SIXTH AMENDMENT

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

CONTENTS

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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 defense.

CRIMINAL PROSECUTIONS

Coverage

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

[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," *supra*. *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

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 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]

RIGHT TO A SPEEDY AND PUBLIC TRIAL

Speedy Trial

Source and Rationale.—The Magna Carta declared "[w]ee shall not . . . deny or delay Justice and right, neither the end, which is

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[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, Black, Douglas, Brennan, and Chief Justice 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 Frankfurter and 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).

[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).

Justice, nor the meane, whereby we may attaine to the end, and that is the law."[14] Much the same language was incorporated into the Virginia Declaration of Rights of 1776[15] and from there into the Sixth Amendment. The right to a speedy trial is a right of an accused, but it serves the interests of defendants and society alike. The provision 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 possibility that long delay will impair the ability of an accused to defend himself."[16] But on the other hand, "there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused." Persons in jail must be supported at considerable public expense and often families must be assisted as well. Persons free in the community after arrest may commit other crimes, lengthy intervals between arrest and trial may promote "bail jumping," and growing backlogs of cases may motivate plea bargaining that does not always match society's expectations for justice. And delay may retard the deterrent and rehabilitative effects of the criminal law.[17]

Application and Scope.—"The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." So finding, the Supreme Court held in the 1967 case of *Klopfer v. North Carolina* that the right to a speedy trial is one of those "fundamental" liberties that the Due Process Clause of the Fourteenth Amendment makes applicable to the states.[18] But beyond its widespread applicability in state and federal prosecutions are questions of when the right attaches, when it is violated, and how violations may be remedied.

The timeline between the commission of a crime and its trial may include an extended period for gathering evidence and decid-

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[14] Ch. 40 of the 1215 Magna Carta, a portion of ch. 29 of the 1225 reissue, translated and quoted by E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (Garland 1979 facsimile of 1642 ed.). *See also* Klopfer v. North Carolina, 386 U.S. 213, 223–24 (1967). The *Klopfer* Court cites an even earlier reference to a right to a speedy trial, dating from 1166. Id. at 223.

[15] 7 F. Thorpe, *The Federal and State Constitutions* H. DOC. NO. 357, 59TH CONGRESS, 2D SESS. 8, 3813 (1909).

[16] United States v. Ewell, 383 U.S. 116, 120 (1966). *See also* Klopfer v. North Carolina, 386 U.S. 213, 221–22 (1967); Smith v. Hooey, 393 U.S. 374, 377–379 (1969); Dickey v. Florida, 389 U.S. 30, 37–38 (1970).

[17] Barker v. Wingo, 407 U.S. 514, 519 (1972); Dickey v. Florida, 398 U.S. 30, 42 (1970) (Justice Brennan concurring). The Speedy Trial Act of 1974, Pub. L. 93–619, 88 Stat. 2076, 18 U.S.C. §§ 3161–74, codified the law with respect to the right, intending "to give effect to the sixth amendment right to a speedy trial." S. REP. NO. 1021, 93d Congress, 2d Sess. 1 (1974).

[18] Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

ing to commence a prosecution. Prejudice that may result from delays between discovering a crime and completing its investigation, or between discovering sufficient evidence to proceed against a suspect and instituting proceedings, is guarded against primarily by statutes of limitation, which represent a legislative judgment with regard to permissible periods of delay.[19] The protection afforded by the speedy trial guarantee of the Sixth 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." [20] Nevertheless, invocation of the right need not always await indictment, information, or other formal charge but can begin with the actual restraints imposed by arrest if those restraints precede the formal preferring of charges.[21] In two cases involving both detention and formal charges, the Court held that the speedy trial guarantee had been violated by states that brought criminal charges against persons who were already incarcerated in prisons of other jurisdictions when the states that brought the criminal charges had ignored the defendants' requests to be given prompt trials and had made no effort through requests to the prison authorities of the other jurisdictions to obtain custody of the prisoners for purposes of trial.[22] But an individual's speedy trial rights can be at issue even when he is not subject to detention and it is uncertain whether the government will ever pursue further prosecution. Thus, a state prac-

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[19] United States v. Marion, 404 U.S. 307, 322–23 (1971). *Cf.* United States v. Toussie, 397 U.S. 112, 114–15 (1970). In some circumstances, pre-accusation delay could constitute a due process violation but not a speedy trial problem. If prejudice results to a defendant because of the government's delay, a court should balance the degree of prejudice against the reasons for delay given by the prosecution. *Marion*, 404 U.S. at 324; United States v. Lovasco, 431 U.S. 783 (1977); United States v. MacDonald, 456 U.S. 1, 8 (1982).

[20] United States v. Marion, 404 U.S. 307, 313 (1971). Justices Douglas, Brennan, and Marshall disagreed, arguing that the "right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post-indictment delays," but concurring because they did not think the guarantee violated under the facts of the case. Id. at 328. In United States v. MacDonald, 456 U.S. 1 (1982), the Court held the clause was not implicated by the action of the United States when, in May of 1970, it proceeded with a charge of murder against defendant under military law but dismissed the charge in October of that year, and he was discharged in December. In June of 1972, the investigation was reopened, but a grand jury was not convened until August of 1974, and MacDonald was not indicted until January of 1975. The period between dismissal of the first charge and the later indictment had none of the characteristics which called for application of the speedy trial clause. Only the period between arrest and indictment must be considered in evaluating a speedy trial claim. *Marion* and *MacDonald* were applied in United States v. Loud Hawk, 474 U.S. 302 (1986), holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained.

[21] United States v. Marion, 404 U.S. 307, 320, 321 (1971).

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

tice permitting a prosecutor to take *nolle prosequi* with leave, which discharged an indicted defendant from custody but left him subject at any time thereafter to prosecution at the discretion of the prosecutor, was condemned as violating the guarantee of a speedy trial.[23]

When the Right is Denied.—"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."[24] No period of time is *per se* too long under this guarantee,[25] nor must any particular prejudice to a fair trial be shown.[26] The Court, rather, has adopted an ad hoc balancing approach. "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. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[27]

The fact of delay triggers an inquiry into the circumstances of the case. Reasons for delay will vary: indeed, reasons for delay, and allocation of responsibility for it, may be disputed.[28] A deliberate delay for advantage will weigh heavily, whereas the absence of a

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[23] Klopfer v. North Carolina, 386 U.S. 213 (1967) (the statute of limitations had been tolled by the indictment). In Pollard v. United States, 352 U.S. 354 (1957), the majority assumed and the dissent asserted that sentence is part of the trial and that too lengthy or unjustified a delay in imposing sentence could run afoul of this guarantee.

[24] Beavers v. Haubert, 198 U.S. 77, 87 (1905) (holding that the guarantee could not be invoked by a defendant first indicted in one district to prevent removal to another district where he had also been indicted). A determination that a defendant has been denied his right to a speedy trial results in a decision to dismiss the indictment or to reverse a conviction in order that the indictment be dismissed. Strunk v. United States, 412 U.S. 434 (1973). A trial court denial of a motion to dismiss on speedy trial grounds is not an appealable order under the "collateral order" exception to the finality rule. One must raise the issue on appeal from a conviction. United States v. MacDonald, 435 U.S. 850 (1977).

[25] *Cf.* Pollard v. United States, 352 U.S. 354 (1957); United States v. Ewell, 383 U.S. 116 (1966). *See* United States v. Provoo, 350 U.S. 857 (1955), *aff'g* 17 F.R.D. 183 (D. Md. 1955).

[26] United States v. Marion, 404 U.S. 307, 320 (1971); Barker v. Wingo, 407 U.S. 514, 536 (1972) (Justice White concurring).

[27] Barker v. Wingo, 407 U.S. 514, 530 (1972). For the federal courts, Congress under the Speedy Trial Act of 1974 imposed strict time deadlines, replacing the *Barker* factors.

[28] *E.g.* Boyer v. Louisiana, 569 U.S. ___, No. 11–9953, slip op. (2013) (writ of *certiorari* dismissed as improvidently granted). Three Justices of the five-Justice *Boyer* majority wrote in concurrence that the record disclosed Boyer's requests for continuances as the single largest contributor to delay in bringing Boyer to trial. Examining the same record, four dissenting Justices concluded that most of the delay was caused by Lousiana's failure to provide funding for Boyer's defense, which failure, according to the dissent, should weigh against the state under Speedy Trial analysis.

witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these other factors.[29] It is the duty of the prosecution to bring a defendant to trial, and the failure of the defendant to demand the right is not to be construed as a waiver of the right.[30] Yet, the defendant's acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, while the defendant's responsibility for delay may preclude a claim altogether. A delay caused by assigned counsel should generally be attributed to the defendant, not to the state. However, "[d]elay resulting from a systemic 'breakdown in the public defender system' could be charged to the State."[31] Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.[32]

Public Trial

"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 letter de cachet. All of these institutions obviously symbolized a menace to liberty. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."[33]

The Supreme Court has cited many civic and process-related purposes served by open trials: they help to ensure the criminal defendant a fair and accurate adjudication of guilt or innocence; they

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[29] Barker v. Wingo, 407 U.S. 514, 531 (1972). Delays caused by the prosecution's interlocutory appeal will be judged by the *Barker* factors, of which the second—the reason for the appeal—is the most important. United States v. Loud Hawk, 474 U.S. 302 (1986) (no denial of speedy trial, since prosecution's position on appeal was strong, and there was no showing of bad faith or dilatory purpose). If the interlocutory appeal is taken by the defendant, he must "bear the heavy burden of showing an unreasonable delay caused by the prosecution [or] wholly unjustifiable delay by the appellate court" in order to win dismissal on speedy trial grounds. Id. at 316.

[30] Barker v. Wingo, 407 U.S. at 528. *See generally* id. at 523–29. Waiver is "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and it is not to be presumed but must appear from the record to have been intelligently and understandingly made. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[31] Vermont v. Brillon, 129 S. Ct. 1283, 1292 (2009) (citation omitted).

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

[33] *In re* Oliver, 333 U.S. 257, 268–70 (1948) (citations omitted). Other panegyrics to the value of openness, accompanied with much historical detail, are Gannett Co. v. DePasquale, 443 U.S. 368, 406, 411–33 (1979) (Justice Blackmun concurring in part and dissenting in part); Richmond Newspapers v. Virginia, 448 U.S. 555, 564–73 (1980) (plurality opinion of Chief Justice Burger); id. at 589–97 (Justice Brennan concurring); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603–07 (1982).

provide a public demonstration of fairness; they discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality. Open trials educate the public about the criminal justice system, give legitimacy to it, and have the prophylactic effect of enabling the public to see justice done.[34] Though the Sixth Amendment expressly grants the accused a right to a public trial,[35] the Court has found the right to be so fundamental to the fairness of the adversary system that it is independently protected against state deprivation by the Due Process Clause of the Fourteenth Amendment.[36] The First Amendment right of public access to court proceedings also weighs in favor of openness.[37]

The Court has borrowed from First Amendment cases in protecting the right to a public trial under the Sixth Amendment. Closure of trials or pretrial proceedings over the objection of the accused may be justified only if the state can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[38] In *Waller v. Georgia*,[39] the Court held that an accused's Sixth Amendment rights had been violated by closure of all 7 days of a suppression hearing in order to protect persons whose phone conversations had been taped, when less than 2½ hours of the hearing had been devoted to playing the tapes. The need for openness at suppression hearings "may be particularly strong," the Court indicated, because the conduct of police and prosecutor is often at issue.[40] Relying on *Waller* and First Amendment precedent, the Court similarly held that an accused's Sixth Amendment right to a public trial had been violated when a

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[34] Richmond Newspapers v. Virginia, 448 U.S. 555, 569–73 (1980) (plurality opinion of Chief Justice Burger); id. at 593–97 (Justice Brennan concurring).

[35] Estes v. Texas, 381 U.S. 532, 538–39 (1965).

[36] *In re* Oliver, 333 U.S. 257 (1948); Levine v. United States, 362 U.S. 610 (1960). Both cases were contempt proceedings which were not then "criminal prosecutions" to which the Sixth Amendment applied (for the modern rule *see* Bloom v. Illinois, 391 U.S. 194 (1968)), so that the cases were wholly due process holdings. *Cf.* Richmond Newspapers v. Virginia, 448 U.S. 555, 591 n.16 (1980) (Justice Brennan concurring).

[37] The Court found a qualified First Amendment right for the public to attend criminal trials in Richmond Newspapers v. Virginia. 448 U.S. 555 (1980) (opinion of Chief Justice Burger); id. at 582 (Justice Stevens concurring); id. at 584 (Justice Brennan concurring); id. at 598 (Justice Stewart concurring); id. at 601 (Justice Blackmun concurring). *See* First Amendment, "Government and the Conduct of Trials," *supra*.

[38] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I).

[39] 467 U.S. 39 (1984).

[40] Waller v. Georgia, 467 U.S. 39, 47 (1984) (indicating that the *Press-Enterprise I* standard governs such 6th Amendment cases).

trial court closed jury selection proceedings without having first explored alternatives to closure on its own initiative.[41]

The Sixth Amendment right to a public trial and the First Amendment right to public access both presume that opening criminal proceedings helps ensure their fairness, but there are circumstances in which an accused might consider openness and its attendant publicity to be unfairly prejudicial. In this regard, the Sixth Amendment right of an accused to a public trial does not carry with it a right to a private trial. Rather, it is the accused's broader right to a fair trial and the government's interest in orderly judicial administration that are weighed in the balance against the public's First Amendment right to access.

The Court has no preset constitutional priorities in resolving these conflicts. Still, certain factors are evident in the Court's analysis, including whether restrictions on access are complete or partial, permanent or time-limited, or imposed with or without full consideration of alternatives. When the complete closure of the record of a normally open proceeding is sought, the accused faces a formidable burden. Thus, in *Press-Enterprise Co. v. Superior Court* the Court reversed state closure of a preliminary hearing in a notorious murder trial, a closure signed off on by the defendant, prosecution, and trial judge: "If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[42] In the earlier decision of *Gannett Co. v. DePasquale*, by contrast, the Court upheld a temporary denial of public access to the transcript of a hearing to suppress evidence, emphasizing that the Sixth Amendment guarantee to a public trial is primarily a personal right of the defendant, not an embodiment of a common law right to open proceedings in favor of the public,[43] and further finding that any First Amendment right to access that might have existed was outweighed by the circumstances of the case.[44] Other cases disfavoring open access have involved press coverage that was found to be so inflammatory or disruptive as to undermine the basic integrity, orderliness, and reliability of the trial pro-

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[41] Presley v. Georgia, 558 U.S. ___, No. 09–5270, slip op. (2010) (per curiam).

[42] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986) (Press-Enterprise II).

[43] *See* Estes v. Texas, 381 U.S. 532, 538–39 (1965).

[44] 443 U.S. 368 (1979). Cf. Nixon v. Warner Communications, 435 U.S. 589, 610 (1978).

cess.[45] Nevertheless, a First Amendment right to public access has found firmer footing over time, and the Court is reluctant to recognize any *per se* rules to wall off criminal proceedings, preferring instead that any restrictions be premised on particularized findings by the trial judge and an exploration of less restrictive options.[46]

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to Magna Carta.[47] The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King's rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of witnesses, called for their knowledge of the case; not until the reign of Henry VI did it become the trier of evidence. It was during the seventeenth century that the jury emerged as a safeguard for the criminally accused.[48] Thus, in the eighteenth century, Blackstone could commemorate the institution as part of a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown" because "the truth of every accusation . . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."[49] The right was guaranteed in the constitutions of the original 13 states, was guaranteed in the body of the Constitution[50] and in the Sixth Amendment, and the constitution of every state entering the Union there-

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[45] Estes v. Texas, 381 U.S. 532 (1965); *see also* Sheppard v. Maxwell, 384 U.S. 333 (1966). *Compare* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraint on pretrial publicity held unconstitutional). *Estes* found that live television coverage of criminal trials was an inherent violation of due process, requiring no specific showing of actual prejudice. This holding was overturned in Chandler v. Florida. 449 U.S. 560 (1981)

[46] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Chandler v. Florida, 449 U.S. 560 (1981); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[47] Historians no longer accept this attribution. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 265 (1892), and the Court has noted this. Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968).

[48] W. FORSYTH, HISTORY OF TRIAL BY JURY (1852).

[49] W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–350 (T. Cooley, 4th ed. 1896). The other of the "two-fold barrier" was, of course, indictment by grand jury.

[50] In Art. III, § 2.

after in one form or another protected the right to jury trial in criminal cases.[51] "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" [52]

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." [53]

Because "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants," the Sixth Amendment provision is binding on the states through the Due Process Clause of the Fourteenth Amendment.[54] But, as it cannot be said that every criminal trial or any particular trial that

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[51] Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

[52] Thompson v. Utah, 170 U.S. 343, 349–50 (1898), quoting 3 J. Story, Commentaries on the Constitution of the United States 1773 (1833).

[53] Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968). At other times the function of accurate factfinding has been emphasized. *E.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). Although federal judges may comment upon the evidence, the right to a jury trial means that the judge must make clear to the jurors that such remarks are advisory only and that the jury is the final determiner of all factual questions. Quercia v. United States, 289 U.S. 466 (1933).

[54] Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

is held without a jury is unfair,[55] a defendant may waive the right and go to trial before a judge alone.[56]

The Attributes and Function of the Jury.—It was previously the Court's position that the right to a jury trial meant "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted."[57] It had therefore been held that this included trial by a jury of 12 persons[58] who must reach a unanimous verdict[59] and that the jury trial must be held during the first court proceeding and not *de novo* at the first appellate stage.[60] However, as it extended the guarantee to the states, the Court indicated that at least some of these standards were open to re-examination,[61] and in subsequent cases it has done so. In *Williams v. Florida*,[62] the Court held that the

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[55] 391 U.S. at 159. Thus, state trials conducted before *Duncan* was decided were held to be valid still. DeStefano v. Woods, 392 U.S. 631 (1968).

[56] Patton v. United States, 281 U.S. 276 (1930). As with other waivers, this one must be by the express and intelligent consent of the defendant. A waiver of jury trial must also be with the consent of the prosecution and the sanction of the court. A refusal by either the prosecution or the court to defendant's request for consent to waive denies him no right since he then gets what the Constitution guarantees, a jury trial. Singer v. United States, 380 U.S. 24 (1965). It may be a violation of defendant's rights to structure the trial process so as effectively to encourage him "needlessly" to waive or to penalize the decision to go to the jury, but the standards here are unclear. *Compare* United States v. Jackson, 390 U.S. 570 (1968), *with* Brady v. United States, 397 U.S. 742 (1970), *and* McMann v. Richardson, 397 U.S. 759 (1970), and *see also* State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1971), *cert. denied*, 408 U.S. 942 (1972).

[57] Patton v. United States, 281 U.S. 276, 288 (1930).

[58] Thompson v. Utah, 170 U.S. 343 (1898). Dicta in other cases was to the same effect. Maxwell v. Dow, 176 U.S. 581, 586 (1900); Rassmussen v. United States, 197 U.S. 516, 519 (1905); Patton v. United States, 281 U.S. 276, 288 (1930).

[59] Andres v. United States, 333 U.S. 740 (1948). *See* dicta in Maxwell v. Dow, 176 U.S. 581, 586 (1900); Patton v. United States, 281 U.S. 276, 288 (1930).

[60] Callan v. Wilson, 127 U.S. 540 (1888). Preserving *Callan*, as being based on Article II, § 2, as well as on the Sixth Amendment and being based on a more burdensome procedure, the Court in Ludwig v. Massachusetts, 427 U.S. 618 (1976), approved a state two-tier system under which persons accused of certain crimes must be tried in the first instance in the lower tier without a jury and if convicted may appeal to the second tier for a trial de novo by jury. Applying a due process standard, the Court, in an opinion by Justice Blackmun, found that neither the imposition of additional financial costs upon a defendant, nor the imposition of increased psychological and physical hardships of two trials, nor the potential of a harsher sentence on the second trial impermissibly burdened the right to a jury trial. Justices Stevens, Brennan, Stewart, and Marshall dissented. Id. at 632. *See also* North v. Russell, 427 U.S. 328 (1976).

[61] Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968); DeStefano v. Woods, 392 U.S. 631, 632–33 (1968).

[62] 399 U.S. 78 (1970). Justice Marshall would have required juries of 12 in both federal and state courts, id. at 116, while Justice Harlan contended that the Sixth Amendment required juries of 12, although his view of the due process standard was that the requirement was not imposed on the states. Id. at 117.

fixing of jury size at 12 was "a historical accident" that, although firmly established when the Sixth Amendment was proposed and ratified, was not required as an attribute of the jury system, either as a matter of common-law background [63] or by any ascertainment of the intent of the framers.[64] Being bound neither by history nor framers' intent, the Court thought the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." The size of the jury, the Court continued, bore no discernable relationship to the purposes of jury trial—the prevention of oppression and the reliability of factfinding. Furthermore, there was little reason to believe that any great advantage accrued to the defendant by having a jury composed of 12 rather than six, which was the number at issue in the case, or that the larger number appreciably increased the variety of viewpoints on the jury. A jury should be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility that a cross-section of the community will be represented on it, but the Court did not speculate whether there was a minimum permissible size and it recognized the propriety of conditioning jury size on the seriousness of the offense.[65]

When the unanimity rule was reconsidered, the division of the Justices was such that different results were reached for state and federal courts.[66] Applying the same type of analysis as that used in *Williams*, four Justices acknowledged that unanimity was a common-law rule but observed for the reasons reviewed in *Williams* that it

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[63] The development of 12 as the jury size is traced in *Williams*, 399 U.S. at 86–92.

[64] 399 U.S. at 92–99. Although the historical materials were scanty, the Court thought it more likely than not that the framers of the Bill of Rights did not intend to incorporate into the word "jury" all its common-law attributes. This conclusion was drawn from the extended dispute between House and Senate over inclusion of a "vicinage" requirement in the clause, which was a common law attribute, and the elimination of language attaching to jury trials their "accustomed requisites." *But see* id. at 123 n.9 (Justice Harlan).

[65] 399 U.S. at 99–103. In Ballew v. Georgia, 435 U.S. 223 (1978), the Court unanimously, but with varying expressions of opinion, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprived an accused of his right to trial by jury. Although readily admitting that the line between six and five members is not easy to justify, the Justices believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.

[66] Apodaca v. Oregon, 406 U.S. 404 (1972), involved a trial held after decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and thus concerned whether the Sixth Amendment itself required jury unanimity, while Johnson v. Louisiana, 406 U.S. 356 (1972), involved a pre-*Duncan* trial and thus raised the question whether due process required jury unanimity. *Johnson* held, five-to-four, that the due process requirement of proof of guilt beyond a reasonable doubt was not violated by a conviction on a nine-to-three jury vote in a case in which punishment was necessarily at hard labor.

seemed more likely than not that the framers of the Sixth Amendment had not intended to preserve the requirement within the term "jury." Therefore, the Justices undertook a functional analysis of the jury and could not discern that the requirement of unanimity materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen. The Justices also determined that the unanimity requirement is not implicated in the constitutional requirement of proof beyond a reasonable doubt, and is not necessary to preserve the feature of the requisite cross-section representation on the jury.[67] Four dissenting Justices thought that omitting the unanimity requirement would undermine the reasonable doubt standard, would permit a majority of jurors simply to ignore those interpreting the facts differently, and would permit oppression of dissenting minorities.[68] Justice Powell, on the other hand, thought that unanimity was mandated in federal trials by history and precedent and that it should not be departed from; however, because it was the Due Process Clause of the Fourteenth Amendment that imposed the basic jury-trial requirement on the states, he did not believe that it was necessary to impose all the attributes of a federal jury on the states. He therefore concurred in permitting less-than-unanimous verdicts in state courts.[69]

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,[70] has been held to be a standard mandated by the Sixth Amendment.[71] The Court further held that the Fifth Amendment's Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.[72] Thus, a district court presiding over a case of providing false statements to a

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[67] Apodaca v. Oregon, 406 U.S. 404 (1972) (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Blackmun indicated a doubt that any closer division than nine-to-three in jury decisions would be permissible. Id. at 365.

[68] 406 U.S. at 414, and Johnson v. Louisiana, 406 U.S. 356, 380, 395, 397, 399 (1972) (Justices Douglas, Brennan, Stewart, and Marshall).

[69] 406 U.S. at 366. Burch v. Louisiana, 441 U.S. 130 (1979), however, held that conviction by a non-unanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation of requiring unanimity in six-member juries required nullification of the state policy. *See also* Brown v. Louisiana, 447 U.S. 323 (1980) (holding *Burch* retroactive).

[70] *See In re* Winship, 397 U.S. 358, 364 (1970).

[71] Sullivan v. Louisiana, 508 U.S. 275 (1993).

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

federal agency in violation of 18 U.S.C. § 1001 erred when it took the issue of the "materiality" of the false statement away from the jury.[73] Later, however, the Court backed off from this latter ruling, holding that failure to submit the issue of materiality to the jury in a tax fraud case can constitute harmless error.[74] Subsequently, the Court held that, just as failing to prove materiality to the jury beyond a reasonable doubt can be harmless error, so can failing to prove a sentencing factor to the jury beyond a reasonable doubt. "Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes."[75]

When the Jury Trial Guarantee Applies.—The Sixth Amendment is phrased in terms of "all criminal prosecutions," but the Court has always excluded petty offenses from the guarantee to a jury trial in federal courts, defining the line between petty and serious offenses either by the maximum punishment available[76] or by the nature of the offense.[77] This line has been adhered to in the application of the Sixth Amendment to the states,[78] and the Court has now held "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."[79] A defendant who is prosecuted in a single proceeding for multiple petty offenses, however, does not have a constitu-

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[73] 515 U.S. at 523.

[74] Neder v. United States, 527 U.S. 1 (1999).

[75] Washington v. Recuenco, 548 U.S. 212, 220 (2006). *Apprendi* is discussed in the next section.

[76] District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904); Callan v. Wilson, 127 U.S. 540 (1888).

[77] District of Columbia v. Colts, 282 U.S. 63 (1930).

[78] Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[79] Baldwin v. New York, 399 U.S. 66, 69 (1970). Justices Black and Douglas would have required a jury trial in all criminal proceedings in which the sanction imposed bears the indicia of criminal punishment. Id. at 74 (concurring); Cheff v. Schnackenberg, 384 U.S. 373, 384, 386 (1966) (dissenting). Chief Justice Burger and Justices Harlan and Stewart objected to setting this limitation at six months for the States, preferring to give them greater leeway. *Baldwin*, 399 U.S. at 76; Williams v. Florida, 399 U.S. 78, 117, 143 (1970) (dissenting). No jury trial was required when the trial judge suspended sentence and placed defendant on probation for three years. Frank v. United States, 395 U.S. 147 (1969). There is a presumption that offenses carrying a maximum imprisonment of six months or less are "petty," although it is possible that such an offense could be pushed into the "serious" category if the legislature tacks on onerous penalties not involving incarceration. No jury trial is required, however, when the maximum sentence is six months in jail, a fine not to exceed $1,000, a 90-day driver's license suspension, and attendance at an alcohol abuse education course. Blanton v. City of North Las Vegas, 489 U.S. 538, 542–44 (1989).

tional right to a jury trial, even if the aggregate of sentences authorized for the offense exceeds six months.[80]

The Court has also made some changes in the meaning of the term "criminal proceeding." Previously, the term had been applied only to situations in which a person has been accused of an offense by information or presentment.[81] Thus, a civil action to collect statutory penalties and punitive damages, because not technically criminal, has been held not to implicate the right to jury trial.[82] Subsequently, however, the Court focused its analysis on the character of the sanction to be imposed, holding that punitive sanctions may not be imposed without adhering to the guarantees of the Fifth and Sixth Amendments.[83] There is, however, no constitutional right to a jury trial in juvenile proceedings, at least in state systems and probably in the federal system as well.[84]

In a long line of cases, the Court had held that no constitutional right to jury trial existed in trials of criminal contempt.[85] In *Bloom v. Illinois*,[86] however, the Court announced that "[o]ur 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 . . . and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial." The Court has consistently held, however, that a jury is not required for pur-

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[80] Lewis v. United States, 518 U.S. 322 (1996).

[81] United States v. Zucker, 161 U.S. 475, 481 (1896).

[82] 161 U.S. at 481. *See also* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909).

[83] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). The statute at issue in *Mendoza-Martinez* automatically divested an American of citizenship for departing or remaining outside the United States to evade military service. A later line of cases, beginning in 1967, held that the Fourteenth Amendment broadly barred Congress from involuntarily expatriating any citizen who was born in the United States.

[84] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[85] *E.g.*, Green v. United States, 356 U.S. 165, 183–87 (1958), and cases cited; United States v. Burnett, 376 U.S. 681, 692–700 (1964), and cases cited. A Court plurality in Cheff v. Schnackenberg, 384 U.S. 373 (1966), held, asserting the Court's supervisory power over the lower federal courts, that criminal contempt sentences in excess of six months imprisonment could not be imposed without a jury trial or adequate waiver.

[86] 391 U.S. 194, 198 (1968). Justices Harlan and Stewart dissented. Id. at 215. As in other cases, the Court drew the line between serious and petty offenses at six months, but because, unlike other offenses, no maximum punishments are usually provided for contempts it indicated the actual penalty imposed should be looked to. Id. at 211. *See also* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). The distinction between criminal and civil contempt may be somewhat more elusive. International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (fines levied on the union were criminal in nature where the conduct did not occur in the court's presence, the court's injunction required compliance with an entire code of conduct, and the fines assessed were not compensatory).

poses of determining whether a defendant is insane or mentally retarded and consequently not eligible for the death penalty.[87]

Within the context of a criminal trial, what factual issues are submitted to the jury was traditionally determined by whether the fact to be established is an element of a crime or instead is a sentencing factor.[88] Under this approach, the right to a jury had extended to the finding of all facts establishing the elements of a crime, but sentencing factors could be evaluated by a judge.[89] Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[90]

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[91] "The relevant inquiry is one not of form, but of effect."[92] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact

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[87] Ford v. Wainwright, 477 U.S. 399, 416–417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 546 U.S. 6, 7 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra*.

[88] In Washington v. Recuenco, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 548 U.S. 212, 222 (2006).

[89] In James v. United States, 550 U.S. 192 (2007), the Court found no Sixth Amendment issue raised when it considered "the *elements of the offense* . . . without inquiring into the specific conduct of this particular offender." Id. at 202 (emphasis in original). The question before the Court was whether, under federal law, attempted burglary, as defined by Florida law, "presents a serious potential risk of physical injury to another" and therefore constitutes a "violent felony," subjecting the defendant to a longer sentence. Id. at 196. In answering this question, the Court employed the "categorical approach" of looking only to the statutory definition and not considering the "particular facts disclosed by the record of conviction." Id. at 202. Thus, "the Court [was] engaging in statutory interpretation, not judicial factfinding," and "[s]uch analysis raises no Sixth Amendment issue." Id. at 214.

[90] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in "Proof, Burden of Proof, and Presumptions," *infra*.

[91] 530 U.S. 466, 490 (2000).

[92] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[93] The one exception *Apprendi* recognized was for sentencing enhancements based on recidivism.[94]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona*,[95] the Court, overruling precedent,[96] applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors. Although Arizona required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court ruled that the findings must be made by a jury.[97]

In *Blakely v. Washington*,[98] the Court applied *Apprendi* to cast doubt on types of widely adopted reform measures that were intended to foster more consistent sentencing practices. Blakely, who pled guilty to an offense for which the "standard range" under the Washington State's sentencing law was 49 to 53 months, was sentenced to 90 months based on the judge's determination—not derived from facts admitted in the guilty plea—that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90-month sentence conformed to

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[93] 530 U.S. at 490.

[94] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid convictions even if the result is a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *Almendarez-Torres* was cited with approval on this point in James v. United States, 550 U.S. 192, 214 n.8 (2007) ("prior convictions need not be treated as an element of the offense for Sixth Amendment purposes"). *See also* Parke v. Raley, 506 U.S. 20 (1992) (if the prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging its validity).

[95] 536 U.S. 584 (2002).

[96] Walton v. Arizona, 497 U.S. 639 (1990). *Ring* also appears to overrule some other decisions on the same issue, including Spaziano v. Florida, 468 U.S. 447, 459 (1984), and Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (per curiam), and undercuts the reasoning of another. *See* Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate court may reweigh aggravating and mitigating factors and uphold imposition of death penalty even though jury relied on an invalid aggravating factor).

[97] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609. The Court rejected Arizona's request that it recognize an exception for capital sentencing in order not to interfere with elaborate sentencing procedures designed to comply with the Eighth Amendment. Id. at 605–07.

[98] 542 U.S. 296 (2004).

statutory limits, but the Court made "clear . . . that the '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.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." [99]

Then, in *United States v. Booker*,[100] the Court held that the same principles limit sentences that courts may impose under the federal Sentencing Guidelines.[101] As the Court restated the principle in *Booker*, "[a]ny 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." [102] Attempts to distinguish *Blakely* were rejected. The Court concluded that the fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitutional significance." [103] Instead, the Guidelines were suspect in application because, on the one hand, they curtailed the role of jury factfinding in determining the upper range of a sentence and, on the other hand, they mandated sentences from which a court could depart only in a limited number of cases and after separately finding the existence of factors not presented to the jury.[104] The mandatory nature of the Guidelines was also important to the Court's formulation of a remedy.[105] Rather than engrafting a jury trial

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[99] 542 U.S. at 303–304 (italics in original; citations omitted). In Southern Union Co. v. United States, 567 U.S. ___, No. 11–94, slip op. (2012), the Court cited this passage in *Blakely* as a springboard to its conclusion that the *Apprendi* line of cases apply in imposing criminal fines. The maximum fine that could be imposed in *Southern Union Co.* was pegged to the number of days a violation continued, but the jury was not asked to determine the duration of the violation. The Court saw no "principled basis" for treating criminal fines differently from imprisonment or capital punishment. In all these cases, the Sixth Amendment guards against "judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow."

[100] 543 U.S. 220 (2005).

[101] Under the Sentencing Reform Act of 1984, the United States Sentencing Commission adopted binding Sentencing Guidelines, and courts were required to impose sentences within the narrow, defined ranges. A judge could depart from the applicable Guideline only upon finding in writing that an aggravating or mitigating factor was present that had not adequately been considered by the Commission. *See* Mistretta v. United States, 488 U.S. 361 (1989).

[102] 543 U.S. at 244.

[103] 543 U.S. at 237. Relying on Mistretta v. United States, 488 U.S. 361 (1989), the Court also rejected a separation-of-powers argument. Id. at 754–55.

[104] 543 U.S. at 233–35.

[105] There were two distinct opinions of the Court in *Booker*. The first, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg (the same Justices who comprised the five-Justice *Blakely* majority), applied *Blakely* to

requirement onto the Sentencing Reform Act, under which the Guidelines were adopted, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and, concomitantly, one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act could remain intact.[106] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." [107]

In *Cunningham v. California*,[108] the Court addressed whether California's determinate state sentencing law, yet another style of legislative effort intended to regularize criminal sentencing, survived the *Booker-Blakely* line of cases. That law, and its implementing rules, required that the trial judge in the case sentence the defendant to 12 years in prison unless the judge found one or more additional "circumstances in aggravation," in which case the sentence would be 16 years. Aggravating circumstances could include specific factual findings made by a judge under a "preponderance of the evidence" standard in apparent violation of *Booker* and *Blakely.* The court was also free to consider "additional criteria reasonably related to the decision being made." [109] The state argued that this latter provision conformed the California sentencing scheme to *Booker*, which contemplated that judges retain discretion to select a specific sentence within a statutory range, subject to appellate review to determine "reasonableness." The Court rejected this argument, finding that the scheme impermissibly allocated sole authority to judges to find the facts that permitted imposition of a higher alternative sentence.[110]

The Court, however, has refused to apply *Apprendi's* principles to judicial factfinding that supports the imposition of mandatory mini-

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find a Sixth Amendment violation; the other, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg (the *Blakely* dissenters joined by Justice Ginsburg), set forth the remedy.

[106] 543 U.S. at 259. Consistent with the role it envisioned for a sentencing judge, the Court substituted a "reasonableness" standard for the statutory *de novo* appellate review standard that it struck down. 543 U.S. at 262.

[107] 543 U.S. at 245–246 (statutory citations omitted). Although not addressed in the *Booker* ruling, a provision of the Sentencing Guidelines that limits district courts from departing from the Guidelines during resentencing (the previous sentence having been vacated) on grounds other than those considered during for the first sentencing, was subsequently struck down as conflicting with the now-advisory nature of the Guidelines. Pepper v. United States, 562 U.S. ___, No. 09–6822, slip op. (2011).

[108] 549 U.S. 270 (2007).

[109] 549 U.S. at 278–79, quoting California Rule 4.408(a).

[110] 549 U.S. at 279–80. "The reasonableness requirement that *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." 549 U.S. at 292–93.

mum sentences.[111] The Court has also refused to extend *Apprendi* to a judge's decision to impose sentences for discrete crimes consecutively rather than concurrently.[112] The Court explained that, when a defendant has been convicted of multiple offenses, each involving discrete sentencing prescriptions, the states apply various rules regarding whether a judge may impose the sentences consecutively or concurrently.[113] The Court held that "twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi's* rule" to preclude judicial factfinding in this situation as well.[114]

In *Rita v. United States*, the Court upheld the application, by federal courts of appeals, of the presumption "that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence."[115] Even if the presumption "increases the likelihood that the judge, not the jury, will find 'sentencing facts,'" the Court wrote, it "does not violate the Sixth Amend-

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[111] Prior to its decision in *Apprendi*, the Court had held that factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545, 568–69 (2002). Five Justices in *Harris* thought that factfinding required for imposition of mandatory minimums fell within *Apprendi's* reasoning, but one of the five, Justice Breyer, concurred in the judgment on practical grounds despite his recognition that *McMillan* was not "easily" distinguishable "in terms of logic." 536 U.S. at 569. Justice Thomas' dissenting opinion, id. at 572, joined by Justices Stevens, Souter, and Ginsburg, elaborated on the logical inconsistency, and suggested that the Court's deference to Congress's choice to treat mandatory minimums as sentencing factors made avoidance of *Apprendi* a matter of "clever statutory drafting." Id. at 579.

[112] Oregon v. Ice, 129 S. Ct. 711 (2009).

[113] Most states follow the common-law tradition of giving judges unfettered discretion over the matter, while some states presume that sentences will run consecutively but allow judges to order concurrent sentences upon finding cause to do so. "It is undisputed," the Court noted, "that States may proceed on [either of these] two tracks without transgressing the Sixth Amendment." 129 S. Ct. at 714.

[114] 129 S. Ct. at 717. The Court also noted other decisions judges make that are likely to evade the strictures of *Apprendi*, including determining the length of supervised release, attendance at drug rehabilitation programs, terms of community service, and imposition of fines and orders of restitution. Id. at 719. Justice Scalia, joined by Chief Justice Roberts and Justices Souter and Thomas, dissented, finding the majority's applying *Apprendi* "only to the length of a sentence for an individual crime and not to the total sentence for a defendant . . . a strange exception to the treasured right of trial by jury." Id. at 720 (Scalia, J., dissenting).

[115] 551 U.S. 338, 341 (2007). The Court emphasized that it was upholding "an *appellate* court presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Id. at 351, quoted in part in Nelson v. United States, 129 S. Ct. 891 (2009) (per curiam), where the Court added, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." Id. at 892 (emphasis in original).

ment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. . . . The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." [116]

In *United States v. Gall*,[117] the Court held that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." [118] The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," and also rejected "the use of 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." These approaches, the Court said, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." [119]

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[116] 551 U.S. at 352, 353 (emphasis in original). The Court added: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. . . . [A]ppellate courts may not presume that every variance from the advisory Guidelines is unreasonable. . . . Several courts of appeals have also rejected a presumption of unreasonableness. . . . However, a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance." Id. at 354–55.

[117] 128 S. Ct. 586 (2007) (upholding a sentence of probation where the Guidelines had recommended imprisonment).

[118] 128 S. Ct. at 591. "As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark.'" Kimbrough v. United States, 128 S. Ct. 558 (2007) (upholding lower-than-Guidelines sentence for trafficker in crack cocaine, where sentence "is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses"). A district court judge may determine "that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564.

[119] 128 S. Ct. at 595. Justice Alito, dissenting, wrote, "we should not forget [that] . . . *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. . . . It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is

Subsequently, in *Spears v. United States*,[120] the Court, emphasizing that the Guidelines "are advisory only," clarified "that district courts are entitled to reject and vary categorically from the . . . Guidelines based on a policy disagreement with those Guidelines." [121] In *Spears*, a district court had given a defendant a sentence significantly below the Guidelines for distribution of crack cocaine, noting that the Guidelines required 100 times more powder cocaine than crack cocaine to trigger a particular sentencing range. The Supreme Court held that, if a sentencing court believes "that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates 'an unwarranted disparity within the meaning of [18 U.S.C.] § 3553(a),'" then it may vary downward from the Guidelines even when the particular defendant "presents no special mitigating circumstances" to justify a lower sentence.[122]

The *Booker* line of cases addresses the role of the Sentencing Guidelines in imposing and reviewing individual sentences. *Booker*, however, did not overturn the Sentencing Reform Act in its entirety, nor did it abolish the Guidelines themselves. One set of provisions left intact directed the Sentencing Commission to review the Guidelines periodically, authorized it to reduce the Guidelines range for individual offenses and make the reduced ranges retroactive, but also generally foreclosed a court from then reducing a sentence previously imposed to one less than the minimum contained in the amended Guideline range. In *Dillon v. United States*,[123] the Court distinguished this sentence modification process from a sentencing or resentencing, and upheld mandatory limits on judicial reductions of sentences under it.

Impartial Jury

The requirement of an impartial jury is secured not only by the Sixth Amendment, which is as applicable to the states as to the Federal Government,[124] but also by the Due Process and Equal Pro-

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the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court's opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray." Id. at 605 (Alito, J., dissenting).

[120] 129 S. Ct. 840 (2009) (per curiam).

[121] 129 S. Ct. at 842, 843–44.

[122] 129 S. Ct. at 842.

[123] Dillon v. United States, 560 U.S. ___, No. 09–6338, slip op. (2010).

[124] Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968); Gonzales v. Beto, 405 U.S. 1052 (1972).

tection Clauses of the Fourteenth Amendment,[125] and perhaps by the Due Process Clause of the Fifth Amendment. In addition, the Court's has directed its supervisory power over the federal system to the issue.[126] Even before the Court extended the right to a jury trial to state courts, it was firmly established that, if a state chose to provide juries, the juries had to be impartial.[127]

Impartiality is a two-fold requirement. 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."[128] This requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[129] "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

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[125] Thus, it violates the Equal Protection Clause to exclude African-Americans from grand and petit juries, Strauder v. West Virginia, 100 U.S. 303 (1880); Alexander v. Louisiana, 405 U.S. 625 (1972), whether defendant is or is not an African-American, Peters v. Kiff, 407 U.S. 493 (1972), and exclusion of potential jurors because of their national ancestry is unconstitutional, at least where defendant is of that ancestry as well, Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482 (1977).

[126] In the exercise of its supervisory power over the federal courts, the Court has permitted any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. Glasser v. United States, 315 U.S. 60, 83–87 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Ballard v. United States, 329 U.S. 187 (1946). In Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979), male defendants were permitted to challenge the exclusion of women as a Sixth Amendment violation.

[127] Turner v. Louisiana, 379 U.S. 466 (1965).

[128] Taylor v. Louisiana, 419 U.S. 522, 528 (1975). *See also* Williams v. Florida, 399 U.S. 78, 100 (1970); Brown v. Allen, 344 U.S. 443, 474 (1953). In Fay v. New York, 332 U.S. 261 (1947), and Moore v. New York, 333 U.S. 565 (1948), the Court in 5-to-4 decisions upheld state use of "blue ribbon" juries from which particular groups, such as laborers and women, had been excluded. With the extension of the jury trial provision and its fair cross section requirement to the States, the opinions in these cases must be considered tenuous, but the Court has reiterated that defendants are not entitled to a jury of any particular composition. *Taylor*, 419 U.S. at 538. Congress has implemented the constitutional requirement by statute in federal courts by the Federal Jury Selection and Service Act of 1968, Pub. L. 90–274, 82 Stat. 53, 28 U.S.C. §§ 1861 *et seq*.

[129] Lockhart v. McCree, 476 U.S. 162 (1986). "We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U.S. at 173. The explanation is that the fair cross-section requirement "is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." Holland v. Illinois, 493 U.S. 474, 480 (1990) (emphasis original).

in the jury-selection process." [130] Further, once a plaintiff demonstrates a *prima facie* violation, the defendant 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." [131] Thus, in one case the Court 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, and, in another it invalidated a state selection system granting women who so requested an automatic exemption from jury service.[132]

Second, there must be assurance that the jurors chosen are unbiased, i.e., willing to decide the case on the basis of the evidence presented. The Court has held that in the absence of an actual showing of bias, a defendant in the District of Columbia is not denied an impartial jury when he is tried before a jury composed primarily of government employees.[133] 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.[134] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and must be inquired into.[135] Private communications, contact, or tam-

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[130] Duren v. Missouri, 439 U.S. 357, 364 (1979). To show that underrepresentation resulted from systematic exclusion requires rigorous evidence beyond merely pointing to a single factor or a host of factors that might have caused fewer members of a distinct group to have been included. Berghuis v. Smith, 559 U.S. ___, No. 08–1402, slip op. (2010).

[131] 439 U.S. at 367–68.

[132] Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

[133] Frazier v. United States, 335 U.S. 497 (1948); Dennis v. United States, 339 U.S. 162 (1950). On common-law grounds, the Court in Crawford v. United States, 212 U.S. 183 (1909), disqualified such employees, but a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia was sustained in United States v. Wood, 299 U.S. 123 (1936).

[134] Remmer v. United States, 350 U.S. 377 (1956) (attempted bribe of a juror reported by him to authorities); Smith v. Phillips, 455 U.S. 209 (1982) (during trial one of the jurors had been actively seeking employment in the District Attorney's office).

[135] *E.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966). 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 (1975). The Court indicated that under the same circumstances in a federal trial it would have overturned the conviction pursuant to its supervisory power. Id. at 797–98, citing Marshall v. United States,

pering with a jury, or the creation of circumstances raising the dangers thereof, is not to be condoned.[136] 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.[137] It is undeniably a violation of due process to subject a defendant to trial in an atmosphere of mob or threatened mob domination.[138]

Because it is too much to expect that jurors can remain uninfluenced by evidence they receive even though they are instructed to use it for only a limited purpose and to disregard it for other purposes, the Court will not permit a confession to be submitted to the jury without a prior determination by the trial judge that it is admissible. A defendant is denied due process, therefore, if he is convicted by a jury that has been instructed to first determine the voluntariness of a confession and then to disregard the confession if it is found to be inadmissible.[139] Similarly invalid is a jury instruction in a joint trial to consider a confession only with regard to the defendant against whom it is admissible, and to disregard that confession as against a co-defendant which it implicates.[140]

In *Witherspoon v. Illinois*,[141] the Court held that the exclusion in capital cases of jurors conscientiously scrupled about 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. "A man who opposes

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, 575, 581 (1981); Smith v. Phillips, 455 U.S. 209, 215–18 (1982); Patton v. Yount, 467 U.S. 1025 (1984).

[136] Remmer v. United States, 347 U.S. 227 (1954). *See* Turner v. Louisiana, 379 U.S. 466 (1965) (placing jury in charge of two deputy sheriffs who were principal prosecution witnesses at defendant's jury trial denied him his right to an impartial jury); Parker v. Gladden, 385 U.S. 363 (1966) (influence on jury by prejudiced bailiff). *Cf.* Gonzales v. Beto, 405 U.S. 1052 (1972).

[137] Irvin v. Dowd, 366 U.S. 717 (1961) (felony); Rideau v. Louisiana, 373 U.S. 723 (1963) (felony); Groppi v. Wisconsin, 400 U.S. 505 (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. U.S., No. 08–1394, slip op. at 16–18 (June 24, 2010).

[138] Frank v. Mangum, 237 U.S. 309 (1915); Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966).

[139] Jackson v. Denno, 378 U.S. 368 (1964) (overruling Stein v. New York, 346 U.S. 156 (1953)).

[140] Bruton v. United States, 391 U.S. 123 (1968) (overruling Delli Paoli v. United States, 352 U.S. 232 (1957)). The rule applies to the states. Roberts v. Russell, 392 U.S. 293 (1968). *But see* Nelson v. O'Neil, 402 U.S. 622 (1971) (co-defendant's out-of-court statement is admissible against defendant if co-defendant takes the stand and denies having made the statement).

[141] 391 U.S. 510 (1968).

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." [142] A jury, the Court 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." [143] 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.[144]

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.'" [145] 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.'" [146] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[147] 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." [148] Moreover, 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

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[142] 391 U.S. at 519.

[143] 391 U.S. 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. *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).

[144] Morgan v. Illinois, 504 U.S. 719 (1992).

[145] 469 U.S. 412, 424 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980).

[146] 469 U.S. at 424. *Accord*, Darden v. Wainwright, 477 U.S. 168 (appropriateness of exclusion should be determined by context, including excluded juror's understanding based on previous questioning of other jurors).

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

[148] 476 U.S. at 183.

evidence for the two distinct but interrelated functions.[149] For the same reasons, 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.[150]

In *Uttecht v. Brown*,[151] 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." [152]

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion may not be subjected to harmless error analysis.[153] However, a court's error in refusing to dis-

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[149] 476 U.S. at 180.

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

[151] 551 U.S. 1 (2007).

[152] 551 U.S. at 9 (citations omitted). Deference was the focus of Uttecht v. Brown, as the Court, by a 5-to-4 vote, reversed the Ninth Circuit and affirmed a death sentence, finding that the Ninth Circuit had neglected to accord the deference it owed to the trial court's finding that a juror was not substantially impaired. The Court concluded: "Courts reviewing claims of *Witherspoon-Witt* error . . . , especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." Id. at 22. The reason that federal courts of appeals owe special deference when considering *habeas* petitions is that the Antiterrorism and Effective Death Penalty Act of 1996 "provide[s] additional, and binding, directions to accord deference." Id. at 10. The dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, noted that the juror whose exclusion for cause was challenged had "repeatedly confirmed" that, despite his "general reservations" about the death penalty, he would be able to vote for it. Id. at 37. Even under the standard of review imposed by the Antiterrorism and Effective Death Penalty Act of 1996, "[w]hile such testimony might justify a peremptory challenge, until today not one of the many cases decided in the wake of Witherspoon v. Illinois has suggested that such a view would support a challenge for cause. . . . In its opinion, the Court blindly accepts the state court's conclusory statement that [the juror's] views would have 'substantially impaired' his ability to follow the court's instructions without examining what that term means in practice and under our precedents." Id. at 37, 38 (citation to *Witherspoon* omitted).

[153] Gray v. Mississippi, 481 U.S. 648 (1987).

miss 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.[154] The relevant inquiry is "on the jurors who ultimately sat," the Court declared, rejecting as overly broad the assertion in *Gray* 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.'" [155]

It is the function of the *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.[156] It is good ground for challenge for cause that a juror has formed an opinion on the issue to be tried, but not every opinion which a juror may entertain necessarily disqualifies him. The judge must determine whether the nature and strength of the opinion raise a presumption against impartiality.[157] 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 did not violate the Sixth Amendment.[158]

Under some circumstances, it may be constitutionally required that questions specifically directed to the existence of racial bias must be asked. Thus, in a situation in which defendant, a black man, alleged that he was being prosecuted on false charges because of his civil rights activities in an atmosphere perhaps open to racial appeals, prospective jurors must be asked about their racial prejudice, if any.[159] 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." A defendant accused of an interracial capital offense is entitled to have prospective jurors informed of the victim's race and questioned as to racial bias.[160] But in circumstances not suggesting a significant likelihood of ra-

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[154] Ross v. Oklahoma, 487 U.S. 81 (1987). The same rule applies in the federal setting. United States v. Martinez-Salazar, 528 U.S. 304 (2000).

[155] 487 U.S. at 86, 87.

[156] Lewis v. United States, 146 U.S. 370 (1892); Pointer v. United States, 151 U.S. 396 (1894).

[157] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). *See* Witherspoon v. Illinois, 391 U.S. 510, 513–15, 522 n.21 (1968).

[158] Mu'Min v. Virginia, 500 U.S. 415 (1991).

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

[160] Turner v. Murray, 476 U.S. 28 (1986). The quotation is from a section of Justice White's opinion not adopted as the opinion of the Court. Id. at 35.

cial prejudice infecting a trial, as when the facts are merely that the defendant is black and the victim white, the Constitution is satisfied by a more generalized but thorough inquiry into the impartiality of the veniremen.[161]

Although government is not constitutionally obligated to allow peremptory challenges,[162] typically a system of peremptory challenges has existed in criminal trials, in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.[163] Although, in *Swain v. Alabama*,[164] the Court held that a prosecutor's purposeful exclusion of members of a specific racial group from the jury would violate the Equal Protection Clause, it posited so difficult a standard of proof that defendants could seldom succeed. The *Swain* standard of proof was relaxed in *Batson v. Kentucky*,[165] with the result that a defendant may establish an equal protection violation resulting from a prosecutor's use of peremptory challenges to systematically exclude blacks from the jury.[166] A violation can occur whether or not the defendant and the excluded jurors are of the same race.[167] Racially discriminatory use of peremptory challenges does not, however, constitute a violation of the Sixth Amendment, the Court ruled in *Holland v. Illinois*.[168] 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

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[161] Ristaino v. Ross, 424 U.S. 589 (1976). 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. Id. at 597 n.9. *See* Aldridge v. United States, 283 U.S. 308 (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.

[162] "This Court has long recognized that peremptory challenges are not of federal constitutional dimension." Rivera v. Illinois, 129 S. Ct. 1446, 1450 (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).

[163] *Cf.* Stilson v. United States, 250 U.S. 583, 586 (1919), holding that it is no violation of the guarantee to limit the number of peremptory challenges to each defendant in a multi-party trial.

[164] 380 U.S. 202 (1965).

[165] 476 U.S. 79 (1986).

[166] *See* Fourteenth Amendment discussion of "Equal Protection and Race," *infra*.

[167] Powers v. Ohio, 499 U.S. 400 (1991) (defendant has standing to raise equal protection rights of excluded juror of different race).

[168] 493 U.S. 474 (1990). *But see* Trevino v. Texas, 503 U.S. 562 (1992) (claim of Sixth Amendment violation resulting from racially discriminatory use of peremptory challenges treated as sufficient to raise equal protection claim under *Swain* and *Batson*).

basis of innumerable other generalized characteristics." [169] 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." [170]

The restraint on racially discriminatory use of peremptory challenges is now a two-way street. The Court ruled in 1992 that a criminal defendant's use of peremptory challenges to exclude jurors on the basis of race constitutes "state action" in violation of the Equal Protection Clause.[171] Disputing the contention that this limitation would undermine "the contribution of the peremptory challenge to the administration of justice," the Court nonetheless asserted that such a result would in any event be "too high" a price to pay. "It is an affront to justice to argue that a fair trail includes the right to discriminate against a group of citizens based upon their race." [172] It followed, therefore, that the limitation on peremptory challenges does not violate a defendant's right to an impartial jury. Although a defendant has "the right to an impartial jury that can view him without racial animus," this means that "there should be a mechanism for removing those [jurors] who would be incapable of confronting and suppressing their racism," not that the defendant may remove jurors on the basis of race or racial stereotypes.[173]

PLACE OF TRIAL: JURY OF THE VICINAGE

Article III, § 2 requires that federal criminal cases be tried by jury in the state and district in which the offense was committed,[174] but much criticism arose over the absence of any guarantee that the jury be drawn from the "vicinage" or neighborhood of the

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[169] 493 U.S. at 487.

[170] 493 U.S. at 484. As a consequence, a defendant who uses a peremptory challenge to correct the court's error in denying a for-cause challenge may have no Sixth Amendment cause of action. Peremptory challenges "are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Ross v. Oklahoma, 487 U.S. 81, 88 (1987). Similarly, there is no due process violation, at least where state statutory law requires use of peremptory challenges to cure erroneous refusals by the court to excuse jurors for cause. "It is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Id.

[171] Georgia v. McCollum, 505 U.S. 42 (1992).

[172] 505 U.S. at 57.

[173] 505 U.S. at 58.

[174] "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."

crime.[175] 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.[176] The provisions limit the Federal Government only.[177]

An accused cannot be tried in one district under an indictment showing that the offense was committed in another;[178] the place where the offense is charged to have been committed determines the place of trial.[179] Thus, a defendant cannot be tried in Missouri for money-laundering if the charged offenses occurred in Florida and there was no evidence that the defendant had been involved with the receipt or transportation of the proceeds from Missouri.[180] In a prosecution for conspiracy, the accused may be tried in any state and district where an overt act was performed.[181] Where a United States Senator was indicted for agreeing to receive compensation for services to be rendered in a proceeding before a government department, and it appeared that a tentative arrangement for such services was made in Illinois and confirmed in St. Louis, the defendant was properly tried in St. Louis, although he was not physically present in Missouri when notice of ratification was dispatched.[182] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates,[183] or the sending of excluded matter through the mails,[184] may be made triable in any district through which the forbidden transportation is conducted. By virtue of a presumption that a letter is delivered in the district to which it is addressed, the offense of scheming to defraud a corporation by mail was held to have been committed in that district although the letter was posted elsewhere.[185] The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdic-

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[175] "Vicinage" means neighborhood, and "vicinage of the jury" means jury of the neighborhood or, in medieval England, jury of the County. 4 W. Blackstone, Commentaries on the Laws of England *350–351 (T. Cooley, 4th ed. 1899). *See* 3 J. Story, Commentaries on the Constitution of the United States 1775–85 (1833).

[176] The controversy is conveniently summarized in Williams v. Florida, 399 U.S. 78, 92–96 (1970).

[177] Nashville, C. & St. L. R.R. v. Alabama, 128 U.S. 96 (1888).

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

[179] Beavers v. Henkel, 194 U.S. 73, 83 (1904). For some more recent controversies about the place of the commission of the offense, *see* United States v. Cores, 356 U.S. 405 (1958), and Johnston v. United States, 351 U.S. 215 (1956).

[180] United States v. Cabrales, 524 U.S. 1 (1998).

[181] Brown v. Elliott, 225 U.S. 392 (1912); Hyde v. United States, 225 U.S. 347 (1912); Haas v. Henkel, 216 U.S. 462 (1910).

[182] Burton v. United States, 202 U.S. 344 (1906).

[183] Armour Packing Co. v. United States, 209 U.S. 56 (1908).

[184] United States v. Johnson, 323 U.S. 273, 274 (1944).

[185] Hagner v. United States, 285 U.S. 427, 429 (1932).

tion of the charge.[186] The assignment of a district judge from one district to another, conformably to statute, does not create a new judicial district whose boundaries are undefined nor subject the accused to trial in a district not established when the offense with which he is charged was committed.[187] 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.[188] The place of trial may be designated by statute after the offense has been committed.[189]

NOTICE OF ACCUSATION

The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge.[190] No indictment is sufficient if it does not allege all of the ingredients that constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology,[191] but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. The facts necessary to bring the case within the statutory definition must also be alleged.[192] If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment that does not contain such allegation is defective.[193] Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is described so as reasonably to inform the accused of the nature of the charge sought to be established against him.[194] The

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[186] United States ex rel. Hughes v. Gault, 271 U.S. 142 (1926). *Cf.* Tinsley v. Treat, 205 U.S. 20 (1907); Beavers v. Henkel, 194 U.S. 73, 84 (1904).

[187] Lamar v. United States, 241 U.S. 103 (1916).

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

[189] Cook v. United States, 138 U.S. 157, 182 (1891). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 250–54 (1940); United States v. Johnson, 323 U.S. 273 (1944).

[190] United States v. Cruikshank, 92 U.S. 542, 544, 558 (1876); United States v. Simmons, 96 U.S. 360 (1878); Bartell v. United States, 227 U.S. 427 (1913); Burton v. United States, 202 U.S. 344 (1906).

[191] Potter v. United States, 155 U.S. 438, 444 (1894).

[192] United States v. Carll, 105 U.S. 611 (1882).

[193] United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872).

[194] Rosen v. United States, 161 U.S. 29, 40 (1896).

Constitution does not require the government to furnish a copy of the indictment to an accused.[195] The right to notice of accusation is so fundamental a part of procedural due process that the states are required to observe it.[196]

CONFRONTATION

"The primary object of the [Confrontation Clause is] to prevent depositions of *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." [197] The right of confrontation is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." [198] Before 1965, when the Court held the right to be protected against state abridgment,[199] it had little need to clarify the relationship between the right of confrontation and the hearsay rule,[200] because it could control the admission of hearsay through exercise of its supervisory powers over the inferior federal courts.[201]

On the basis of the Confrontation Clause, the Court had concluded that evidence given at a preliminary hearing could not be used at the trial if the absence of the witness was attributable to the negligence of the prosecution,[202] but that if a witness' absence

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[195] United States v. Van Duzee, 140 U.S. 169, 173 (1891).

[196] *In re* Oliver, 333 U.S. 257, 273 (1948); Cole v. Arkansas, 333 U.S. 196, 201 (1948); Rabe v. Washington, 405 U.S. 313 (1972).

[197] Mattox v. United States, 156 U.S. 237, 242–43 (1895).

[198] Kirby v. United States, 174 U.S. 47, 55, 56 (1899). *Cf.* Pointer v. Texas, 380 U.S. 400, 404–05 (1965). The right may be waived but it must be a knowing, intelligent waiver uncoerced from defendant. Brookhart v. Janis, 384 U.S. 1 (1966).

[199] Pointer v. Texas, 380 U.S. 400 (1965) (overruling West v. Louisiana, 194 U.S. 258 (1904)); *see also* Stein v. New York, 346 U.S. 156, 195–96 (1953).

[200] Hearsay is the prior out-of-court statements of a person, offered affirmatively for the truth of the matters asserted, presented at trial either orally by another person or in writing. Hickory v. United States, 151 U.S. 303, 309 (1894); Southern Ry. v. Gray, 241 U.S. 333, 337 (1916); Bridges v. Wixon, 326 U.S. 135 (1945).

[201] Thus, although it had concluded that the co-conspirator exception to the hearsay rule was consistent with the Confrontation Clause, Delaney v. United States, 263 U.S. 586, 590 (1924), the Court's formulation of the exception and its limitations was pursuant to its supervisory powers. Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949).

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

had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial.[203] The Court had also recognized the admissibility of dying declarations [204] and of testimony given at a former trial by a witness since deceased.[205] The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of the defendant now on trial was stolen.[206] A prosecutor, however, may comment on a defendant's presence at trial, and call attention to the defendant's opportunity to tailor his or her testimony to comport with that of previous witnesses.[207]

For years the Court has struggled with the relationship between hearsay rules and the Confrontation Clause. In a series of decisions beginning in 1965, the Court seemed to equate the Confrontation Clause with the hearsay rule, positing that a major purpose of the clause was "to give the defendant charged with crime an opportunity to cross-examine the witnesses against him," unless one of the hearsay exceptions applies.[208] Thus, in *Pointer v. Texas*,[209] the complaining witness had testified at a preliminary hearing at which he was not cross-examined and the defendant was not represented by counsel, and by the time of trial, the witness had moved to another state and the prosecutor made no effort to obtain his

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[203] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879).

[204] Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[205] Mattox v. United States, 156 U.S. 237, 240 (1895).

[206] Kirby v. United States, 174 U.S. 47 (1899), and Dowdell v. United States, 221 U.S. 325 (1911), recognized the inapplicability of the clause to the admission of documentary evidence to establish collateral facts, admissible under the common law, to permit certification as an additional record to the appellate court of the events of the trial.

[207] Portuondo v. Agard, 529 U.S. 61 (2000).

[208] Pointer v. Texas, 380 U.S. 400, 406–07 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965). "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." Barber v. Page, 390 U.S. 719, 725 (1968). Unjustified limitation of the defendant's right to cross-examine witnesses presented against him at trial may constitute a confrontation clause violation, Smith v. Illinois, 390 U.S. 129 (1968), or a denial of due process, Alford v. United States, 282 U.S. 687 (1931); and *In re* Oliver, 333 U.S. 257 (1948).

[209] 380 U.S. 400 (1965). Justices Harlan and Stewart concurred on due process grounds, rejecting the "incorporation" holding. Id. at 408, 409. *See also* Barber v. Page, 390 U.S. 719 (1968), in which the Court refused to permit the state to use the preliminary hearing testimony of a witness in a federal prison in another state at the time of trial. The Court acknowledged the hearsay exception permitting the use of such evidence when a witness was unavailable but refused to find him "unavailable" when the state had made no effort to procure him; and Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court permitted the state to assume the unavailability of a witness then living in Sweden, and to use the transcript of the witness' testimony at a former trial.

return. Offering the preliminary hearing testimony violated the defendant's right of confrontation. In *Douglas v. Alabama*,[210] the prosecution called as a witness the defendant's alleged accomplice, and when the accomplice refused to testify, pleading his privilege against self-incrimination, the prosecutor read to him to "refresh" his memory a confession in which he implicated the defendant. Because the defendant could not cross-examine the accomplice with regard to the truth of the confession, the Court held that the Confrontation Clause had been violated. In *Bruton v. United States*,[211] the use at a joint trial of a confession made by one of the defendants was held to violate the confrontation rights of the other defendant who was implicated by it because he could not cross-examine the codefendant.[212]

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[210] 380 U.S. 415 (1965). *See also* Smith v. Illinois, 390 U.S. 129 (1968) (Confrontation Clause was violated by allowing an informer as to identify himself by alias and to conceal his true name and address because the defense could not effectively cross-examine); Davis v. Alaska, 415 U.S. 308 (1974) (state law prohibiting disclosure of the identity of juvenile offenders could not be applied to preclude cross-examination of a witness about his juvenile record when the object was to allege possible bias on the part of the witness). *Cf.* Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Nobles, 422 U.S. 233, 240–41 (1975).

[211] 391 U.S. 123 (1968). The Court in this case equated confrontation with the hearsay rule, first emphasizing "that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence," id. at 128 n.3, and then observing that "[t]he reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter." Id. at 136 n.12 (emphasis by Court). *Bruton* was applied retroactively in a state case in Roberts v. Russell, 392 U.S. 293 (1968). Where, however, the codefendant takes the stand in his own defense, denies making the alleged out-of-court statement implicating defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has not been denied his right of confrontation under *Bruton*. Nelson v. O'Neil, 402 U.S. 622 (1971). In two cases, violations of the rule in *Bruton* have been held to be "harmless error" in the light of the overwhelming amount of legally admitted evidence supporting conviction. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972). *Bruton* was held inapplicable, however, when the nontestifying codefendant's confession was redacted to omit any reference to the defendant, and was circumstantially incriminating only as the result of other evidence properly introduced. Richardson v. Marsh, 481 U.S. 200 (1987). *Bruton* was held applicable, however, where a blank space or the word "deleted" is substituted for the defendant's name in a co-defendant's confession, making such confession incriminating of the defendant on its face. Gray v. Maryland, 523 U.S. 185 (1998).

[212] In Parker v. Randolph, 442 U.S. 62 (1979), the Court was evenly divided on the question whether interlocking confessions may be admitted without violating the clause. Four Justices held that admission of such confessions is proper, even though neither defendant testifies, if the judge gives the jury a limiting instruction. Four Justices held that a harmless error analysis should be applied, although they then divided over its meaning in this case. The former approach was rejected in favor of the latter in Cruz v. New York, 481 U.S. 186 (1987). The appropriate focus is on reliability, the Court indicated, and "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him (assuming the 'unavailability' of the codefendant) despite the lack of opportunity for cross-examination." 481 U.S. at 193–94.

The Court continues to view as "presumptively unreliable accomplices' confessions that incriminate defendants." [213]

Then, in 1970, the Court refused to equate the Confrontation Clause with hearsay rules. "While . . . hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." [214] In holding admissible a statement made to police during custodial interrogation, the Court explained that "[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." [215]

The Court favored a hearsay exception over a cross-examination requirement in *Dutton v. Evans*,[216] upholding the use as substantive evidence at trial of a statement made by a witness whom the prosecution could have produced but did not.[217] Presentation of a

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[213] Lee v. Illinois, 476 U.S. 530, 541 (1986); Lilly v. Virginia, 527 U.S. 116, 132 (1999).

[214] California v. Green, 399 U.S. 149, 155–56 (1970) (citations omitted) (holding statement admissible because the witness was present at trial and could have been cross-examined then). *See also* Dutton v. Evans, 400 U.S. 74, 80–86 (1970) (plurality opinion by Justice Stewart). *Compare* id. at 94–95 (Justice Harlan concurring), *with* id. at 105 n.7 (Justice Marshall dissenting).

[215] California v. Green, 399 U.S. at 164. Justice Brennan dissented. Id. at 189. *See also* Nelson v. O'Neil, 402 U.S. 622 (1971). "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. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination." Delaware v. Fensterer, 474 U.S. 15, 21–22 (1985) (per curiam) (expert witness testified as to conclusion, but could not remember basis for conclusion). *See also* United States v. Owens, 484 U.S. 554 (1988) (testimony as to a previous, out-of-court identification statement is not barred by witness' inability, due to memory loss, to explain the basis for his identification).

[216] 400 U.S. 74 (1970).

[217] The statement was made by an alleged co-conspirator of the defendant and was admissible under the co-conspirator exception to the hearsay rule.

statement by a witness who is under oath, in the presence of the jury, and subject to cross-examination by the defendant is only one way of complying with the Confrontation Clause, four Justices concluded. Thus, at least in the absence of prosecutorial misconduct or negligence and where the evidence is not "crucial" or "devastating," these Justices found that the Confrontation Clause could be satisfied if "the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement." The reliability of a statement was to be ascertained in each case by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory.[218]

In *Ohio v. Roberts*,[219] a Court majority adopted a reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[220] Over the course of 24 years, *Roberts* was applied, narrowed,[221] and finally overruled in *Crawford v.*

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[218] 400 U.S. at 86–89. The quoted phrase is at 89, (quoting California v. Green, 399 U.S. 149, 161 (1970)). Justice Harlan concurred to carry the case, on the view that (1) the Confrontation Clause requires only that any testimony actually given at trial must be subject to cross-examination, but (2) in the absence of countervailing circumstances introduction of prior recorded testimony—"trial by affidavit"—would violate the clause. Id. at 93, 95, 97. Justices Marshall, Black, Douglas, and Brennan dissented, id. at 100, arguing for adoption of a rule that: "The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule." Id. at 110–11. The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant's own testimony. Tennessee v. Street, 471 U.S. 409 (1985) (use of accomplice's confession not to establish facts as to defendant's participation in the crime, but instead to support officer's rebuttal of defendant's testimony as to circumstances of defendant's confession; presence of officer assured right of cross-examination).

[219] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The state's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74–77.

[220] "[O]nce a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[221] Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in United States v. Inadi, 475 U.S. 387 (1986), which held that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. See also White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (in-

Washington.[222] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." [223] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." [224] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." [225]

Crawford represented a decisive turning point by clearly stating the basic principles to be used in Confrontation Clause analysis. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable (and the government has made reasonable efforts to procure his presence), the defendant has had a prior opportunity to cross-examine as to the content of the statement.[226] What statements are "testimonial"? In *Crawford*, the Court wrote: "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material 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; extrajudicial statements . . . contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions; 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." [227] The Court added that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" but, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." [228]

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sufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

[222] 541 U.S. 36 (2004).

[223] 541 U.S. at 60–61.

[224] 541 U.S. at 63.

[225] 541 U.S. at 68–69.

[226] 541 U.S. at 54, 59.

[227] 541 U.S. at 51–2 (internal quotation marks and citations omitted), quoted with approval in Melendez-Diaz v. Massachusetts, 557 U.S. ___, No. 07–591, slip op. at 3–4 (2009).

[228] 541 U.S. at 68.

The Court subsequently concluded that "little more than the application of our holding in *Crawford v. Washington*" was needed to find that "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine" were subject to the right of confrontation. The Court found that the analysts were required to testify in person even though state law declared their affidavits "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed."[229] Further, where such testimony is required, the prosecution may not use a "surrogate" witness who, although familiar with the mechanics of forensic testing, had not signed the certification or personally performed or observed the performance of the test. Such a surrogate could not speak to concerns about the integrity of testing procedures or to questions about the performance of the certifying analyst.[230] A year after this apparently straightforward holding in *Bullcoming v. New Mexico*, however, the Court's guidance on trial consideration of forensic reports was clouded by *Williams v. Illinois*.[231] In *Williams*, an expert witness (not a surrogate witness from the testing lab) testified that a DNA profile she had prepared from the defendant's blood matched a DNA profile reported by an outside lab from a swab of a rape victim. A four-Justice plurality held that the expert incorporated the lab's report in her testimony in a way not intended to prove that the outside lab had in fact tested a swab from a particular rape victim and come up with the defendant's DNA profile, but rather in a way solely intended to establish a basis for the expert's opinion that two DNA profiles matched. Four dissenters vigorously asserted the contrary, finding that the outside lab's report served the purpose of incriminating the defendant directly because it identified the rape victim as the source of the material the lab profiled. The expert's testimony effectively was used to connect the defendant with a named individual and not just his DNA profile with a DNA sample obtained from some unnamed source. Accordingly, the dissent asserted the Confrontation Clause required that the defendant have an opportunity to examine the lab technicians responsible for the report. The ninth Justice in the case, Justice Thomas, agreed the report was directly incriminating because the expert expressly used it to link her profile of the defendant's DNA to the rape victim. Nevertheless, Justice Thomas concurred in judgment of the plurality,

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[229] Melendez-Diaz v. Massachusetts, 557 U.S. ___, No. 07–591, slip op. at 23, 1, 2 (2009).

[230] Bullcoming v. New Mexico, 564 U.S. ___, No. 09–10876, slip op. at 12 (2011).

[231] 567 U.S. ___, No. 10–8505, slip op. (2012).

reprising his opinion stated in earlier cases [232] that the Confrontation Clause covers only formalized statements of a solemnity that the uncertified lab report in this case lacked.

Generally, the only exceptions to the right of confrontation that the Court has acknowledged are the two that existed under common law at the time of the founding: "declarations made by a speaker who was both on the brink of death and aware that he was dying," and "statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." [233] The second of these exceptions applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." [234] Thus, in a trial for murder, the question arose whether statements made by the victim to a police officer three weeks before she was murdered, that the defendant had threatened her, could be admitted. The state court had admitted them on the basis that the defendant's having murdered the victim had made the victim unavailable to testify, but the Supreme Court reversed, holding that, unless the testimony had been confronted or fell within the dying declaration exception, it could not be admitted "on the basis of a prior *judicial* assessment that the defendant is guilty as charged," for to admit it on that basis it would "not sit well with the right to trial by jury." [235]

In *Davis v. Washington*,[236] the Court began to explore the parameters of *Crawford* by considering when a police interrogation is "testimonial" for purposes of the Confrontation Clause. *Davis* involved a 911 call in which a woman described being assaulted by a former boyfriend. A tape of that call was admitted as evidence of a felony violation of a domestic no-contact order, despite the fact that the woman in question did not testify. Although again declining to establish all the parameters of when a response to police interrogation is testimonial, the Court held that statements to the police are nontestimonial when made under circumstances that "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." [237] Statements made

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[232] *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. ___, No. 07–591, slip op. (Justice Thomas concurring).
[233] Giles v. California, 128 S. Ct. 2678, 2682, 2683 (2008).
[234] 128 S. Ct. at 2683.
[235] 128 S. Ct. at 2686.
[236] 547 U.S. 813 (2006).
[237] 547 U.S. at 822.

after such an emergency has ended, however, would be treated as testimonial and could not be introduced into evidence.[238]

In *Michigan v. Bryant*,[239] however, the Court appeared to extend the scope and basis of the "ongoing emergency" exception. In *Bryant*, a man dying from a gun shot wound was found by police lying on the ground next to his car in a gas station parking lot, several blocks away from where he had been shot. In response to questions from several police officers, the victim identified the defendant as his assailant, and his response was later used in the defendant's trial despite the victim's unavailability to testify. In determining whether such statements were related to an ongoing emergency (and thus were non-testimonial), the majority noted that an objective analysis of this question was "highly context-dependent,"[240] and depended on the nature of the crime, the weapon utilized, the medical condition of the victim, and the formality of the setting. Further, in determining the testimonial nature of such information, the Court considered not just the intent of the declarant, but also the intentions of the police coming upon the crime scene who, ignorant of preceding events, began seeking information to decide whether there was a continuing danger to the victim or the public.[241] Considering that there are other potential exceptions to the Confrontation Clause where the "primary purpose" for creation of evidence is not related to gathering evidence for trial,[242] the breadth of this opinion may signal a retreat from the limits of *Crawford*.

In two pre-*Crawford* cases, the Court took contrasting approaches to the Confrontation Clause regarding state efforts to protect a child from psychological trauma while testifying. In *Coy v.*

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[238] 547 U.S. at 828–29. Thus, where police responding to a domestic violence report interrogated a woman in the living room while her husband was being questioned in the kitchen, there was no present threat to the woman, so such information as was solicited was testimonial. Id. at 830 (facts of *Hammon v. Indiana*, considered together with *Davis*.)

[239] 562 U.S. ___, No. 09–150, slip op. (2011). Justice Sotomayor wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Breyer and Alito. Justice Thomas file an opinion concurring in judgment, while Justices Scalia and Ginsburg filed dissenting opinions. Justice Kagan did not participate in the case.

[240] 562 U.S. ___, No. 09–150, slip op. at 16.

[241] 562 U.S. ___, No. 09–150, slip op at 20.

[242] *See* 562 U.S. ___, No. 09–150, slip op. at 15 n.9. The Court noted that many exceptions to hearsay rules rest on the belief that certain statements are made for a purpose other than use in a prosecution *See, e.g.*, Fed. Rule Evid. 801(d)(2)(E) (statement by a co-conspirator during and in furtherance of the conspiracy); 803(4) (Statements for Purposes of Medical Diagnosis or Treatment); 803(6) (Records of Regularly Conducted Activity); 803(8) (Public Records and Reports); 803(9) (Records of Vital Statistics); 803(11) (Records of Religious Organizations); 803(12) (Marriage, Baptismal, and Similar Certificates); 803(13) (Family Records); and 804(b)(3) (Statement Against Interest).

Iowa,[243] the Court held that the right of confrontation is violated by a procedure, authorized by statute, placing a one-way screen between complaining child witnesses and the defendant, thereby sparing the witnesses from viewing the defendant. This conclusion was reached even though the witnesses could be viewed by the defendant's counsel and by the judge and jury, even though the right of cross-examination was in no way limited, and even though the state asserted a strong interest in protecting child sex-abuse victims from further trauma.[244] The Court's opinion by Justice Scalia declared that a defendant's right during his trial to *face-to-face* confrontation with his accusers derives from "the irreducible literal meaning of the clause," and traces "to the beginnings of Western legal culture."[245] Squarely rejecting the Wigmore view "that the only essential interest preserved by the right was cross-examination,"[246] the Court emphasized the importance of face-to-face confrontation in eliciting truthful testimony.

Coy's interpretation of the Confrontation Clause, though not its result, was rejected in *Maryland v. Craig*.[247] In *Craig*, the Court upheld Maryland's use of one-way, closed circuit television to protect a child witness in a sex crime from viewing the defendant. As in *Coy*, procedural protections other than confrontation were afforded: the child witness must testify under oath, is subject to cross examination, and is viewed by the judge, jury, and defendant. The critical factual difference between the two cases was that Maryland required a case-specific finding that the child witness would be traumatized by presence of the defendant, while the Iowa procedures struck down in *Coy* rested on a statutory presumption of trauma. But the difference in approach is explained by the fact that Justice O'Connor's views, expressed in a concurring opinion in *Coy*, became the opinion of the Court in *Craig*.[248] Beginning with the proposition that the Confrontation Clause does not, as evidenced by hearsay exceptions, grant an absolute right to face-to-face confrontation, the Court in *Craig* described the clause as "reflect[ing] a *preference*

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[243] 487 U.S. 1012 (1988).

[244] On this latter point, the Court indicated that only "individualized findings," rather than statutory presumption, could suffice to create an exception to the rule. 487 U.S. at 1021.

[245] 487 U.S. at 1015, 1021.

[246] 487 U.S. at 1018 n.2.

[247] 497 U.S. 836 (1990).

[248] *Coy* was decided by a 6–2 vote. Justice Scalia's opinion of the Court was joined by Justices Brennan, White, Marshall, Stevens, and O'Connor; Justice O'Connor's separate concurring opinion was joined by Justice White; Justice Blackmun's dissenting opinion was joined by Chief Justice Rehnquist; and Justice Kennedy did not participate. In *Craig*, a 5–4 decision, Justice O'Connor's opinion of the Court was joined by the two *Coy* dissenters and by Justices White and Kennedy. Justice Scalia's dissent was joined by Justices Brennan, Marshall, and Stevens.

for face-to-face confrontation."[249] This preference can be overcome "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[250] Relying on the traditional and "transcendent" state interest in protecting the welfare of children, on the significant number of state laws designed to protect child witnesses, and on "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims,"[251] the Court found a state interest sufficiently important to outweigh a defendant's right to face-to-face confrontation. Reliability of the testimony was assured by the "rigorous adversarial testing [that] preserves the essence of effective confrontation."[252] All of this, of course, would have led to a different result in *Coy* as well, but *Coy* was distinguished with the caveat that "[t]he requisite finding of necessity must of course be a case-specific one"; Maryland's required finding that a child witness would suffer "serious emotional distress" if not protected was clearly adequate for this purpose.[253]

In another case involving child sex crime victims, the Court held that there is no right of face-to-face confrontation at an in-chambers hearing to determine the competency of a child victim to testify, because the defendant's attorney participated in the hearing, and because the procedures allowed "full and effective" opportunity to cross-examine the witness at trial and request reconsideration of the competency ruling.[254] And there is no absolute right to confront witnesses with relevant evidence impeaching those witnesses; failure to comply with a rape shield law's notice requirement can validly preclude introduction of evidence relating to a witness's prior sexual history.[255]

COMPULSORY PROCESS

The provision requires, of course, that the defendant be afforded legal process to compel witnesses to appear,[256] but another apparent purpose of the provision was to make inapplicable in fed-

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[249] 497 U.S. at 849 (emphasis in original).

[250] 497 U.S. at 850. Dissenting Justice Scalia objected that face-to-face confrontation "is not a preference 'reflected' by the Confrontation Clause [but rather] a constitutional right unqualifiedly guaranteed," and that the Court "has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it." Id. at 863, 870.

[251] 497 U.S. at 855.

[252] 497 U.S. at 857.

[253] 497 U.S. at 855.

[254] Kentucky v. Stincer, 482 U.S. 730, 744 (1987).

[255] Michigan v. Lucas, 500 U.S. 145 (1991).

[256] United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800) (Justice Chase on circuit).

eral trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense.[257] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is 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. This 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 providing that coparticipants in the same crime could not testify for one another.[258]

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.[259]

In *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."[260]

ASSISTANCE OF COUNSEL

Absolute Right to Counsel at Trial

Historical Practice.—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

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[257] 3 J. Story, Commentaries on the Constitution of the United States 1786 (1833). *See* Rosen v. United States, 245 U.S. 467 (1918).

[258] Washington v. Texas, 388 U.S. 14, 19–23 (1967). Texas permitted coparticipants to testify for the prosecution.

[259] Taylor v. Illinois, 484 U.S. 400 (1988).

[260] 480 U.S. 39, 56 (1987) (ordering trial court review of files of child services agency to determine whether they contain evidence material to defense in child abuse prosecution).

from the existent English practice to appointment of counsel in a few states where needed counsel could not be retained.[261] 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 was limited to retained counsel by a defendant wishing and able to afford assistance.[262]

By federal statute, an individual tried for a capital crime in a federal court was entitled to appointed counsel, and, by judicial practice, the federal courts came to appoint counsel frequently for indigents charged with noncapital crimes, although it may be assumed that the practice fell short at times of what is now constitutionally required.[263] State constitutions and statutes gradually ensured a defendant the right to appear in state trials with retained counsel, but the states were far less uniform on the existence and scope of a right to appointed counsel. It was in the context of a right to appointed counsel that the Supreme Court began to develop its modern jurisprudence on a constitutional right to counsel generally, first applying procedural due process analysis under the Fourteenth Amendment to state trials, also finding a Sixth Amendment based right to appointed counsel in federal prosecutions, and eventually applying this Sixth Amendment based right to the states.

Development of Right.—The development began in *Powell v. Alabama*,[264] 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. Due process, Justice Sutherland said for the Court, always requires the observance of certain fundamental personal rights associated with a hearing, and "the right to the aid of counsel is of this fundamental character." This observation was about the right to retain counsel of one's choice and at one's expense, and included an eloquent statement of the necessity of counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of deter-

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

[262] 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 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."

[263] W. Beaney, The Right to Counsel in American Courts 29–30 (1955).

[264] 287 U.S. 45 (1932).

mining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." [265]

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. Therefore, the Court concluded, under the circumstances—"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives"—"the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." The holding was narrow. "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, 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 . . . ." [266]

The next step in the expansion came in *Johnson v. Zerbst*,[267] in which the Court announced an absolute rule requiring appointment of counsel for federal criminal defendants who could not afford to retain a lawyer. The right to assistance of counsel, Justice Black wrote for the Court, "is necessary to insure fundamental human rights of life and liberty." Without stopping to distinguish between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Justice quoted Justice Sutherland's invocation of the necessity of legal counsel for even the intelligent and educated layman and said: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty un-

[265] 287 U.S. at 68–69.
[266] 287 U.S. at 71.
[267] 304 U.S. 458 (1938).

less he has or waives the assistance of counsel." [268] 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.[269]

An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts v. Brady*.[270] Justice Roberts for the Court observed that the Sixth Amendment would compel the result only in federal courts but that 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 the first eight Amendments might "in certain circumstances" be a violation of due process. The question was rather "whether the constraint laid by the Amendment upon the national 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." [271] 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." 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.[272] Justice Black in dissent argued that the Fourteenth Amendment made the Sixth applicable to the states and required the appointment of counsel, but that even on the Court's terms counsel was a fundamental right and appointment was required by due process.[273]

Over time the Court abandoned the "special circumstances" language of *Powell v. Alabama* [274] when capital cases were in-

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[268] 304 U.S. at 462, 463.

[269] 304 U.S. at 464–65. The standards for a valid waiver were tightened in Walker v. Johnston, 312 U.S. 275 (1941), setting aside a guilty plea made without assistance of counsel, by a ruling requiring that a defendant appearing in court be advised of his right to counsel and asked whether or not he wished to waive the right. *See also* Von Moltke v. Gillies, 332 U.S. 708 (1948); Carnley v. Cochran, 369 U.S. 506 (1962). A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

[270] 316 U.S. 455 (1942).

[271] 316 U.S. at 461–62, 465.

[272] 316 U.S. at 471, 473.

[273] 316 U.S. at 474 (joined by Justices Douglas and Murphy).

[274] 287 U.S. 45, 71 (1932).

volved and finally in *Hamilton v. Alabama*,[275] held that in a capital case a defendant need make no showing of particularized need or of prejudice resulting from absence of counsel; henceforth, assistance of counsel was a constitutional requisite in capital cases. In non-capital cases, developments were such that Justice Harlan could assert that "the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded."[276] The rule was designed to afford some certainty in the determination of when failure to appoint counsel would result in a trial lacking in "fundamental fairness." Generally, the Court developed three categories of prejudicial factors, often overlapping in individual cases, which required the furnishing of assistance of counsel. There were (1) the personal characteristics of the defendant which made it unlikely he could obtain an adequate defense of his own,[277] (2) the technical complexity of the charges or of possible defenses to the charges,[278] and (3) events occurring at trial that raised problems of prejudice.[279] The last characteristic especially had been used by the Court to set aside convictions occurring in the absence of coun-

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[275] 368 U.S. 52 (1961). Earlier cases employing the "special circumstances" language were Williams v. Kaiser, 323 U.S. 471 (1945); Tompkins v. Missouri, 323 U.S. 485 (1945); Hawk v. Olson, 326 U.S. 271 (1945); De Meerleer v. Michigan, 329 U.S. 663 (1947); Marino v. Ragen, 332 U.S. 561 (1947); Haley v. Ohio, 332 U.S. 596 (1948). Dicta appeared in several cases thereafter suggesting an absolute right to counsel in capital cases. Bute v. Illinois, 333 U.S. 640, 674 (1948); Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). A state court decision finding a waiver of the right in a capital case was upheld in Carter v. Illinois, 329 U.S. 173 (1946).

[276] Gideon v. Wainwright, 372 U.S. 335, 350 (1963).

[277] Youth and immaturity (Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948); Marino v. Ragen, 332 U.S. 561 (1947); De Meerleer v. Michigan, 329 U.S. 663 (1947)), inexperience (Moore v. Michigan, *supra* (limited education), Uveges v. Pennsylvania, *supra*), and insanity or mental abnormality (Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951)), were commonly cited characteristics of the defendant demonstrating the necessity for assistance of counsel.

[278] Technicality of the crime charged (Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Williams v. Kaiser, 323 U.S. 471 (1945)), or the technicality of a possible defense (Rice v. Olson, 324 U.S. 786 (1945); McNeal v. Culver, 365 U.S. 109 (1961)), were commonly cited.

[279] The deliberate or careless overreaching by the court or the prosecutor (Gibbs v. Burke, 337 U.S. 772 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Palmer v. Ashe, 342 U.S. 134 (1951); White v. Ragen, 324 U.S. 760 (1945)), prejudicial developments during the trial (Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, *supra*), and questionable proceedings at sentencing (Townsend v. Burke, *supra*), were commonly cited.

sel,[280] and the last case rejecting a claim of denial of assistance of counsel had been decided in 1950.[281]

Against this background, a unanimous Court in *Gideon v. Wainwright*[282] overruled *Betts v. Brady* and held "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[283] Justice Black, a dissenter in the 1942 decision, asserted for the Court that *Betts* was an "abrupt break" with earlier precedents, citing *Powell* and *Johnson v. Zerbst*. Rejecting the *Betts* reasoning, the Court decided that the right to assistance of counsel is "fundamental" and the Fourteenth Amendment does make the right constitutionally required in state courts.[284] The Court's opinion in *Gideon* left unanswered the question whether the right to assistance of counsel could be claimed by defendants charged with misdemeanors or serious misdemeanors as well as with felonies, and it was not until later that the Court held that the right applies to any misdemeanor case in which imprisonment is imposed—that no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right.[285] The Court subsequently extended the right to cases where a suspended sentence or

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[280] Hudson v. North Carolina, 363 U.S. 697 (1960), 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. The case seemed to require reversal of any conviction when the record contained a prejudicial occurrence that under state law might have been prevented or ameliorated. Carnley v. Cochran, 369 U.S. 506 (1962), reversed a conviction because the unrepresented defendant failed to follow some advantageous procedure that a lawyer might have utilized. Chewning v. Cunningham, 368 U.S. 443 (1962), 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.

[281] Quicksal v. Michigan, 339 U.S. 660 (1950). *See also* Canizio v. New York, 327 U.S. 82 (1946); Foster v. Illinois, 332 U.S. 134 (1947); Gayes v. New York, 332 U.S. 145 (1947); Bute v. Illinois, 333 U.S. 640 (1948); Gryger v. Burke, 334 U.S. 728 (1948). *Cf.* White v. Ragen, 324 U.S. 760 (1945).

[282] 372 U.S. 335 (1963).

[283] 372 U.S. at 344.

[284] 372 U.S. at 342–43, 344. Justice Black, of course, believed the Fourteenth Amendment made applicable to the States all the provisions of the Bill of Rights, Adamson v. California, 332 U.S. 46, 71 (1947), but for purposes of delivering the opinion of the Court followed the due process absorption doctrine. Justice Douglas, concurring, maintained the incorporation position. *Gideon*, 372 U.S. at 345. Justice Harlan concurred, objecting both to the Court's manner of overruling Betts v. Brady and to the incorporation implications of the opinion. Id. at 349.

[285] Scott v. Illinois, 440 U.S. 367 (1979), adopted a rule of actual punishment and thus modified Argersinger v. Hamlin, 407 U.S. 25 (1972), which had held counsel required if imprisonment were possible. The Court has also extended the right of assistance of counsel to juvenile proceedings. *In re* Gault, 387 U.S. 1 (1967). *See also* Specht v. Patterson, 386 U.S. 605 (1967).

probationary period is imposed, on the theory that any future incarceration that occurred would be based on the original uncounseled conviction.[286]

Because 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, *Gideon* has been held fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,[287] but also may not be subsequently used either to support guilt in a new trial or to enhance punishment upon a valid conviction.[288]

Limits on the Right to Retained Counsel.—*Gideon v. Wainwright* [289] is regarded as having consolidated a right to counsel at trial in the Sixth Amendment, be the trial federal or state or counsel retained or appointed.[290] The Sixth Amendment cases, together with pre-*Gideon* cases that applied due process analysis under the Fourteenth Amendment to state proceedings, point to an unquestioned right to retain counsel for the course of a prosecution, but also to circumstances in which the choice of a particular representative must give way to the right's fundamental purpose of ensuring the integrity of the adversary trial system.

The pre-*Gideon* cases often spoke of the right to retain counsel expansively. 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

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

[287] Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Doughty v. Maxwell, 376 U.S. 202 (1964); Kitchens v. Smith, 401 U.S. 847 (1971). *See* Linkletter v. Walker, 381 U.S. 618, 639 (1965).

[288] Burgett v. Texas, 389 U.S. 109 (1967) (admission of record of prior conviction without the assistance of counsel at trial, with instruction to jury to regard it only for purposes of determining sentence if it found defendant guilty, but not to use it in considering guilt, was inherently prejudicial); United States v. Tucker, 404 U.S. 443 (1972) (error for sentencing judge in 1953 to have relied on two previous convictions at which defendant was without counsel); Loper v. Beto, 405 U.S. 473 (1972) (error to have permitted counseled defendant in 1947 trial to have his credibility impeached by introduction of prior uncounseled convictions in the 1930s; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); *But see* Nichols v. United States, 511 U.S. 738 (1994) (as Scott v. Illinois, 440 U.S. 367 (1979) provides that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).

[289] 372 U.S. 335 (1963).

[290] *E.g.*, Wheat v. United States, 486 U.S. 153, 158 (1988).

violation of his Fourteenth Amendment due process rights.[291] "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."[292]

Though there is a presumption under the Sixth Amendment that a defendant may retain counsel of choice, the right to choose a particular attorney is not absolute. The prospect of compromised loyalty or competence may be sufficiently immediate and serious for a court to deny a defendant's selection. In *Wheat v. United States*, the 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 co-conspirators in an illegal drug enterprise.[293] 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. 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.[294]

Also, the right to retain counsel of choice does not bar operation of forfeiture provisions, even if the result is to deny to a defendant the wherewithal to employ counsel.[295] In *Caplin & Drysdale v. United States*,[296] 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,"[297] even though a portion of the forfeited assets had been used to retain defense counsel.[298] Although a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant

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[291] 348 U.S. 3 (1954).

[292] 348 U.S. at 9, 10. *See also* House v. Mayo, 324 U.S. 42 (1945); Hawk v. Olson, 326 U.S. 271 (1945); Reynolds v. Cochran, 365 U.S. 525 (1961).

[293] 486 U.S. 153 (1988).

[294] 486 U.S. at 159.

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[296] 491 U.S. 617 (1989).

[297] 21 U.S.C. § 853.

[298] On the same day, the Court also rejected a due process challenge to the same statute, holding that it was permissible to restrain the use of the forfeited property pre-conviction as long as probable cause had been established that a qualifying crime had been committed. United States v. Monsanto, 491 U.S. 600, 615 (1989) ("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

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 defendant will be able to retain the attorney of his choice."[299] Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act,[300] the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.[301]

Nevertheless, 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.[302] 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),[303] the Court had held that the decision is not subject to a "harmless error" analysis.[304]

Effective Assistance of Counsel.—"[T]he right to counsel is the right to the effective assistance of counsel."[305] This right to effective assistance has two aspects. First, a court may not restrict defense counsel in the exercise of the representational duties and

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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 found that where a grand jury had returned an indictment based on probable cause, the defendants did not have right to have such conclusion re-examined by a judge during a forfeiture proceeding. Kaley v. United States, 571 U.S. ___, No. 12–464, slip op. (2014).

[299] 491 U.S. at 626.

[300] The statute was interpreted in United States v. Monsanto, 491 U.S. 600 (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.

[301] Dissenting Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, described the Court's ruling as allowing the Sixth Amendment right to counsel of choice to be "outweighed by a legal fiction." 491 U.S. at 644 (dissenting from both *Caplin & Drysdale* and *Monsanto*).

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

[303] Arizona v. Fulminante, 499 U.S. 279, 307–310 (1991).

[304] *Gonzalez-Lopez*, 548 U.S. at 148–49. The Court noted that an important component of the finding that denial of the right to choose one's own counsel was a "structural defect" was the difficulty of assessing the effect of such denial on a trial's outcome. Id. at 149 n.4.

[305] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). "[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 . . . ." 397 U.S. 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 (1982) (summarily holding that defendant may not raise ineffective assistance claim in context of proceeding in which he had no constitutional right to counsel).

prerogatives attendant to our adversarial system of justice.[306] Second, defense counsel can deprive a defendant of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial,[307] or, more broadly, a just outcome.[308] The right to effective assistance may be implicated as early as the appointment process. Cases requiring appointment of counsel for indigent defendants hold that, as a matter of due process, the assignment of defense counsel must be timely and made in a manner that affords "effective aid in the preparation and trial of the case." [309] The Sixth Amendment also 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.[310]

Restrictions on representation imposed during trial also have been stricken as impermissible interference with defense counsel. The Court invalidated application of a statute that empowered a judge to deny final summations before judgment in a nonjury trial: "The right to the assistance of counsel . . . ensures to the defense in a criminal trial the opportunity to participate fully and fairly . . . ." [311] And, in *Geders v. United States*,[312] 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.[313] Other direct and indirect restraints upon counsel have been found to violate the Amendment.[314] Government investigators

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[306] *E.g.*, Geders v. United States, 425 U.S. 80 (1976) (trial judge barred consultation between defendant and attorney overnight); Herring v. New York, 422 U.S. 853 (1975) (application of statute to bar defense counsel from making final summation).

[307] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[308] Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012) (erroneous advice during plea bargaining).

[309] Powell v. Alabama, 287 U.S. 45, 71–72 (1932); Glasser v. United States, 315 U.S. 60, 70 (1942).

[310] Glasser v. United States, 315 U.S. 60 (1942).

[311] Herring v. New York, 422 U.S. 853, 858 (1975). "[T]he right to 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." 422 U.S. at 857.

[312] 425 U.S. 80 (1976).

[313] *Geders* was distinguished in Perry v. Leeke, 488 U.S. 272 (1989), in which the Court upheld a trial court's order that the defendant and his counsel not consult during a 15-minute recess between the defendant's direct testimony and his cross-examination.

[314] *E.g.*, Ferguson v. Georgia, 365 U.S. 570 (1961) (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); Brooks

also are barred from impermissibly interfering with the relationship between defendant and counsel.[315]

Additionally, the Sixth Amendment's right to effective assistance attaches directly to the fidelity and competence of defense counsel's services, regardless of whether counsel is appointed or privately retained or whether the government in any way brought about the defective representation. "The 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."[316] To an argument that a state need only appoint for indigent defendants to satisfy Sixth Amendment requirements, the Court responded that "the State's conduct of a criminal trial itself implicates the State in the defendant's conviction," and no state may proceed against a defendant whose counsel, appointed or retained, cannot defend him fully and faithfully.[317]

Fidelity has been at issue in cases of joint representation of codefendants. In *Glasser v. United States*, the Court found a trial judge erred in appointing one defendant's attorney to also represent a codefendant in a conspiracy case; the judge knew of potential conflicts of interest in the case, and the original defendant had earlier expressed a desire for sole representation.[318] Counsel for codefendants in another case made a timely assertion to the trial judge that continuing joint representation could pose a conflict of interest, and the Court found that the trial judge erred in not examining the assertion of potential conflict closely and permitting or appointing separate counsel, absent a finding that the risk of conflict was remote.[319] Joint representation does not deny effective assistance *per se*, however. Judges are not automatically required to initiate an inquiry into the propriety of multiple representation, being able to assume in the absence of undefined "special circumstances" that no conflict exists. On the other hand, a defendant who objects to joint representation must be given an opportunity to make the

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v. Tennessee, 406 U.S. 605 (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).

[315] United States v. Morrison, 449 U.S. 361 (1981) (Court assumed 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 Court held that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

[316] Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

[317] Id.

[318] 315 U.S. 60 (1942).

[319] Holloway v. Arkansas, 435 U.S. 475 (1978). Counsel had been appointed by the court.

case that potential conflicts exist. Absent an objection, a defendant must later show the existence of an "actual conflict of interest which adversely affected his lawyer's performance." 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.[320]

As to attorney competence, although the Court touched on the question in 1970,[321] it did not articulate a general Sixth Amendment standard for adequacy of representation until 1984 in *Strickland v. Washington*.[322] There are two components to the *Strickland* test: deficient representation and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.[323] The gauge of deficient representation is an objective standard of rea-

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[320] Cuyler v. Sullivan, 446 U.S. 335, 348–50 (1980). *Accord But see* Wood v. Georgia, 450 U.S. 261 (1981) (where counsel retained by defendants' employer had conflict between their interests and employer's, and all the facts were known to trial judge, he should have inquired further); Wheat v. United States, 486 U.S. 153 (1988) (district court correctly denied defendant's waiver of right to conflict-free representation; separate representation order is justified by likelihood of attorney's conflict of interest). 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 (2002). For earlier cases presenting more direct violations of defendant's rights, *see* 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).

[321] In McMann v. Richardson, 397 U.S. 759, 768–71 (1970), the Court 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." *See also* Tollett v. Henderson, 411 U.S. 258, 266–69 (1973); United States v. Agurs, 427 U.S. 97, 102 n.5 (1976).

[322] 466 U.S. 668 (1984). *Strickland* involved capital sentencing, and the Court had left open the since-resolved issue of what standards might apply in ordinary sentencing, where there is generally far more discretion than in capital sentencing, or in the guilt/innocence phase of a capital trial. 466 U.S. at 686.

[323] The Court often emphasizes that the *Strickland* test is necessarily difficult to pass: Ineffective assistance of counsel claims can put rules of waiver and forfeiture at issue and otherwise threaten the integrity of the adversarial system if wide-ranging, after-the-fact second-guessing of counsel's action is freely encouraged. *E.g.*, Harrington v. Richter, 562 U.S. ___, No. 09–587, slip op. at 15 (2011). Furthermore, ineffective assistance of counsel claims frequently are asserted in federal court to support petitions for writs of *habeas corpus* filed by state prisoners. Making a successful *Strickland* claim in a *habeas* context, as opposed to direct review, was made doubly daunting 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. 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. Harrington v. Richter, 562 U.S. ___, No. 09–587, slip op. at 10–14, 15–16 (counsel's decision to forgo inquiry into blood evidence held to be at least arguably reasonable). *See also* Cullen v. Pinholster, 563 U.S. ___, No. 09–1088, slip op. at 15–16 (2011); Burt v. Titlow, 571 U.S. ___, No. 12–414, slip op. (2013) (attorney's ethical lapses do not make the attorney's representation *per se* ineffective).

sonableness "under prevailing professional norms" that takes into account "all the circumstances" and evaluates conduct "from counsel's perspective at the time." [324] Providing effective assistance is not limited to a single path, and the defendant bears the burden to prove insufficiency [325]. No detailed rules or guidelines for adequate representation are appropriate: "Any 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." [326]

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." [327] Counsel's obligation is a general one: to act within the wide range of legitimate, lawful, and reasonable conduct.[328] "[S]trategic choices made after thorough investigation of relevant law and facts . . . are virtually unchallengeable," [329] as is "a reasonable decision that makes particular investigations unnecessary," [330] or a reasonable decision selecting which is-

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[324] 466 U.S. at 688, 689.

[325] 466 U.S. at 690.

[326] 466 U.S. at 689. *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.*, Wiggins v. Smith, 539 U.S. 510, 524 (2003), and Rompilla v. Beard, 545 U.S. 374, 387 (2005). But in Bobby v. Van Hook, the Court held that the Sixth Circuit had erred in assessing 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. ___, No. 09–144, slip op. at 5 n.1 (2009) (per curiam).

[327] *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.

[328] There is no obligation to assist the defendant in presenting perjured testimony, Nix v. Whiteside, 475 U.S. 157 (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 (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 (1983).

[329] *Strickland*, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). *Accord* Burt v. Titlow, 571 U.S. ___, No. 12–414, slip op. (2013). *See also* Yarborough v. Gentry, 540 U.S. 1 (2003) (deference to attorney's choice of tactics for closing argument).

[330] *Strickland*, 466 U.S. at 691. *See also* Woodford v. Visciotti, 537 U.S. 19 (2002) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors); Schriro v. Landrigan, 550 U.S. 465 (2007) (federal district court was within its discretion to conclude that attorney's failure to present mitigating evidence made no difference in sentencing).

sues to raise on appeal.[331] In *Strickland* itself, the allegation of ineffective assistance failed: The Court found 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." [332]

On the other hand, defense counsel does have a general duty to investigate a defendant's background, and limiting investigation and presentation of mitigating evidence must be supported by reasonable efforts and judgment.[333] Also, even though deference to counsel's choices may seem particularly apt in the unstructured, often style-driven arena of plea bargaining,[334]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.[335]

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

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[331] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983) (appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

[332] 466 U.S. at 699. *Accord* Wong v. Belmontes, 558 U.S. ___, No. 08–1263 (2009) (per curiam); Darden v. Wainwright, 477 U.S. 168 (1986) (decision not to introduce mitigating evidence).

[333] *See* Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable); Rompilla v. Beard, 545 U.S. 374 (2005) (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); Porter v. McCollum, 558 U.S. ___, No. 08–10537, slip op. (2009) (per curiam) (attorney's failure to interview witnesses or search records in preparation for penalty phase of capital murder trial constituted ineffective assistance of counsel); *See also*, Sears v. Upton, 561 U.S. ___, No. 09–8854, slip op. (2010); Cullen v. Pinholster, 563 U.S. ___, No. 09–1088, slip op. (2011) (Sotomayor, J. dissenting). *See also* Hinton v. Alabama, 571 U.S. ___, No. 13–6440, slip op. (2014) (per curiam) (attorney's hiring of a questionably competent expert witness because of a mistaken belief of the legal limit on the amount of funds payable on behalf of an indigent defendant constitutes ineffective assistance).

[334] *See, e.g.*, Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011).

[335] Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012). Failure to communicate a plea offer to a defendant also may amount to deficient representation. Missouri v. Frye, 566 U.S. ___, No. 10–444, slip op. (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.").

advice on deportation.[336] Because of its severity, historical association with the criminal justice system, and increasing certainty following conviction and imprisonment, deportation was found to be of a "unique nature": the Court pointedly stated that it was not addressing whether distinguishing between direct and collateral consequences of conviction was appropriate in bounding defense counsel's constitutional duty in a criminal case.[337] Further, the Court held that defense counsel failed to meet prevailing professional norms in representing to Padilla that he did not have to worry about deportation because of the length of his legal residency in the U.S. 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.[338] Silence is not an option. On the issue of prejudice to Padilla from ineffective assistance, the Court sent the case back to lower courts for further findings.[339]

What constitutes prejudice from attorney error, the second *Strickland* requirement, has proved to be a more difficult issue, and one that gained additional doctrinal salience after *Lafler* and *Frye*.[340] The touchstone of "prejudice" under *Strickland* is that the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[341] Nevertheless, de-

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[336] Padilla v. Kentucky, 559 U.S. ___, No. 08–651, slip op. (2010).

[337] 559 U.S. ___, No. 08–651, slip op. at 8.

[338] 559 U.S. ___, No. 08–651, slip op. at 12–16.

[339] In Chaidez v. United States, 568 U.S. ___, No. 11–820, slip op. (2013), 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. Retroactive application of the Court's criminal procedure decisions is discussed under the topic "Retroactivity Versus Prospectivity" in Article III, *supra*

[340] The *Frye* Court observed that, according to the Bureau of Justice Statistics, ninety-seven percent of recent federal convictions and ninety-four percent of recent state convictions had resulted from guilty pleas. Hill v. Lockhart had earlier established a basis for a Sixth Amendment challenge to a *conviction* arising from a plea bargain if a defendant could show he accepted the plea after having received ineffective assistance of counsel. By laying a basis for a Sixth Amendment challenge to a *failure to accept a plea offer* from the prosecution, *Frye* and *Lafler* recognized the possibililty of prejudice from ineffective bargaining alone regardless of the fairness of a subsequent conviction after a later plea to the court or a full trial.

[341] *Strickland*, 466 U.S. at 694. This standard does not require that "a defendant show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. *See also* Porter v. McCollum, 558 U.S. ___, No. 08–10537, slip op. at 15 (2009). Also, presentation of a plausible mitigation theory supported by evidence does not foreclose prejudice based on counsel's earlier failure to have conducted an adequate mitigation investigation. Sears v. Upton, 561 U.S. ___, No. 09–8854, slip op. (2010) (counsel presented evidence of supportive family ties as a mitigating factor in the penalty phase of a capital case, but a fuller inves-

fendants frequently fall short on the prejudice requirement, with the Court posing it as a threshold matter and failing to find how other representation could have made a significant difference.[342]

Beyond *Strickland's* "reasonable probability of a different result" starting point, 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."[343] However, the Court subsequently characterized *Lockhart* as addressing a class of exceptions to the "outcome determinative" test, and not supplanting it. According to *Williams v. Taylor*, it would disserve justice in some circumstances to find prejudice premised on a likelihood of a different outcome.[344] An overriding interest in fundamental fairness precluded a prejudice finding in *Lockhart*, for example, because such a finding would be nothing more than a fortuitous windfall for the defendant. As

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tigation by counsel would have uncovered evidence of physical abuse, pronounced brain damage, and significantly diminished mental functioning). *See also*, *e.g.*, Glover v. United States, 531 U.S. 198 (2001) (6- to 21-month increase in prison term is sufficient "prejudice" under *Strickland* to raise issue of ineffective counsel).

[342] *E.g.*, Smith v. Spisak, 558 U.S. ___, No. 08–724, slip op. at 11–15 (2010). *See also* Hill v. Lockhart, 474 U.S. 52, 60 (1985). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court applied the *Strickland* test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty. And, prejudice may be particularly difficult to infer from a decision to plead guilty because of the many uncertainties still outstanding during plea negotiations. Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011).

But see Missouri v. Frye, 566 U.S. ___, No. 10–444, slip op. (2012) and Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012), in which the Court acknowledged that prejudice could arise from not accepting a plea offer from the prosecution because of inadequate counsel. When prejudice does arise from not accepting a plea offer, fashioning a remedy should neither grant the defendant a windfall (*e.g.*, automatic revival of the plea offer regardless of the defendant's subsequent conduct or conviction), nor must the government's efforts in securing a later conviction be ignored. To determine a remedy, the *Lafler* majority would leave it to the trial court's discretion in each case to sentence under the forgone plea, sentence under the subsequent conviction, or sentence in accordance with alternatives somewhere in between. The dissenting Justices pointedly criticized this "opaque" guidance.

[343] 506 U.S. 364, 368–70 (1993). Defense counsel had failed to raise a constitutional claim during sentencing that would have saved the defendant from a death sentence. The case precedent that supported the claim was itself overturned after sentencing but before defendant asserted in a habeas writ that he had received ineffective assistance. The Court held, 7–2, that even though the adequacy of counsel's representation is assessed under the standards that existed contemporaneously with the conduct, it was inappropriate in assessing prejudice to give the defendant the benefit of overturned case law. So long as the defendant was not deprived of a procedural or substantive right to which he would still be entitled, relief is not available. 506 U.S. at 372–73.

[344] 529 U.S. 362 (2000).

another example, 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.[345] In *Lafler v. Cooper*, four dissenters further would have imposed a fundamental fairness overlay to foreclose relief whenever a defendant proceeded to trial after turning down a plea offer because of incompetent advice of counsel.[346] In their view, conviction after a full and fair trial cannot be prejudicial in a constitutional sense, even if a forgone plea would have yielded lesser charges or punishment. This view did not prevail, however.

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."[347] 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.[348] "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show

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[345] 529 U.S. at 391–93. The latter example references Nix. v. Whiteside, 475 U.S. 157, 175–76 (1986).

[346] 566 U.S. ___, No. 10–209, slip op. (2012) (Scalia, J., with Roberts, C.J., and Thomas, J., dissenting); 566 U.S. ___, No. 10–209, slip op. (2012) (Alito, J., dissenting).

[347] United States v. Cronic, 466 U.S. 648, 658 (1984).

[348] 466 U.S. at 657, 659. *But see* Bell v. Cone, 535 U.S. 685 (2002) (failure to introduce mitigating evidence and waiver of closing argument in penalty phase of death penalty case was not failure to test prosecution's case, where mitigating evidence had been presented during guilt phase and where waiver of argument deprived skilled prosecutor of an opportunity for rebuttal); Mickens v. Taylor, 535 U.S. 162 (2002) (failure of judge who knew or should have known of an attorney's conflicting interest to inquire as to whether such conflict was prejudicial not grounds for automatic reversal). In Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), the Supreme Court noted that it has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that *Cronic* should apply. The fact that the Court has never ruled on the question means that "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law,'" and, as a consequence, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), the defendant is not entitled to *habeas* relief. Id. at 748 (quoting Carey v. Musladin, 549 U.S. 70, 77 (2006), as to which see "Limitations on *Habeas Corpus* Review of Capital Sentences" under Eighth Amendment, *infra*.

[prejudice],"[349] and consequently most claims of inadequate representation continue to be measured by the *Strickland* standard.[350]

Self-Representation.—The Court has 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.[351] It is a right the defendant must adopt knowingly and intelligently; 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 or when his self-representation is so disruptive of orderly procedures that the judge may curtail it.[352] The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction.[353]

The essential elements of self-representation were spelled out in *McKaskle v. Wiggins*,[354] 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 en-

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[349] *Cronic*, 466 U.S. at 659 n.26.

[350] *Strickland* and *Cronic* were decided the same day, and the Court's opinion in each cited the other. See *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 666 n.41. The *Cronic* presumption of prejudice may be appropriate when counsel's "overall performance" is brought into question, whereas *Strickland* is generally the appropriate test for "claims based on specified [counsel] errors." *Cronic*, 466 U.S. at 666 n.41. The narrow reach of *Cronic* has been illustrated by subsequent decisions. Not constituting *per se* ineffective assistance is a defense counsel's failure to file a notice of appeal, or in some circumstances even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). *But see* Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam). *See also* Florida v. Nixon, 543 U.S. 175 (2004) (no presumption of prejudice when a defendant has failed to consent to a tenable strategy counsel has adequately disclosed to and discussed with him). A standard somewhat different from *Cronic* and *Strickland* governs claims of attorney conflict of interest. See discussion of Cuyler v. Sullivan under "Protection of Right to Retained Counsel," *supra*.

[351] Faretta v. California, 422 U.S. 806 (1975). An invitation to overrule *Faretta* because it leads to unfair trials for defendants was declined in Indiana v. Edwards, 128 S. Ct. 2379, 2388 (2008). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. 422 U.S. 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 (2005) (per curiam). Related to the right of self-representation is the right to testify in one's own defense. Rock v. Arkansas, 483 U.S. 44 (1987) (per se rule excluding all hypnotically refreshed testimony violates right).

[352] 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. Indiana v. Edwards, 128 S. Ct. 2379 (2008). 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 (1993).

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

[354] 465 U.S. 168 (1984).

titled 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."[355] 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.[356]

Right to Assistance of Counsel in Nontrial Situations

Judicial Proceedings Before Trial.—Even a preliminary hearing where no government prosecutor is present can trigger the right to counsel.[357] "[A] criminal defendant's defendant's initial appearance before a judicial officer, where he learns the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[358] "Attachment," however, may signify "nothing more than the beginning of the defendant's prosecution [and] . . . not mark the beginning of a substantive entitlement to the assistance of counsel."[359] Thus, counsel need be appointed only "as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial."[360]

Dicta in *Powell v. Alabama*,[361] however, indicated 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 trial, when consultation, thoroughgoing 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." This language was gradually expanded upon and the Court developed a concept of "a critical stage in a criminal proceeding" as indicating when the defendant must be represented by counsel. Thus,

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[355] 465 U.S. at 178.

[356] 465 U.S. at 184.

[357] Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (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).

[358] 128 S. Ct. at 2592.

[359] 128 S. Ct. at 2592 (Alito, J., concurring). Justice Alito's concurrence, joined by Chief Justice Roberts and Justice Scalia, was not necessary for the majority opinion in *Rothgery*, but the majority noted that it had not decided "whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this." Id.

[360] 128 S. Ct. at 2595 (Alito, J. concurring).

[361] 287 U.S. 45, 57 (1932).

in *Hamilton v. Alabama*,[362] the Court noted that arraignment under state law was a "critical stage" because the defense of insanity had to be pleaded then or lost, pleas in abatement had to be made then, and motions to quash on the ground of racial exclusion of grand jurors or that the grand jury was improperly drawn had to be made then. In *White v. Maryland*,[363] 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. Finally, in *Coleman v. Alabama*,[364] the Court denominated 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; 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 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 bound over, and could in any event preserve for use in cross-examination at trial and impeachment purposes testimony he could elicit at the hearing; he could discover as much as possible of the prosecution's case against defendant for better trial preparation; and he could influence the court in such matters as bail and psychiatric examination. The result seems to be that reached in pre-*Gideon* cases in which a defendant was entitled to counsel if a lawyer might have made a difference.[365]

Custodial Interrogation.—At first, the Court followed the rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel that his subsequent trial was tainted.[366] It held in *Spano v. New York* [367] that, under the totality of circumstances, a confession obtained in a post-indictment interrogation was involuntary,

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[362] 368 U.S. 52 (1961).

[363] 373 U.S. 59 (1963).

[364] 399 U.S. 1 (1970). Justice Harlan concurred solely because he thought the precedents compelled him to do so, id. at 19, while Chief Justice Burger and Justice Stewart dissented. Id. at 21, 25. Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the factfinding process as the role of counsel at trial, *Coleman* was denied retroactive effect in Adams v. Illinois, 405 U.S. 278 (1972). Justice Blackmun joined Chief Justice Burger in pronouncing *Coleman* wrongly decided. Id. at 285, 286. *Hamilton* and *White*, however, were held to be retroactive in Arsenault v. Massachusetts, 393 U.S. 5 (1968).

[365] *Compare* Hudson v. North Carolina, 363 U.S. 697 (1960), *with* Chewning v. Cunningham, 368 U.S. 443 (1962), *and* Carnley v. Cochran, 369 U.S. 506 (1962).

[366] Crooker v. California, 357 U.S. 433 (1958) (five-to-four decision); Cicenia v. Lagay, 357 U.S. 504 (1958) (five-to-three).

[367] 360 U.S. 315 (1959).

and four Justices wished to place the holding solely on the basis that post-indictment interrogation in the absence of defendant's lawyer was a denial of his right to assistance of counsel. The Court issued that holding in *Massiah v. United States*,[368] in which federal officers caused an informer to elicit from the already-indicted defendant, who was represented by a lawyer, incriminating admissions that were secretly overheard over a broadcasting unit. Then, in *Escobedo v. Illinois*,[369] the Court held that preindictment interrogation violated the Sixth Amendment. But *Miranda v. Arizona*[370] switched from reliance on the Sixth Amendment to reliance on the Fifth Amendment's Self-Incrimination Clause in cases of pre-indictment custodial interrogation, although *Miranda* still placed great emphasis upon police warnings of the right to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.[371]

Massiah was reaffirmed and in some respects expanded by the Court. In *Brewer v. Williams*,[372] the right to counsel was found violated when police elicited from 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 the attorney that defendant would not be questioned in his absence. In *United States v. Henry*,[373] 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 pay-

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[368] 377 U.S. 201 (1964). *See also* McLeod v. Ohio, 381 U.S. 356 (1965) (applying *Massiah* to the states, in a case not involving trickery but in which defendant was endeavoring to cooperate with the police). *But see* Hoffa v. United States, 385 U.S. 293 (1966). *Cf.* Milton v. Wainwright, 407 U.S. 371 (1972). In Kansas v. Ventris, 556 U.S. ___, No. 07–1356, slip op. at 5 (Apr. 29, 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.

[369] 378 U.S. 478 (1964).

[370] 384 U.S. 436 (1966).

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

[372] 430 U.S. 387 (1977). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. Id. at 415, 429, 438. *Compare* Rhode Island v. Innis, 446 U.S. 291 (1980), decided on self-incrimination grounds under similar facts.

[373] 447 U.S. 264 (1980). Justices Blackmun, White, and Rehnquist dissented. Id. at 277, 289. *Accord*, Kansas v. Ventris, 556 U.S. ___, No. 07–1356, slip op. at 2 (Apr. 29, 2009). *But cf.* Weatherford v. Bursey, 429 U.S. 545, 550 (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 revealing his identity, a violation of the defendant's constitutional rights has occurred . . . ").

ment 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.

The Court extended the *Edwards v. Arizona* [374] rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. In the subsequently overruled *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." [375] 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." [376] The protection, however, is not as broad under the Sixth Amendment as it is under the Fifth. Although *Edwards* has been extended to bar custodial questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested,[377] this extension does not apply for purposes of the Sixth Amendment right to counsel. The Sixth Amendment right is "offense-specific," and so also is "its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews." [378] Therefore, although a defendant who has invoked his Sixth Amendment right to counsel with respect to the offense for which he is being prosecuted may not waive that right, he may waive his *Miranda*-based right not to be interrogated about unrelated and uncharged offenses.[379]

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[374] 451 U.S. 477 (1981). See Fifth Amendment, "*Miranda v. Arizona*," *supra*.

[375] 475 U.S. 625, 636 (1986).

[376] 475 U.S. at 631. If a prisoner does not ask for the assistance of counsel, however, and voluntarily waives his rights following a *Miranda* warning, these reasons disappear. Moreover, although the right to counsel is more difficult to waive at trial than before trial, "whatever standards suffice for *Miranda*'s purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment questioning." Patterson v. Illinois, 487 U.S. 285, 298 (1988).

[377] Arizona v. Roberson, 486 U.S. 675 (1988).

[378] McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The reason that the right is "offense-specific" is that "it does not attach until a prosecution is commenced." Id.

[379] Rejecting an exception to the offense-specific limitation for crimes that are closely related factually to a charged offense, the Court instead borrowed the *Blockburger* test 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." Texas v. Cobb, 532 U.S. 162, 173 (2001). This meant that the defendant, who had been charged with burglary, had a right to counsel on that charge, but not with respect to murders committed during the burglary.

In *Montejo v. Louisiana*,[380] the Court overruled *Michigan v. Jackson*, finding that the Fifth Amendment's "*Miranda-Edwards-Minnick* line of cases" constitutes sufficient protection of the right to counsel. In *Montejo*, the defendant had not actually requested a lawyer, but had stood mute at a preliminary hearing at which the judge ordered the appointment of counsel. Later, before Montejo had met his attorney, two police detectives read him his *Miranda* rights and he agreed to be interrogated. *Michigan v. Jackson* had prohibited waivers of the right to counsel after a defendant's assertion of the right to counsel, so the Court in *Montejo* was faced with the question of whether *Michigan v. Jackson* applied where an attorney had been appointed in the absence of such an assertion.

The Court in *Montejo* noted that "[n]o reason exists to assume that a defendant like Montejo, 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."[381] But, to apply *Michigan v. Jackson* only when the defendant invokes his right to counsel "would be unworkable in more than half the States of the Union," where "appointment of counsel is automatic upon a finding of indigency" or may be made "*sua sponte* by the court."[382] "On the other hand, eliminating the invocation requirement would render the rule easy to apply but depart fundamentally from the *Jackson* rationale," which was "to prevent police from badgering defendants into changing their minds about their rights" after they had invoked them.[383] Moreover, the Court found, *Michigan v. Jackson* achieves little by way of preventing unconstitutional conduct. 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. . . . The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. . . . Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), 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,

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[380] 556 U.S. ___, No. 07–1529, slip op. at 15 (2009).
[381] 556 U.S. ___, No. 07–1529, slip op. at 10.
[382] 556 U.S. ___, No. 07–1529, slip op. at 13, 4.
[383] 556 U.S. ___, No. 07–1529, slip op. at 13, 10.

not only must the immediate contact end, but 'badgering' by later requests is prohibited."[384] Thus, the Court in *Montejo* overruled *Michigan v. Jackson*.[385]

The remedy for violation of the Sixth Amendment rule is exclusion from evidence of statements so obtained.[386] And, although the basis for the Sixth Amendment exclusionary rule—to protect the right to a fair trial—differs from that of the Fourth Amendment rule—to deter illegal police conduct—exceptions to the Fourth Amendment's exclusionary rule can apply as well to the Sixth. In *Nix v. Williams*,[387] the Court held the "inevitable discovery" exception applicable to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[388] Also, an exception to the Sixth Amendment exclusionary rule has been recognized for the purpose of impeaching the defendant's trial testimony.[389]

Lineups and Other Identification Situations.—The concept of the "critical stage" was again expanded and its rationale formulated in *United States v. Wade*,[390] which, with *Gilbert v. Califor-*

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[384] 556 U.S. ___, No. 07–1529, slip op. at 15.

[385] Justice Stevens, joined by Justices Souter and Ginsburg, and by Justice Breyer except for footnote 5, dissented. He wrote, "The majority's analysis flagrantly misrepresents *Jackson's* underlying rationale and the constitutional interests the decision sought to protect. . . . [T]he *Jackson* opinion does not even mention the anti-badgering considerations that provide the basis for the Court's decision today. Instead, *Jackson* relied primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel—not its Fifth Amendment counterpart. *Jackson* emphasized that the purpose of the Sixth Amendment is to 'protec[t] the unaided layman at critical confrontations with his adversary,' by giving him 'the right to rely on counsel as a medium between him[self] and the State.' . . . Once *Jackson* is placed in its proper Sixth Amendment context, the majority's justifications for overruling the decision crumble." Slip op. at 5, 6 (internal quotation marks and citations omitted). Justice Stevens added, "Even if *Jackson* had never been decided, it would be clear that Montejo's Sixth Amendment rights were violated. . . . Because police questioned Montejo without notice to, and outside the presence of, his lawyer, the interrogation violated Montejo's right to counsel even under pre-*Jackson* precedent." Slip op. at 10–11.

[386] *See* Michigan v. Jackson, 475 U.S. 625 (1986).

[387] 467 U.S. 431 (1984).

[388] 467 U.S. at 446.

[389] Michigan v. Harvey, 494 U.S. 344 (1990) (post-arraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant's inconsistent trial testimony); Kansas v. Ventris, 556 U.S. ___, No. 07–1356, slip op. at 6 (2009) (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").

[390] 388 U.S. 218 (1967).

nia,[391] held that lineups are a critical stage and that in-court identification of defendants based on out-of-court lineups or show-ups without the presence of defendant's counsel is inadmissible. The Sixth Amendment guarantee, said Justice Brennan, was intended to do away with the common-law limitation of assistance of counsel to matters of law, excluding matters of fact. The abolition of the fact-law distinction took on new importance due to the changes in investigation and prosecution since adoption of the Sixth Amendment. "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, 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. In recognition of these realities of modern criminal prosecution, 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.'" [392]

"It is central to [the principle of *Powell v. Alabama*] that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." [393] Counsel's presence 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.[394] However, because there was less certainty and frequency of possible injustice at this stage, the Court held that the two cases 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.[395] The *Wade-Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwrit-

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[391] 388 U.S. 263 (1967).

[392] United States v. Wade, 388 U.S. 218, 224–25 (1967).

[393] 388 U.S. at 226 (citations omitted).

[394] 388 U.S. at 227–39. Previously, the manner of an extra-judicial identification affected only the weight, not the admissibility, of identification testimony at trial. Justices White, Harlan, and Stewart dissented, denying any objective need for the Court's per se rule and doubting its efficacy in any event. Id. at 250.

[395] Stovall v. Denno, 388 U.S. 293 (1967).

ing 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.[396]

In *United States v. Ash*,[397] 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 trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure 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. 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."[398] Therefore, unless the pretrial stage involved 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.

Because the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, and therefore there was no trial-like confrontation, and because the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.[399]

Both Wade and Gilbert had already been indicted and counsel had been appointed to represent them when their lineups were conducted, a fact noted in the opinions and in subsequent ones,[400] but

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[396] Gilbert v. California, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).

[397] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id. at 326.

[398] 413 U.S. at 309–10, 312–13. Justice Stewart, concurring on other grounds, rejected this analysis, id. at 321, as did the three dissenters. Id. at 326, 338–344. "The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of the trial itself.'" Id. at 339 (Justice Brennan dissenting). 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 (1987) (also subjecting Estelle v. Smith violations to harmless error analysis in capital cases).

[399] 413 U.S. at 317–21. The due process standards are discussed under the Fourteenth Amendment, "Criminal Identification Process," *infra*.

[400] United States v. Wade, 388 U.S. 218, 219, 237 (1967); Gilbert v. California, 388 U.S. 263, 269, 272 (1967); Simmons v. United States, 390 U.S. 377, 382–83 (1968).

the cases in which the rulings were denied retroactive application involved preindictment lineups.[401] Nevertheless, in *Kirby v. Illinois*,[402] the Court held that no right to counsel exists with respect to lineups that precede some formal act of charging a suspect. The Sixth Amendment does not become operative, explained Justice Stewart's plurality opinion, until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearings, indictment, information, or arraignment. . . . The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It 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. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[403] The Court's distinguishing of the underlying basis for *Miranda v. Arizona*[404] left that case basically unaffected by *Kirby*, but it appears that *Escobedo v. Illinois*,[405] and perhaps other cases, is greatly restricted thereby.

Post-Conviction Proceedings.—The right to counsel under the Sixth Amendment applies to "criminal prosecutions," a restriction

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[401] Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

[402] 406 U.S. 682, 689 (1972).

[403] 406 U.S. at 689–90. Justices Brennan, Douglas, and Marshall, dissenting, argued that it had never previously been doubted that *Wade* and *Gilbert* applied in preindictment lineup situations and that, in any event, the rationale of the rule was no different whatever the formal status of the case. Id. at 691. Justice White, who dissented in *Wade* and *Gilbert*, dissented in *Kirby* simply on the basis that those two cases controlled this one. Id. at 705. Indictment, as the quotation from *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (suspect had been seized pursuant to an arrest warrant, arraigned, and committed by court); United States v. Gouveia, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment—there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes).

[404] "[T]he *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." 406 U.S. at 688 (emphasis by Court).

[405] "But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination. . . .' Johnson v. New Jersey, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, Johnson v. New Jersey, *supra*, at 733–34, and those facts are not remotely akin to the facts of the case before us." 406 U.S. at 689. *But see* id. at 693 n.3 (Justice Brennan dissenting).

that limits its scope but does not exhaust all constitutional rights to representation in adversarial contexts associated with the criminal justice process. The Sixth Amendment requires counsel at the sentencing stage,[406] and the Court has held that, 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.[407] Beyond this, however, the Court has eschewed Sixth Amendment analysis, instead delimiting the right to counsel under due process and equal protection principles.[408]

Noncriminal and Investigatory Proceedings.—Commitment proceedings that lead to the imposition of essentially criminal punishment are subject to the Due Process Clause and require the assistance of counsel.[409] 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.[410] Another decision refused to extend the right to counsel to investigative proceedings antedating a criminal prosecution, and sustained the contempt conviction of private detectives who refused to testify before a judge authorized to conduct a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding, and who based their refusal on the ground that their counsel were required to remain outside the hearing room.[411]

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[406] Townsend v. Burke, 334 U.S. 736 (1948).

[407] Mempa v. Rhay, 389 U.S. 128 (1967) (applied retroactively in McConnell v. Rhay, 393 U.S. 2 (1968)).

[408] State criminal appeals, applications for collateral relief, and post-sentencing parole or probation determinations are examples of procedures with respect to which the Court has not invoked the Sixth Amendment. Using due process analysis, the Court has found no constitutional right to counsel in prison disciplinary proceedings. Wolff v. McDonnell, 418 U.S. 539, 560–70 (1974); Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976). *See* Fourteenth Amendment, "Rights of Prisoners," *infra*.

[409] Specht v. Patterson, 386 U.S. 605 (1967).

[410] *In re* Groban, 352 U.S. 330 (1957). Four Justices dissented.

[411] Anonymous v. Baker, 360 U.S. 287 (1959). Four Justices dissented.