Hamilton*, the Court explained that "[w]hatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a state as arraignment under Alabama law" because the defendant "entered a plea before the magistrate and that plea was taken at a time when he had no counsel."[9]

Subsequently, in *Coleman v. Alabama*,[10] the Court identified a preliminary hearing as a "critical stage" necessitating counsel even though the only functions of the hearing were to determine probable cause to warrant presenting the case to a grand jury and to fix bail, and although no defense was required to be presented at that point and nothing occurring at the hearing could be used against the defendant at trial. The Court emphasized the practical difference a lawyer could have made at the preliminary hearing.[11] In particular, the Court hypothesized that a lawyer might, by skilled examination and cross-examination, expose weaknesses in the prosecution's case and thereby save the defendant from being required to face trial.[12] Further, the Court speculated that a lawyer could preserve testimony he elicited at the hearing for use in cross-examination at trial and impeachment purposes; better prepare for trial by discovering as much as possible of the prosecution's case against defendant; and influence the court in such matters as bail and psychiatric examination.[13]

Amdt6.6.3.3 Custodial Interrogation and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,*

[6] 368 U.S. at 53, 54.

[7] *Id.* (listing the defense of insanity, pleas in abatement, and motions to quash, as examples of actions tied to the arraignment stage under Alabama law).

[8] 373 U.S. 59, 59–60 (1963) (per curiam).

[9] *Id.* at 60.

[10] 399 U.S. 1, 8 (1970) (plurality opinion). Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the fact-finding process as the role of counsel at trial, *Coleman* was subsequently denied retroactive effect. Adams v. Illinois, 405 U.S. 278, 285 (1972) (plurality opinion). *Hamilton* and *White*, however, were held to be retroactive. Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam).

[11] In doing so, *Coleman* appears to track the logic of several pre-*Gideon* cases in which a defendant was entitled to counsel if a lawyer might have made a difference. *See* Chewning v. Cunningham, 368 U.S. 443, 447 (1962) (concluding that counsel was necessary given the complexity of issues raised in underlying prosecution and the significant "potential prejudice resulting from the absence of counsel"); Carnley v. Cochran, 369 U.S. 506, 507, 512–13 (1962) (observing that "[t]he assistance of counsel might well have materially aided the petitioner in coping with several aspects of the case" and therefore holding that "petitioner's case was one in which the assistance of counsel, unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment"); Hudson v. North Carolina, 363 U.S. 697, 703 (1960) (explaining the need for counsel in circumstances of underlying prosecution and finding that lack of counsel amounted to deprivation of due process under the Fourteenth Amendment).

[12] *Coleman*, 399 U.S. at 9.

[13] *Id.*

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the context of custodial interrogations—such as police questioning of a suspect[1]—the Court's doctrine on the extent of the right to counsel has evolved to be closely related to its doctrine on the Fifth Amendment's protection against self-incrimination.[2] At first, the Court evaluated the constitutionality of custodial interrogations against a rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel at custodial interrogation that his subsequent trial was tainted.[3] In 1959, the Court in *Spano v. New York*[4] declined to consider whether, as a blanket rule, a "confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment." Instead, the Court in *Spano* concluded that use of the confession at issue violated the Fourteenth Amendment based on the surrounding circumstances—including the defendant's limited education, the numerous denials of request for counsel, and the hours of interrogation undertaken by various officers (one of whom was a friend of the defendant).[5]

Five years later, in *Massiah v. United States*,[6] the Court began to move away from this circumstance—dependent approach rooted in the Fourteenth Amendment, holding that post—indictment interrogation in the absence of defendant's lawyer was a denial of the defendant's Sixth Amendment right to assistance of counsel.[7] The same year as *Massiah*, the Court in *Escobedo v. Illinois*[8] held that preindictment custodial interrogation violates the Sixth Amendment when "the suspect has requested and been denied an opportunity to consult with his lawyer." In 1966, the Court in *Miranda v. Arizona*[9] reaffirmed *Escobedo*, but switched from reliance on the Sixth Amendment to reliance on the Fifth Amendment's Self-Incrimination Clause in cases of pre-indictment custodial interrogation. That said,

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[1] *See*, *e.g.*, *Interrogation*, Black's Law Dictionary (11th ed. 2019) ("Police questioning of a detained person about the crime that he or she is suspected of having committed.").

[2] For further discussion of the Fifth Amendment and self-incrimination, see *supra* Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice.

[3] Crooker v. California, 357 U.S. 433, 439 (1958); *see also* Cicenia v. Lagay, 357 U.S. 504, 510 (1958) ("[T]his Court, in judging whether state prosecutions meet the requirements of due process, has sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness.").

[4] 360 U.S. 315, 320 (1959).

[5] *Id.* at 317–320.

[6] 377 U.S. 201, 205–06 (1964); *See also* McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam) (citing *Massiah* and reversing *State v. McLeod*, 1 Ohio St. 2d 60 (Ohio 1964)—a state prosecution where an already-indicted defendant voluntarily made an oral confession to police); *Cf.* Hoffa v. United States, 385 U.S. 293 (1966) (declining to extend *Massiah* to require assistance of counsel for any questioning after the moment when the suspect *could* have been arrested, even if he or she was not); Milton v. Wainwright, 407 U.S. 371, 372 (1972) (passing on question of whether post-indictment questioning of suspect by officer posing as cellmate violated Sixth Amendment right to counsel pursuant to *Massiah*, because "any error in its admission was harmless beyond a reasonable doubt"). In Kansas v. Ventris, 556 U.S. 586, 592 (2009), the Court "conclude[d] that the Massiah right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation," not merely if and when the defendant's statement is admitted into evidence.

[7] In *Massiah*, federal officers used an informer to elicit incriminating admissions from the defendant—who had already been indicted and was represented by a lawyer—which they surreptitiously listened to through a broadcasting unit. *Massiah*, 377 U.S. at 201–03.

[8] 378 U.S. 478, 485, 490–91 (1964). Subsequently, the Court limited its holding in *Escobedo* to prospective application. *See* Johnson v. New Jersey, 384 U.S. 719, 721 (1966), *abrogated by* United States v. Johnson, 457 U.S. 537 (1982) ("We hold that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision.").

[9] 384 U.S. 436, 441, 467 (1966).

Miranda still placed great emphasis upon police warnings of the right to counsel and foreclosed interrogation in the absence of counsel without a valid waiver by defendant.[10] However, in subsequent opinions, the Court clarified that neither *Miranda* nor *Escobedo* support the assertion that "the Sixth Amendment right, in any of its manifestations, applies *prior* to the initiation of adversary judicial proceedings."[11]

Despite *Miranda's* general reliance on the Fifth Amendment, and the Court's limitation on the scope of *Escobedo*, it has reaffirmed and in some respects expanded *Massiah*. First, in *Brewer v. Williams*,[12] the Court held that police had violated the right to counsel by eliciting from the defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on the defendant's known weakness. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to defense counsel that the defendant would not be questioned in his absence.[13] Then, in *United States v. Henry*,[14] the Court held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that, even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that that result would follow.[15]

Another issue in the custodial interrogation context involves waiver of the right to counsel where the suspect makes incriminating statements during police questioning following a request for counsel. In *Michigan v. Jackson*, the Court held that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[16] The Court concluded that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before."[17] However, in *Montejo v. Louisiana*,[18] the

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[10] *Id.* at 471–75. The different issues in Fifth and Sixth Amendment cases were summarized in Fellers v. United States, 540 U.S. 519, 524–25 (2004), which held that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

[11] Moran v. Burbine, 475 U.S. 412, 429 (1986) (emphasis added); *see also* Illinois v. Perkins, 496 U.S. 292, 299 (1990) ("In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable."). For a discussion of intervening precedent, which developed the concept of initiation of adversary proceedings, see Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel.

[12] 430 U.S. 387, 391–93 (1977). The Court later decided another similar case (involving incriminating statements made to police officers during a pre-indictment conversation in a patrol car) on self-incrimination grounds. Rhode Island v. Innis, 446 U.S. 291, 294–95, 302 (1980).

[13] *Brewer*, 430 U.S. at 391.

[14] 447 U.S. 264, 265–66, 270, 274–75 (1980); *but see* Kansas v. Ventris, 556 U.S. 586, 589, 594 (2009) (concluding that law enforcement had violated defendant's Sixth Amendment right to counsel by soliciting incriminating statements through an informant planted in defendant's cell, but holding that statements were nevertheless admissible for purposes of impeaching the defendant's "inconsistent testimony at trial"); Weatherford v. Bursey, 429 U.S. 545, 550–51 (1977) (rejecting a per se rule that, regardless of the circumstances, "if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent's revealing his identity, a violation of the defendant's constitutional rights has occurred . . . ").

[15] *Henry*, 447 U.S. at 271.

[16] Michigan v. Jackson, 475 U.S. 625, 636 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009). .

[17] *Id.* at 631. The Court stated: "If an accused knowingly and intelligently" waives his Sixth Amendment right to counsel, there is "no reason why the uncounseled statements he then makes must be excluded at his trial." Patterson v. Illinois, 487 U.S. 285, 291 (1988) (internal quotation marks omitted). Moreover, although the Court "require[s] a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than [it] require[s] for a Sixth Amendment waiver during postindictment questioning," it has clarified that "whatever standards suffice for *Miranda*'s purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment

Court overruled *Jackson*, finding that the prophylactic Fifth Amendment protections created by *Miranda* and its progeny constitute sufficient protection of the right to counsel. The Court in *Montejo* was faced with the question of whether *Jackson* also barred waivers of the right where an attorney had been appointed in the absence of such an assertion.[19] In deciding to overrule *Jackson*, the Court in *Montejo* noted that "[n]o reason exists to assume that a defendant . . . who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present."[20] Moreover, the Court found, *Jackson* achieves little by way of preventing unconstitutional conduct.[21]

Statements obtained during custodial interrogation in violation of the Sixth Amendment right to counsel are ordinarily inadmissible at trial (a remedy known as the exclusionary rule).[22] In light of the Sixth Amendment basis for the exclusionary rule—to protect the right to a fair trial—exceptions to that rule exist where that basis is not served. For example, in *Nix v. Williams*,[23] the Court held the "inevitable discovery" exception applied to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. The Court in *Nix* reasoned that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[24] An exception to the Sixth Amendment exclusionary rule has also been recognized for the purpose of impeaching the defendant's trial testimony.[25]

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questioning." *Id.* at 298–99. In *McNeil v. Wisconsin*, the Court reasoned that the Sixth Amendment right is "offense-specific," and so also is "its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews." 501 U.S. 171, 175, 177 (1991). The reason that the right is "offense-specific" is that "it does not attach until a prosecution is commenced." *Id.* Therefore, a defendant who has invoked his Sixth Amendment right to counsel with respect to the offense for which he is being prosecuted may maintain that right, but still potentially waive his *Miranda* -based right not to be interrogated about unrelated and uncharged offenses. The Court declined to recognize an exception to the offense-specific limitation for crimes that are closely related factually to a charged offense. Texas v. Cobb, 532 U.S. 162, 168 (2001). The Court instead borrowed from double-jeopardy law: if the same transaction constitutes a violation of two separate statutory provisions, the test is "whether each provision requires proof of a fact which the other does not." *Id.* at 173 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). Thus, where a defendant had been charged with burglary, but not murder, in connection with a fatal home invasion, the Court concluded that "the Sixth Amendment right to counsel did not bar police from interrogating [the defendant] regarding the murders, and [the defendant's] confession was therefore admissible," because "burglary and capital murder are not the same offense" under the relevant test. *Id.* at 173.

[18] 556 U.S. 778, 794 (2009).

[19] *Id.* at 782–83.

[20] *Id.* at 789.

[21] The Court reasoned that without *Jackson*, there would be "few if any" instances in which "fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial" given *Miranda* and its progeny, which guarantee that "a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited." *Id.* at 794–95.

[22] *See* Maine v. Moulton, 474 U.S. 159, 180 (1985) ("Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel."); Massiah v. United States, 377 U.S. 201, 205–06 (1964) ("We hold that the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."); *but see* Michigan v. Harvey, 494 U.S. 344, 345–46 (1990) (holding that the "prosecution may use a statement taken [post-arraignment] in violation of the [Sixth Amendment] . . . to impeach a defendant's false or inconsistent testimony").

[23] 467 U.S. 431, 446 (1984).

[24] *Id.*

[25] *See Harvey*, 494 U.S. at 345–46 (post-arraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant's inconsistent trial testimony); Kansas v. Ventris, 556 U.S. 586, 589, 593 (2009)

Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Whether the right to counsel applies to identification situations depends in part on the extent to which they represent a critical stage in a criminal proceeding. *United States v. Wade*,[1] in conjunction with *Gilbert v. California*,[2] held that lineups are of critical importance and in-court identification of defendants based on out-of-court lineups or show-ups without the presence of defendant's counsel is inadmissible. In reaching that conclusion, the Court observed that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[3] Summarizing its Sixth Amendment doctrine in light of this context, the Court noted that "our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'"[4]

The Court reasoned that the presence of counsel at a lineup is constitutionally necessary because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which cannot adequately be discovered and remedied at trial.[5] However, the Court concluded that there was less certainty and frequency of possible injustice stemming from lack of counsel in lineups than at trial, and the Court held that *Wade* and *Gilbert* were to be given prospective effect only; more egregious instances, where identification had been based upon lineups conducted in a manner that was unnecessarily suggestive and conducive to irreparable mistaken identification, could be invalidated under the Due Process Clause.[6] The *Wade-Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.[7]

In *United States v. Ash*,[8] the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at

(statement made to informant planted in defendant's holding cell admissible for impeachment purposes because "[t]he interests safeguarded by exclusion are 'outweighed by the need to prevent perjury and to assure the integrity of the trial process'").

[1] 388 U.S. 218, 236–37 (1967) ("Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for [the defendant] the postindictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel). . . as at the trial itself.'" (quoting *Powell v. State of Ala.,* 287 U.S. 45, 57 (1932)).

[2] 388 U.S. 263, 271–72 (1967).

[3] *Wade*, 388 U.S. at 224.

[4] *Id.* at 224–25.

[5] *Id.* at 227–39.

[6] Stovall v. Denno, 388 U.S. 293, 299–300 (1967).

[7] Gilbert v. California, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).

[8] 413 U.S. 300, 311–13 (1973).

trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[9] Given developments in criminal investigation and procedure, assistance would be "less than meaningful if it were limited to the formal trial itself;" therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself."[10] The court explained that at these "newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."[11] Therefore, unless the pretrial stage involves the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.[12] Because the defendant in *Ash* was not present when witnesses to the crime viewed photographs of possible guilty parties, the Court therefore concluded that there was no trial-like confrontation.[13] Further, because the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by examining witnesses, the Court in *Ash* concluded that an indicted defendant is not entitled to have his counsel present at such a display.[14]

Another issue involves whether the right to counsel applies to lineups or identification procedures occurring before indictment. The defendants in *Wade* and *Gilbert* had already been indicted and counsel had been appointed to represent them when their lineups were conducted.[15] Subsequently in *Kirby v. Illinois*,[16] the Court held that no right to counsel exists for lineups that precede some formal act of charging a suspect. In a plurality opinion, the Court explained that the Sixth Amendment does not become operative until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[17] Such a step is significant, the Court observed, because, "it is the starting point of our whole system of adversary criminal justice" and it is only "then that the government has committed itself to prosecute, and only then that

[9] *Id.* at 309.

[10] *Id.* at 310.

[11] *Id*. Examination of defendant by court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. Estelle v. Smith, 451 U.S. 454, 469–71 (1981). Constructive notice is insufficient to alert counsel to psychiatric examination to assess future dangerousness of an indicted client, Satterwhite v. Texas, 486 U.S. 249, 255 (1987); see also Powell v. Texas, 492 U.S. 680, 686 (1989) (per curiam) (requiring under Sixth Amendment, notice to counsel of psychiatric examination for future dangerousness); *Cf.* Buchanan v. Kentucky, 483 U.S. 402, 425, (1987) (finding no Sixth Amendment violation where "counsel was certainly on notice that if, as appears to be the case, he intended to put on a 'mental status' defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal"). Violations of the right to counsel at post-indictment psychiatric examinations of defendants are subject to harmless error analysis. *Satterwhite*, 486 U.S. at 258.

[12] *Ash*, 413 U.S. at 313.

[13] *Id.* at 317.

[14] 413 U.S. at 317–21.

[15] United States v. Wade, 388 U.S. 218, 219, 237 (1967); Gilbert v. California, 388 U.S. 263, 269, 272 (1967); *accord* Simmons v. United States, 390 U.S. 377, 382–83 (1968) ("The rationale of [*Wade* and *Gilbert*] . . . was that an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.'").

[16] 406 U.S. 682, 689–90 (1972) (plurality opinion); *see also* Coleman v. Alabama, 399 U.S. 1, 5 (1970) (concluding under totality of the circumstances that "[i]t cannot be said on this record that the trial court erred in finding that . . . in-court identification of the petitioners did not stem from an identification procedure at the lineup 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'" (quoting Simmons v. United States, 390 U.S. (1968)); Foster v. California, 394 U.S. 440, 443 (1969) (holding that a police lineup—where defendant was taller than other participants and "was wearing a leather jacket similar to that worn by the robber"—"so undermined the reliability of the eyewitness identification as to violate due process"); Stovall v. Denno, 388 U.S. 293, 295, 302 (1967) (determining that although "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned," it was not a due process violation to do so in the hospital room of a stabbing victim who was "hospitalized for major surgery to save her life").

[17] *Kirby*, 406 U.S. at 689.

the adverse positions of Government and defendant have solidified."[18] Further, the Court noted, "[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[19] Therefore, the Court stated that the initiation of adversary judicial criminal proceedings "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[20] *Kirby* appears to limit opinions such as *Escobedo v. Illinois*,[21] which had held that the Sixth Amendment right to counsel applies to pre-indictment custodial interrogation,[22] at least to the extent *Escobedo* suggested that the right to counsel could apply before the initiation of adversary proceedings.[23]

Amdt6.6.3.5 Post-Conviction Proceedings and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

With respect to post-conviction proceedings, the Court has held that the right to counsel applies at the sentencing stage,[1] and where sentencing was deferred after conviction and the defendant was placed on probation, he must be afforded counsel at a hearing on revocation of probation and imposition of the deferred sentence.[2] In other contexts such as state criminal appeals and prison disciplinary hearings the Court has eschewed Sixth Amendment analysis, instead delimiting the right to counsel under due process and equal protection principles.[3]

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 689–90. Indictment, *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. *E.g.*, Brewer v. Williams, 430 U.S. 387, 399 (1977) (explaining that there was "no doubt in the present case that judicial proceedings had been initiated" where a "warrant had been issued for [the defendant's] arrest, [the defendant] had been arraigned on that warrant before a judge in a Davenport courtroom, and [the defendant] had been committed by the court to confinement in jail"); *see also* United States v. Gouveia, 467 U.S. 180, 192 (1984) (holding that placing prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes does not amount to an initiation of judicial proceedings for Sixth Amendment purposes).

[21] 378 U.S. 478, 490–91 (1964).

[22] Amdt6.6.3.3 Custodial Interrogation and Right to Counsel.

[23] *See* Moran v. Burbine, 475 U.S. 412, 429 (1986) (Citing to *Kirby* and explaining that "[a]t the outset, subsequent decisions foreclose any reliance on *Escobedo* . . . for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings.").

[1] The seminal precedent on the applicability of the right to counsel at sentencing is the Court's 1948 opinion *Townsend v. Burke*, which concluded that the defendant was entitled to counsel at sentencing as a matter of due process under the circumstances of that particular case. 334 U.S. 736, 741 (1948). However, in a later opinion, the Court seemed to indicate *Townsend* indicates a right to counsel at sentencing as a byproduct of the Sixth Amendment, noting that the opinion "might well be considered to support by itself a holding that the right to counsel applies at sentencing." Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[2] *Mempa*, 389 U.S. at 137 (applied retroactively in McConnell v. Rhay, 393 U.S. 2, 3 (1968) (per curiam)); *but see* Gagnon v. Scarpelli, 411 U.S. 778, 781, 790 (1973) (concluding that due process does not require appointment of counsel in every post-sentencing parole revocation proceeding, and instead "decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system" (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).

[3] For example, the Court has not invoked the Sixth Amendment when determining applicability of the right to counsel to state criminal appeals. *See* Douglas v. California, 372 U.S. 353, 356 (1963) (concluding that defendant was

Amdt6.6.3.6 Noncriminal and Investigatory Proceedings and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Court has construed the applicability of the right to counsel, or lack thereof, in various noncriminal and investigatory proceedings as a matter of the Due Process Clause rather than the Sixth Amendment. For example, commitment proceedings that lead to the imposition of essentially criminal punishment are subject to the Due Process Clause and require the assistance of counsel.[1] However, a state administrative investigation by a fire marshal inquiring into the causes of a fire was held not to be a criminal proceeding and hence, despite the fact that the petitioners had been committed to jail for noncooperation, not the type of hearing at which counsel was requisite as a matter of Due Process.[2] In another decision, the Court refused to extend the Due Process-based right to counsel to a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding, even though the defendants in the case were subsequently prosecuted and sentenced for contempt in refusing to testify at the inquiry on the ground that their counsel were required to remain outside the hearing room.[3]

Amdt6.6.4 Right to Choose Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under the Sixth Amendment, there is a presumption that a defendant may retain counsel of choice, but the right to choose a particular attorney is not absolute.[1] For instance, in *Wheat v. United States*, a district court had denied a defendant's proffered waiver of conflict of interest and refused to allow representation by an attorney who represented the defendant's

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entitled to counsel in appealing conviction as a matter of equal protection); *see also* Ross v. Moffitt, 417 U.S. 600, 612 (1974) ("In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court."). In addition, using due process analysis, the Court found no constitutional right to counsel in prison disciplinary proceedings. Wolff v. McDonnell, 418 U.S. 539, 560–63, 570 (1974); *see also* Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976) (rejecting assertion that *Miranda* requires appointment of counsel in prison disciplinary hearings and declining to alter holding in *Wolff*, 418 U.S. at 560–53, 580).

[1] Specht v. Patterson, 386 U.S. 605, 608, 610 (1967).

[2] In re *Groban*, 352 U.S. 330, 332, 334–35 (1957).

[3] Anonymous v. Baker, 360 U.S. 287, 289, 290–91, 295 (1959); *see also* United States v. Williams, 504 U.S. 36, 49 (1992) ("We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation.") (citing *In re Groban*, 352 U.S. at 333 and United States v. Mandujano, 425 U.S. 564, 581 (1976)).

[1] *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," the "Sixth Amendment right to choose one's own counsel is circumscribed in several important respects").

co-conspirators in an illegal drug enterprise.[2] Upholding the district court's discretion to disallow representation in instances of actual conflict of interests or serious potential for conflict, the Court mentioned other situations in which a defendant's choice may not be honored.[3] A defendant, for example, is not entitled to an advocate who is not a member of the bar, nor may a defendant insist on representation by an attorney who denies counsel for financial reasons or otherwise, nor may a defendant demand the services of a lawyer who may be compromised by past or ongoing relationships with the Government.[4]

The right to retain counsel of choice generally does not bar operation of asset forfeiture provisions, even if the forfeiture serves to deny to a defendant the wherewithal to employ counsel. In *Caplin & Drysdale v. United States*,[5] the Court upheld a federal statute requiring forfeiture to the government of property and proceeds derived from drug-related crimes constituting a "continuing criminal enterprise,"[6] even though a portion of the forfeited assets had been used to retain defense counsel. Although a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that [the] defendant will be able to retain the attorney of his choice."[7] Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act,[8] the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.[9] Moreover, on the same day *Caplin & Drysdale* was decided, the Court, in *United States v. Monsanto*, held that the government may, prior to trial, freeze assets that a defendant needs to hire an attorney if probable cause exists to "believe that the property will ultimately be proved forfeitable."[10] Nonetheless, in *Luis v. United States* the Court limited the holdings from *Caplin & Drysdale* and *Monsanto*, deciding that the Sixth Amendment provides criminal defendants the right to preserve *legitimate, untainted* assets unrelated to the underlying crime in order to retain counsel of their choice.[11]

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[2] 486 U.S. 153 (1988).

[3] *Id.* at 159.

[4] *Id.*

[5] 491 U.S. 617, 619, 626 (1989).

[6] 21 U.S.C. §§ 848, 853.

[7] *Caplin & Drysdale*, 491 U.S. at 626.

[8] The statute was interpreted in United States v. Monsanto, 491 U.S. 600, 602, 607 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.

[9] *See Caplin & Drysdale*, 491 U.S. at 628 ("There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right.").

[10] *Monsanto*, 491 U.S. at 615 ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that . . . the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."). A subsequent case held that where a grand jury had returned an indictment based on probable cause, that conclusion was binding on a court during forfeiture proceedings and the defendants do not have a right to have such a conclusion re-examined in a separate judicial hearing in order to unfreeze the assets to pay for their counsel.

[11] 578 U.S. 5, 8–9, 12–13 (2016) (plurality opinion). The Court in *Luis* split as to the reasoning for holding that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. Four Justices employed a balancing test, weighing the government's contingent future interest in the untainted assets against the interests in preserving the right to counsel—a right at the "heart of a fair, effective criminal justice system"—in concluding that the defendant had the right to use innocent property to pay a reasonable fee for assistance of counsel. *See id.* at 16–23 (Justice Stephen Breyer, joined by Chief Justice John Roberts, Justices Ruth Bader Ginsburg & Sonia Sotomayor). Justice Clarence Thomas, in providing the fifth and deciding vote, concurred in judgment only, contending that "textual understanding and history" alone suffice to "establish that the Sixth

Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[12] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury) but a "structural defect" (a constitutional error that affects the framework of the trial), the Court held that the decision is not subject to a "harmless error" analysis.[13]

In *Faretta v. California*, the Court held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself.[14] It is a right the defendant must adopt knowingly and intelligently;[15] under some circumstances the trial judge may deny the authority to exercise it, as when the defendant simply lacks the competence to make a knowing or intelligent waiver of counsel[16] or when his self-representation is so disruptive of orderly procedures that the judge may curtail it.[17] The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction.[18] The Court spelled out the essential elements of self-representation in *McKaskle v. Wiggins*,[19] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself."[20] But participation of standby counsel even in the jury's presence and over the defendant's objection does not violate the defendant's Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.[21]

Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture." *See id.* at 25 (Thomas, J., concurring); *see also id.* at 33 ("I cannot go further and endorse the plurality's atextual balancing analysis.").

[12] United States v. Gonzalez-Lopez, 548 U.S. 140, 144–45 (2006).

[13] *Gonzalez-Lopez*, 548 U.S. at 148–50 (citing Arizona v. Fulminante, 499 U.S. 279, 282 (1991)).

[14] 422 U.S. 806, 807, 817 (1975). Although the Court acknowledged some concern by judges that *Faretta* leads to unfair trials for defendants, in *Indiana v. Edwards* the Court declined to overrule *Faretta*. 554 U.S. 164, 178 (2008). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. *See Faretta*, 422 U.S. at 834 (explaining that "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage," and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored"). A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. *Id.* at 834–35 n.46. The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9, 10 (2005) (per curiam). Related to the right of self-representation is the right to testify in one's own defense. *See* Rock v. Arkansas, 483 U.S. 44, 52, 62 (1987) (holding that per se rule excluding all hypnotically refreshed testimony violates right).

[15] *See*, *e.g.*, Godinez v. Moran, 509 U.S. 389, 396 (1993) (explaining that a criminal defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently'" (quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).

[16] The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. *Edwards*, 554 U.S. at 177–78. Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398–99 (1993).

[17] *Faretta*, 422 U.S. at 834 n.46.

[18] Martinez v. Court of App. of Cal., Fourth App. Dist., 528 U.S. 152, 154 (2000). The Sixth Amendment itself "does not include any right to appeal." *Id.* at 160.

[19] 465 U.S. 168, 170 (1984).

[20] *Id.* at 178.

[21] *Id.* at 184.

Amdt6.6.5 Right to Effective Assistance of Counsel

Amdt6.6.5.1 Overview of the Right to Effective Assistance of Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

In *McMann v. Richardson*, the Court held that "the right to counsel is the right to the effective assistance of counsel."[1] This right to effective assistance may be implicated in at least three ways.[2] First, a court's action may interfere with counsel's effectiveness if the court restricts a defense counsel in exercising his or her representational duties and prerogatives attendant to the adversarial system of justice of the United States.[3] Second, the Sixth Amendment is implicated when a court appoints a defendant's attorney to represent his co-defendant as well, where the co-defendants are known to have potentially conflicting interests.[4] Third, defense counsel may deprive a defendant of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial,[5] or, more broadly, a just outcome.[6] The right to effective assistance may be implicated as early as the process for appointment of counsel.[7]

Amdt6.6.5.2 Deprivation of Effective Assistance of Counsel by Court Interference

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

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[1] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The Court stated: "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ." *Id.* at 771. As a corollary, there is no Sixth Amendment right to effective assistance where there is no Sixth Amendment right to counsel. Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam) (holding that defendant may not raise ineffective assistance claim in context of proceeding in which he had no constitutional right to counsel).

[2] An additional issue is the extent to which the actions of government investigators may interfere with the effective assistance of counsel. *See* United States v. Morrison, 449 U.S. 361, 362, 364, 366 (1981) (assuming without deciding that investigators who met with defendant on another matter without knowledge or permission of counsel and who disparaged counsel and suggested she could do better without him, interfered with counsel, but holding that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

[3] *E.g.*, Geders v. United States, 425 U.S. 80, 91 (1976) (holding "that an order preventing [defendant] from consulting his counsel 'about anything' during a seventeen hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment"); Herring v. New York, 422 U.S. 853, 864–65 (1975) (concluding that trial court denied defendant effective assistance of counsel through application of state statute to bar defense counsel from making final summation).

[4] *E.g.*, Glasser v. United States, 315 U.S. 60, 75–76 (1942) (holding that court deprived defendant of effective assistance of counsel by appointing the same counsel to represent defendant and a codefendant despite danger of divided attention and conflicts).

[5] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[6] *See*, *e.g.*, Lafler v. Cooper, 566 U.S. 156, 162–63 (2012) (defense counsel deprived defendant of effective assistance of counsel through erroneous advice during plea bargaining).

[7] *Glasser*, 315 U.S. at 70 (stating that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests"); *see also* Powell v. Alabama, 287 U.S. 45, 71–72 (1932) (holding that as a matter of due process, the assignment of defense counsel in a capital case must be timely and made in a manner that affords "effective aid in the preparation and trial of the case").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Restrictions on representation imposed during trial have been stricken as impermissible interference with defense counsel. For example, the Court invalidated application of a statute that empowered a judge to deny final summations before judgment in a nonjury trial; explaining that "the right to the assistance of counsel . . . ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."[1] In *Geders v. United States*,[2] the Court held that a trial judge's order preventing a defendant from consulting his counsel during a 17-hour overnight recess between his direct and cross-examination, to prevent tailoring of testimony or "coaching," deprived the defendant of his right to assistance of counsel and was invalid.[3] The Court has treated other direct and indirect restraints upon counsel as violations of the Fourteenth Amendment right to due process.[4]

Amdt6.6.5.3 Deprivation of Effective Assistance of Counsel in Joint Representation

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In cases of joint representation of codefendants, deprivation of effective assistance of counsel may result from a lack of fidelity by the attorney to the client. For instance, in *Glasser v. United States*, the Court held a trial judge erred in appointing one defendant's attorney to also represent a codefendant in a conspiracy case, where the judge knew of potential conflicts of interest in the case, and the original defendant had earlier expressed a desire for sole representation.[1] In another case, counsel for codefendants made a timely assertion to the trial judge that continuing joint representation could pose a conflict of interest, and the Court held that the trial judge erred in not examining the assertion closely and by not permitting or appointing separate counsel, absent a finding that the risk of conflict was remote.[2] Joint

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[1] Herring v. New York, 422 U.S. 853, 858, 864–65 (1975)."[T]he right to the assistance to counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Id.* at 857.

[2] 425 U.S. 80, 91 (1976).

[3] The Court distinguished *Geders* in Perry v. Leeke, 488 U.S. 272, 283–85 (1989), which upheld a trial court's order that the defendant and his counsel not consult during a fifteen-minute recess between the defendant's direct testimony and his cross-examination; see also Chandler v. Fretag, 348 U.S. 3, 10 (1954) (holding that denial of request for continuance "to employ and consult with counsel" deprived defendant of due process of law).

[4] *E.g.*, Brooks v. Tennessee, 406 U.S. 605, 612–13 (1972) (alternative holding) (statute requiring defendant to testify prior to any other witness for defense or to forfeit the right to testify denied him due process by depriving him of the tactical advice of counsel on whether to testify and when); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (concluding under the Fourteenth Amendment where Georgia statute, uniquely, barred sworn testimony by defendants, a defendant was entitled to the assistance of counsel in presenting the unsworn statement allowed him under Georgia law).

[1] 315 U.S. 60, 75–76 (1942).

[2] Holloway v. Arkansas, 435 U.S. 475, 484 (1978). Counsel had been appointed by the court. *Id.* at 477.

representation does not deny effective assistance per se, however.[3] Judges are not automatically required to initiate an inquiry into the propriety of multiple representation, and are able to assume in the absence of "special circumstances" that no conflict exists.[4] On the other hand, a defendant who objects to joint representation must be given an opportunity to make the case that potential conflicts exists.[5] Absent an objection, a defendant must later show the existence of an "actual conflict of interest [that] adversely affected his lawyer's performance."[6] Once it is established that a conflict did actively affect the lawyer's joint representation, however, a defendant need not additionally prove that the lawyer's representation was prejudicial to the outcome of the case.[7]

Amdt6.6.5.4 Deprivation of Effective Assistance of Counsel by Defense Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment's guarantee of effective assistance of counsel is not satisfied by the mere appointment of counsel regardless of the competence or fidelity of their services; indeed, the "right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."[1] Further, the Sixth Amendment's right to effective assistance applies to counsel regardless of whether counsel is appointed or privately retained or whether the government in any way brought about the defective representation.[2] As the Court has explained, "[t]he vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection."[3]

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[3] *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) ("[M]ultiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest." (citing *Holloway*, 435 U.S. at 482)).

[4] *See id.* at 346–47 ("Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.").

[5] *Id.* at 348.

[6] *Id.*

[7] *Id.* at 348–50; *see also* Wheat v. United States, 486 U.S. 153, 162 (1988) ("[W]here a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented."); Wood v. Georgia, 450 U.S. 261, 272–73 (1981) (concluding on due process grounds that where counsel retained by defendants' employer potentially had conflict between defendants' interests and employer's, and facts indicating potential conflict were known to trial judge, the trial judge should have inquired further). Where an alleged conflict is not premised on joint representation, but rather on a prior representation of a different client, for example, a defendant may be required to show actual prejudice in addition to a potential conflict. Mickens v. Taylor, 535 U.S. 162, 166–67, 173–74 (2002). For earlier cases presenting more direct violations of defendant's rights, see generally Glasser v. United States, 315 U.S. 60 (1942); United States v. Hayman, 342 U.S. 205 (1952); and Ellis v. United States, 356 U.S. 674 (1958).

[1] Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)

[2] See *id.* ("A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel.").

[3] *Id.*

The seminal test for adequate representation stems from the Court's 1984 opinion *Strickland v. Washington*.[4] There are two components to the *Strickland* test: (1) deficient representation and (2) resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.[5]

Amdt6.6.5.5 Deficient Representation Under Strickland

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The gauge of deficient representation is an objective standard of reasonableness "under prevailing professional norms" that takes into account "all the circumstances" and evaluates conduct "from counsel's perspective at the time."[1] Providing effective assistance is not limited to a single path. No detailed rules or guidelines for adequate representation are appropriate, as "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[2]

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[4] 466 U.S. 668 (1984). In an earlier case, the Court had observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on whether a court would retrospectively consider his advice right or wrong "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 768–71 (1970); *see also* United States v. Agurs, 427 U.S. 97, 102 n.5 (1976) ("We think it clear, however, that counsel's failure to obtain . . . prior criminal record does not demonstrate ineffectiveness."); Tollett v. Henderson, 411 U.S. 258, 266 (1973) ("If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" (quoting *McMann*, 397 U.S. at 771)).

[5] *Strickland*, 466 U.S. at 687. The Court has emphasized that an "ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 689–90). Furthermore, ineffective assistance of counsel claims frequently are asserted in federal court to support petitions for writs of habeas corpus filed by state prisoners. *E.g.*, *Richter*, 562 U.S. at 96–97; Kimmelman v. Morrison, 477 U.S. 365 (1986). Making a successful *Strickland* claim in a habeas context, as opposed to direct review, was further complicated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104–132, § 104, 110 Stat. 1218–1219, amending 28 U.S.C. § 2254. *See generally*, *e.g.*, Shinn v. Martinez Ramirez, No. 20–1009, at 2, 6–22 (U.S. May 23, 2022) (reviewing and applying AEDPA to foreclose evidentiary hearing where "prisoner's state postconviction counsel negligently failed to develop the state-court record" of ineffective assistance of trial counsel). After the passage of AEDPA, one must go beyond showing that a state court applied federal law incorrectly to also show that the court misapplied established Supreme Court precedent in a manner that no fair-minded jurist could find to be reasonable. *E.g.*, *Richter*, 562 U.S. at 100–05, 106 (reviewing and applying AEDPA standards to habeas claim premised on ineffective assistance of counsel, and holding that counsel's decision to forgo inquiry into blood evidence was at least arguably reasonable); *see also* Burt v. Titlow, 571 U.S. 12, 15 (2013) (reversing Sixth Circuit decision based on "doubly deferential" standard of review for habeas claims under AEDPA and Strickland that does not "permit federal judges to . . . casually second-guess the decisions of their state-court colleagues or defense attorneys"); Cullen v. Pinholster, 563 U.S. 170, 187 (2011) (evaluating federal habeas claim premised on ineffective assistance of counsel and concluding that standard required by AEDPA had not been met).

[1] *Strickland*, 466 U.S. at 688, 689; *see also* Maryland v. Kulbicki, 577 U.S. 1, 4 (2015) (per curiam) (reversing an opinion by Maryland's highest state court, which found that counsel was ineffective because the defendant's attorneys did not question the methodology used by the state in analyzing bullet fragments, on the grounds that this methodology "was widely accepted" at the time of trial, and courts "regularly admitted [such] evidence").

[2] *Strickland*, 466 U.S. at 689. The Court in *Strickland* observed that "American Bar Association standards and the like" may reflect prevailing norms of practice, "but they are only guides." *Id.* at 688. Subsequent cases also cite ABA standards as touchstones of prevailing norms of practice. *E.g.*, Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003). But in *Bobby v. Van Hook*, the Court held that the Sixth Circuit had erred in assessing

Because even the most highly competent attorneys might choose to defend a client differently, "[j]udicial scrutiny of counsel's performance must be highly deferential."[3] Counsel's obligation is a general one: to act within the wide range of legitimate, lawful, and reasonable conduct.[4] The Court has advised that "strategic choices made after thorough investigation of [relevant] law and facts . . . are virtually unchallengeable,"[5] and the same is true of reasonable decisions that "make[ ] particular investigations unnecessary,"[6] or reasonable decisions in selecting which issues to raise on appeal.[7] In *Strickland* itself, the allegation of ineffective assistance failed; the Court held that the defense attorney's decision to forgo character and psychological evidence in a capital sentencing proceeding to avoid rebuttal evidence of the defendant's criminal history was "the result of reasonable professional judgment."[8]

On the other hand, defense counsel does have a general duty to investigate a defendant's background, and a decision to limit investigation and presentation of mitigating evidence must be supported by reasonable efforts and judgment.[9] Also, even though deference to counsel's choices may seem particularly apt in the unstructured, often style-driven arena of plea

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an attorney's conduct in the 1980s under 2003 ABA guidelines, and also noted that its holding "should not be regarded as accepting the legitimacy of a less categorical use of the [2003] Guidelines to evaluate post-2003 representation." 558 U.S. 4, 7, 8 n.1 (2009) (per curiam).

[3] *Strickland*, 466 U.S. at 689. The purpose is "not to improve the quality of legal representation, . . . [but] simply to ensure that criminal defendants receive a fair trial." *Id.*

[4] There is no obligation to assist the defendant in presenting perjured testimony, Nix v. Whiteside, 475 U.S. 157, 171, 175 (1986), and a defendant has no right to require his counsel to use peremptory challenges to exclude jurors on the basis of race. Georgia v. McCollum, 505 U.S. 42, 57 (1992). Also, "effective" assistance of counsel does not guarantee the accused a "meaningful relationship" of "rapport" with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. Morris v. Slappy, 461 U.S. 1, 13–14 (1983).

[5] *Strickland*, 466 U.S. at 690; *see also Burt*, 571 U.S. at 23–24 (rejecting conclusion that a lack of evidence indicating that counsel gave "constitutionally adequate advice on whether to withdraw [a] guilty plea" justified finding counsel ineffective on Sixth Amendment grounds); Yarborough v. Gentry, 540 U.S. 1, 4–6 (2003) (per curiam) (applying deference to attorney's choice of tactics for closing argument and reversing federal appellate decision finding that counsel had deprived defendant of effective assistance of counsel).

[6] *Strickland*, 466 U.S. at 691; *see also* Schriro v. Landrigan, 550 U.S. 465, 475–77 (2007) (determining that federal district court was within its discretion to conclude that attorney's failure to present mitigating evidence made no difference in sentencing); Woodford v. Visciotti, 537 U.S. 19, 26–27 (2002) (per curiam) (determining that state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors).

[7] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745, 750–51, 754 (1983) (concluding that appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

[8] 466 U.S. at 699; *see also* Wong v. Belmontes, 558 U.S. 15, 20, 28 (2009) (per curiam) (rejecting ineffective assistance of counsel claim based on decision not to present additional mitigating evidence); Darden v. Wainwright, 477 U.S. 168, 184–87 (1986) (similar).

[9] *See* Andrus v. Texas, No. 18–9674, slip op. at 1–2, 8 (U.S. Jun. 15, 2020) (per curiam) (concluding the defendant's counsel provided constitutionally ineffective assistance by inadequately investigating mitigating evidence, providing evidence that bolstered the state's case, and failing to scrutinize the state's aggravating evidence); Buck v. Davis, No. 15–8049, slip op. at 17 (U.S. Feb. 22, 2017) (concluding that "[n]o competent defense attorney would introduce" evidence that his client was a future danger because of his race); see also Hinton v. Alabama, 571 U.S. 263, 274 (2014) (per curiam) (holding an attorney's hiring of a questionably competent expert witness because of a mistaken belief in the legal limit on the amount of funds payable on behalf of an indigent defendant constitutes ineffective assistance); Sears v. Upton, 561 U.S. 945, 951–52, 956 (2010) (per curiam) (concluding that the "cursory nature" of a defense counsel's investigation into mitigation evidence was constitutionally ineffective); Porter v. McCollum, 558 U.S. 30, 39–40 (2009) (per curiam) (holding an attorney's failure to interview witnesses or search records in preparation for penalty phase of capital murder trial constituted ineffective assistance of counsel); Rompilla v. Beard, 545 U.S. 374, 385 (2005) (concluding that a defendant's attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate); Wiggins v. Smith, 539 U.S. 510, 526–28 (2003) (holding an attorney's failure to investigate defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable).

bargaining,[10] an accused, in considering a plea, is clearly entitled to advice of counsel on the prospect of conviction at trial and the extent of punishment that might be imposed. Thus, in *Lafler v. Cooper* the government conceded that the deficient representation part of the *Strickland* test was met when an attorney erroneously advised the defendant during plea negotiations that the facts in his case would not support a conviction for attempted murder.[11] In *Missouri v. Frye*,[12] the Court held that failure to communicate a plea offer to a defendant also may amount to deficient representation.

Moreover, in *Padilla v. Kentucky* the Court held that defense counsel's Sixth Amendment duty to a client considering a plea goes beyond advice on issues directly before the criminal court to reach advice on deportation.[13] Because of its severity, historical association with the criminal justice system, and increasing certainty following conviction and imprisonment, the Court found deportation to be of a "unique nature."[14] Further, the Court held that defense counsel failed to meet prevailing professional norms in representing to the defendant that he did not have to worry about deportation because of the length of his legal residency in the United States.[15] The Court emphasized that this conclusion was not based on the attorney's mistaken advice, but rather on a broader obligation to inform a noncitizen client whether a plea carries a risk of deportation.[16]

Amdt6.6.5.6 Prejudice Resulting from Deficient Representation Under Strickland

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

For deficient representation to constitute a constitutional violation, the Court established in *Strickland v. Washington* that there must be (1) deficient representation and (2) resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.[1] Meeting the second requirement of *Strickland*—whether the deficient representation resulted in prejudice—can be challenging The touchstone of "prejudice" under *Strickland* is that the defendant "must show that there is a reasonable probability that, but for counsel's

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[10] *See*, *e.g.*, Premo v. Moore, 562 U.S. 115, 123–26 (2011) (reviewing considerations when evaluating ineffective assistance claim at plea bargaining stage and noting that "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks").

[11] 566 U.S. 156, 161, 166 (2012).

[12] 566 U.S. 134, 145 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

[13] Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010).

[14] *Id.* at 365–66. The Court did not address whether distinguishing between direct and collateral consequences of conviction was appropriate in bounding defense counsel's constitutional duty in a criminal case. *Id.* at 365.

[15] *Id.* at 359, 367–69.

[16] *Id.* at 369–74 (2010). On the issue of prejudice to the defendant from ineffective assistance, the Court sent the case back to lower courts for further findings. *Id.* at 369. In *Chaidez v. United States*, the Court held that *Padilla* announced a "new rule" of criminal procedure that did not apply "retroactively" during collateral review of convictions then already final. 568 U.S. 342, 358 (2013).

[1] Strickland v. Washington, 466 U.S. 668, 687 (1984).

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[2] Defendants frequently fall short on the prejudice requirement.[3]

Beyond *Strickland*'s "reasonable probability of a different result" test for determining prejudice, there are issues of when an "outcome determinative" test alone suffices, what exceptions exist, and whether the general rule should be modified. In *Lockhart v. Fretwell*, the Court appeared to refine the *Strickland* test when it stated that an "analysis focusing solely on mere outcome determination" is "defective" unless attention is also given to whether the result was "fundamentally unfair or unreliable."[4] However, the Court subsequently characterized *Lockhart* as limited to a class of exceptions to the "outcome determinative" test and not supplanting it.[5] According to *Williams v. Taylor*, it would disserve justice in some circumstances to find prejudice premised on a likelihood of a different outcome.[6] For example, fundamental fairness precluded finding prejudice where defense counsel had failed to object to the use sentencing of an aggravating factor barred by a recent appellate case, but where that case was subsequently overturned.[7] According to the Court, finding prejudice based on defense counsel's failure to object in the narrow window where it would have been permissible based on the shifting precedent would have been nothing more than a fortuitous windfall for the

[2] *See* Strickland v. Washington, 466 U.S. 668, 694 (1984). This standard does not require that a defendant show "that counsel's deficient conduct more likely than not altered the outcome in the case." *See Id.* at 693. At the same time, the Court has concluded that the "prejudice inquiry under *See Strickland*" applies to cases beyond those in which there was only "little or no mitigation evidence" presented. Sears v. Upton, 561 U.S. 945, 954 (2010) (per curiam); Porter v. McCollum, 558 U.S. 30, 40–42 (2009) (per curiam) (evaluating the totality of mitigating evidence to conclude that there was "a reasonable probability that the advisory jury—and the sentencing judge—would have struck a different balance'" but for the counsel's deficiencies (Wiggins v. Smith, 539 U.S. 510, 537 (2003))). For an example of a criminal defendant who succeeded on the prejudice prong of the *Strickland* test, see Buck v. Davis, No. 15–8049, slip op. at 18–20 (U.S. Feb. 22, 2017) (holding that, in a case where the focus of a capital sentencing proceeding was on the defendant's likelihood of recidivism, defense counsel had been ineffective by introducing racially charged testimony about the defendant's future dangerousness, and "[r]easonable jurors might well have valued [the testimony] concerning the central question before them"). Where a defendant alleges that ineffective assistance of counsel resulted in an increased term of imprisonment, it is not necessary that the increased prison term be of significant duration. *See* Glover v. United States, 531 U.S. 198, 203 (2001) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

[3] *E.g.*, Smith v. Spisak, 558 U.S. 139, 154–56 (2010). In *Hill v. Lockhart*, the Court applied the *Strickland* test to attorney decisions to accept a plea bargain, holding that a defendant must show a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. 474 U.S. 52, 59 (1985). As a result, the prejudice question with respect to when a counsel's deficient performance leads the defendant to accept a guilty plea rather than go to trial is not whether the trial would have resulted in a not guilty verdict. *See* Roe v. Flores-Ortega, 528 U.S. 470, 482–83 (2000). Instead, the issue is whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." *Id.* at 483. As a result, prejudice may be very difficult to prove if the defendant's decision about going to trial turns on his prospects of success and those chances are affected by an attorney's error. *See* Premo v. Moore, 562 U.S. 115, 118, 123–24 (2011). However, when a defendant's choice to accept a plea bargain has nothing to do with his chances of success at trial, such as if the defendant is primarily concerned with the respective consequences of a conviction after trial or by plea, a defendant can show prejudice by providing evidence contemporaneous with the acceptance of the plea that he would have rejected the plea if not for the erroneous advice of counsel. *See* Lee v. United States, No. 16–327, slip op. at 7–10 (U.S. Mar. 28, 2017) (holding that a defendant whose fear of deportation was the determinative factor in whether to accept a plea agreement could show prejudice resulting from his attorney's erroneous advice that a felony charge would not lead to deportation even when a different result at trial was remote).

[4] 506 U.S. 364, 368–70 (1993).

[5] *See Glover*, 531 U.S. at 203 ("The Court explained last Term that our holding in *Lockhart* does not supplant the *Strickland* analysis."); Williams v. Taylor, 529 U.S. 362, 391 (2000) ("The Virginia Supreme Court erred in holding that our decision in [*Lockhart*] . . . modified or in some way supplanted the rule set down in *Strickland*.") (internal citation omitted).

[6] 529 U.S. at 391–92.

[7] *Id.* at 392–93.

defendant.[8] As another example, the Court has said it would be unjust to find legitimate prejudice in a defense attorney's interference with a defendant's perjured testimony, even if that testimony could have altered a trial's outcome.[9]

A second category of recognized exceptions to the application of the "outcome determinative" prejudice test includes the relatively limited number of cases in which prejudice is presumed. This presumption occurs when there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[10] These situations, the Court explained in *United States v. Cronic* involve some kind of "breakdown of the adversarial process," and include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution's case to meaningful adversarial testing.[11] Moreover, prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken."[12] "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice],"[13] and consequently most claims of inadequate representation continue to be measured by the *Strickland* standard.[14]

Amdt6.6.5.7 Limits on Role of Attorney

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

While the Sixth Amendment guarantees the right of assistance of counsel, that right does not require the defendant to surrender control entirely to his representative.[1] Defense counsel's central province is in trial management, providing assistance in deciding what arguments to make, what evidentiary objections to raise, and what evidence should be

[8] *Id.*

[9] *Id.* (citing and discussing Nix. v. Whiteside, 475 U.S. 157, 175–76 (1986)).

[10] United States v. Cronic, 466 U.S. 648, 658 (1984).

[11] *Id.* at 657–59.

[12] Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000). In *Garza v. Idaho*, the Court clarified that the presumption of prejudice that applies when counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken remains even when the defendant has signed an appeal waiver, because issues may remain as to the scope or validity of the waiver and the presumption-of-prejudice rule does not depend upon the prospects of the defendant's appeal. No. 17–1026, slip op. at 3–6, 9 (U.S. Feb. 27, 2019).

[13] *Cronic*, 466 U.S. at 659 n.26.

[14] *See*, *e.g.*, Weaver v. Massachusetts, No. 16–240, slip op. at 12 (U.S. June 22, 2017) (holding that "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically"); Florida v. Nixon, 543 U.S. 175, 189–90 (2004) (holding that a concession-of-guilt strategy in a capital trial does not automatically rank as prejudicial ineffective assistance of counsel); Bell v. Cone, 535 U.S. 685, 697–98 (2002) (concluding that *Cronic*'s rule that prejudice can be presumed when counsel "entirely fails" to subject the prosecution's case to meaningful adversarial testing does not extend to situations where counsel's failings were limited to specific points in the trial); Mickens v. Taylor, 535 U.S. 162, 173–74 (2002) (holding that, to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest, the defendant must establish that the conflict adversely affected his counsel's performance).

[1] *See* Faretta v. California, 422 U.S. 806, 819–20 (1975) (noting that counsel, by providing "assistance," no matter how expert, is "still an assistant").

submitted.[2] At the same time, the accused has the "ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[3] Such decisions are for the criminal defendant to make notwithstanding the defendant's own inexperience or lack of professional qualifications.[4] Allowing counsel to usurp such decisions from the accused violates the Sixth Amendment's right to counsel, amounting to a structural error that obviates any need to inquire into whether the criminal defendant was prejudiced in any way.[5]

In this vein, the Court held in *McCoy v. Louisiana* that a criminal defendant's choice to maintain his innocence at the guilt phase of a capital trial was not a strategic choice for counsel to make, notwithstanding counsel's view that confessing guilt offered the best chance to avoid the death penalty.[6] Instead, the Court concluded that such a decision amounts to a fundamental choice about the client's objectives for the criminal proceeding.[7] More specifically, while acknowledging that counsel "may reasonably assess a concession of guilt as best suited to avoiding the death penalty," the Court noted that a criminal defendant may not share the objective of avoiding such a punishment and instead may wish, above all else, to avoid admitting guilt or living the rest of his life in prison.[8] Because the Sixth Amendment requires the assistance of counsel, the *McCoy* Court concluded that a lawyer cannot concede his client's guilt and must instead assist in achieving his client's express objective to maintain his innocence of the charged criminal acts.[9]

[2] *See* Gonzalez v. United States, 553 U.S. 242, 248 (2008).

[3] *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

[4] *See* McCoy v. Louisiana, No. 16–8255, slip op. at 6 (U.S. May 14, 2018).

[5] See *id.* at 11 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence.").

[6] *Id.* at 1–2, 6–7.

[7] *Id*.

[8] *Id.* at 7.

[9] *Id.* at 5–8.