SIXTH AMENDMENT

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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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

Criminal prosecutions in the District of Columbia [1] and in incorporated territories [2] must conform to this Amendment, but those in the unincorporated territories need not do so. [3] In upholding a trial before a United States consul of a United States citizen for a crime committed within the jurisdiction of a foreign nation, the Court specifically held that this Amendment reached only citizens and others within the United States or who were brought to the United States for trial for alleged offenses committed elsewhere, and not to citizens residing or temporarily sojourning abroad. [4] It is clear that this holding no longer is supportable after *Reid v. Covert*, [5] but it is not clear what the constitutional rule is. All of the

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

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

[3] Balzac v. Puerto 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 following the flag." Supra, pp. 324–25. *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

[4] In re Ross, 140 U.S. 453 (1891).

[5] 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 wherever it acted, 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, concur-

rights guaranteed in this Amendment are so fundamental that they have been made applicable against state abridgment by the due process clause of the Fourteenth Amendment.[6]

Offenses Against the United States.—There are no common-law offenses against the United States. Only those acts which Congress has forbidden, with penalties for disobedience of its command, are crimes.[7] Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions,[8] as is true also of deportation proceedings,[9] but contempt proceedings which were at one time not considered to be criminal prosecutions are no longer within that category.[10] To what degree Congress may make conduct engaged in outside the territorial limits of the United States a violation of federal criminal law is a matter not yet directly addressed by the Court.[11]

RIGHT TO A SPEEDY AND PUBLIC TRIAL

Speedy Trial

Source and Rationale.—The right to a speedy trial may be derived from a provision of Magna Carta and it was a right so interpreted by Coke.[12] Much the same language was incorporated

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ring, 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).

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

[7] 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).

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

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

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

[11] *See* United States v. Bowman, 260 U.S. 94 (1922) (treating question as a matter of statutory interpretation); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 69–76 (1970). Congress has recently asserted the authority by criminalizing various terrorist acts committed abroad against U.S. nationals. *See, e.g.*, prohibitions against hostage taking and air piracy contained in Pub. L. No. 98–473, ch. XX; 18 U.S.C. § 1203 and 49 U.S.C. app. §§ 1471, 72; and prohibitions against killing or doing physical violence to a U.S. national abroad contained in Pub. L. No. 99–399, § 1202(a), 100 Stat. 896 (1986); 18 U.S.C. § 2331. Extraterritorial jurisdiction under the hostage taking and air piracy laws was upheld by an appeals court in United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

[12] "We will sell to no man, we will not deny or defer to any man either justice or right." Ch. 40 of the 1215 Magna Carta, a portion of ch. 29 of the 1225 reissue. Klopfer v. North Carolina, 386 U.S. 213, 223–24 (1967).

into the Virginia Declaration of Rights of 1776 [13] and from there into the Sixth Amendment. Unlike other provisions of the Amendment, this guarantee can be attributable to reasons which have to do with the rights of and infliction of harms to both defendants and society. 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." [14] The passage of time alone may lead to the loss of witnesses through death or other reasons and the blurring of memories of available witnesses. 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 may commit other crimes, may be tempted over a lengthening period of time to "jump" bail, and may be able to use the backlog of cases to engage in plea bargaining for charges or sentences which do not give society justice. And delay often retards the deterrent and rehabilitative effects of the criminal law. [15]

Application and Scope.—Because the guarantee of a speedy trial "is one of the most basic rights preserved by our Constitution," it is one of those "fundamental" liberties embodied in the Bill of Rights which the due process clause of the Fourteenth Amendment makes applicable to the States. [16] The protection afforded by this guarantee "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." Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if those restraints precede the formal preferring of charges. [17] Possible prejudice that

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[13] 7 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, H. Doc. No. 357, 59th Congress, 2d Sess. 8, 3813 (1909).

[14] 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).

[15] Barker v. Wingo, 407 U.S. 514, 519 (1972); Dickey v. Florida, 398 U.S. 30, 42 (1970) (Justice Brennan concurring). Congress by the Speedy Trial Act of 1974, Pub. L. No. 93–619, 88 Stat. 2076, 18 U.S.C. §§ 3161–74, has 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).

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

[17] United States v. Marion, 404 U.S. 307, 313, 320, 322 (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 impli-

may result from delays between the time government discovers sufficient evidence to proceed against a suspect and the time of instituting those proceedings is guarded against by statutes of limitation, which represent a legislative judgment with regard to permissible periods of delay.[18] In two cases, the Court held that the speedy trial guarantee had been violated by States which preferred criminal charges against persons who were already incarcerated in prisons of other jurisdictions following convictions on other charges when those States ignored the defendants' requests to be given prompt trials and made no effort through requests to prison authorities to obtain custody of the prisoners for purposes of trial.[19] A state practice permitting the prosecutor to take *nolle prosequi* with leave, which discharged the accused from custody but left him subject at any time thereafter to prosecution at the discretion of the prosecutor, the statute of limitations being tolled, was condemned as violative of the guarantee.[20]

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."[21] No length of time is per se too long to pass scrutiny under this guarantee,[22] but on the other hand nei-

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cated 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 and an investigation was begun, 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. 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.

[18] 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*, supra, at 324; United States v. Lovasco, 431 U.S. 783 (1977); United States v. MacDonald, 456 U.S. 1, 8 (1982).

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

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

[21] 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).

[22] *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).

ther does the defendant have to show actual prejudice by delay.[23] 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."[24] The fact of delay triggers an inquiry and is dependent on the circumstances of the case. Reasons for delay will vary. A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these other factors.[25] 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;[26] 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, and the defendant's responsibility for the delay would be conclusive. Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.[27]

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.[28]

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

[24] 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.

[25] 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.

[26] Id. 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).

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

[28] 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).

Public Trial

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment . . . most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

"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."[29] The purposes of the requirement of open trials are multiple: it helps to assure the criminal defendant a fair and accurate adjudication of guilt or innocence, it provides a public demonstration of fairness, it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality. The Court has also expatiated upon the therapeutic value to the community of open trials to enable the public to see justice done and the fulfillment of the urge for retribution that people feel upon the commission of some kinds of crimes.[30] Because of the near universality of the guarantee in this country, the Supreme Court has had little occasion to deal with the right. It is a right so fundamental that it is protected against state deprivation by the due process clause,[31] but it is not

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[29] In re Oliver, 333 U.S. 257, 266–70 (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).

[30] Estes v. Texas, 381 U.S. 532, 538–39 (1965); Richmond Newspapers v. Virginia, 448 U.S. 555, 569–73 (1980) (plurality opinion of Chief Justice Burger); id. at 593–97 (Justice Brennan concurring).

[31] 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 pros-

so absolute that reasonable regulation designed to forestall prejudice from publicity and disorderly trials is foreclosed.[32] The banning of television cameras from the courtroom and the precluding of live telecasting of a trial is not a denial of the right,[33] although the Court does not inhibit televised trials under the proper circumstances.[34]

The Court has borrowed from First Amendment cases in protecting the right to a public trial. 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."[35] In *Waller v. Georgia*,[36] 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 $2^1/_2$ 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, due to the fact that the conduct of police and prosecutor is often at issue.[37] However, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . 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."[38]

The Sixth Amendment guarantee is apparently a personal right of the defendant, which he may in some circumstances waive in conjunction with the prosecution and the court.[39] The First Amendment, however, has been held to protect public and press ac-

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ecutions" 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).

[32] *Cf.* Sheppard v. Maxwell, 384 U.S. 333 (1966); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[33] Estes v. Texas, 381 U.S. 532 (1965). *Cf.* Nixon v. Warner Communications, 435 U.S. 589, 610 (1978).

[34] Chandler v. Florida, 449 U.S. 560 (1981).

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

[36] 467 U.S. 39 (1984).

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

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

[39] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

cess to trials in all but the most extraordinary circumstances,[40] hence a defendant's request for closure of his trial must be balanced against the public and press right of access. Before such a request for closure will be honored, there must be "specific findings . . . 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."[41]

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.[42] 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.[43] 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."[44] The right was guaranteed in the constitutions of the original 13 States, was guaranteed in the body of the Constitu-

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[40] Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). *See also* Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (Justice Powell concurring).

[41] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). *See* First Amendment discussion supra pp. 1105–08.

[42] 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).

[43] W. FORSYTH, HISTORY OF TRIAL BY JURY (London: 1852).

[44] 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.

tion [45] and in the Sixth Amendment, and the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases. [46] "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.'" [47]

"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 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." [48]

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. [49] But inasmuch as it cannot be said that every criminal trial or any particular trial which is held without a jury is unfair, [50] it is possible for

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[45] In Art III, § 2.

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

[47] Thompson v. Utah, 170 U.S. 343, 349–50 (1898), quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1773 (1833).

[48] 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). While 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).

[49] Duncan v. Louisiana, 391 U.S. 145, 158–59 (1968).

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

a defendant to waive the right and go to trial before a judge alone.[51]

The Attributes of the Jury.—It was previously the position of the Court 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."[52] It had therefore been held that this included trial by a jury of 12 persons[53] who must reach a unanimous verdict[54] and that the jury trial must be held during the first court proceeding and not *de novo* at the first appellate stage.[55] However, as it extended the guarantee to the States, the Court indicated that at least some of these standards were open to re-examination,[56] and in subsequent cases it has done so. In *Williams v. Florida*,[57] the Court held that the fixing of jury size at 12 was "a historical accident" which, while 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

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[51] 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).

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

[53] 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).

[54] 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).

[55] 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).

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

[57] 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.

common-law background[58] or by any ascertainment of the intent of the framers.[59] 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.[60]

When the unanimity rule was reconsidered, the division of the Justices was such that different results were reached for state and federal courts.[61] 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 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

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

[59] Id. at 92–99. While 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).

[60] Id. 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. While 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.

[61] 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.

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.[62] 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.[63] 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 which 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.[64]

Criminal Proceedings to Which the Guarantee Applies.—Although the Sixth Amendment provision does not differentiate among types of criminal proceedings in which the right to a jury trial is or is not present, the Court has always excluded petty offenses from the guarantee in federal courts, defining the line between petty and serious offenses either by the maximum punishment available[65] or by the nature of the offense.[66] This line has been adhered to in the application of the Sixth Amendment to the States[67] and the Court has now held "that no offense can be deemed 'petty' for purposes of the right to trial by jury where im-

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[62] 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.

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

[64] Id. 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) (*Burch* held retroactive).

[65] 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).

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

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

prisonment for more than six months is authorized."[68] The Court has also made some changes in the meaning attached to the term "criminal proceeding." Previously, it had been applied only to situations in which a person has been accused of an offense by information or presentment.[69] Thus, a civil action to collect statutory penalties and punitive damages, because not technically criminal, has been held to implicate no right to jury trial.[70] But more recently the Court has held denationalization to be punishment which Congress may not impose without adhering to the guarantees of the Fifth and Sixth Amendments,[71] and the same type of analysis could be used with regard to other sanctions. In a long line of cases, the Court had held that no constitutional right to jury trial existed in trials of criminal contempt.[72] But in *Bloom v. Illinois*,[73] 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." At least in state systems and probably in the federal system as well, there is no constitutional right

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[68] 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*, supra, 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).

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

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

[71] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[72] 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.

[73] 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. *And see* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

to a jury trial in juvenile proceedings.[74] In capital cases there is no requirement that a jury impose the death penalty[75] or make the factual findings upon which a death sentence must rest.[76]

Impartial Jury

Impartiality as a principle of the right to trial by jury is served not only by the Sixth Amendment, which is as applicable to the States as to the Federal Government,[77] but as well by the due process and equal protection clauses of the Fourteenth,[78] and perhaps the due process clause of the Fifth Amendment, and the Court's supervisory power has been directed to the issue in the federal system.[79] Prior to the Court's extension of a right to jury trials in state courts, it was firmly established that if a State chose to provide juries they must be impartial ones.[80]

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."[81] This re-

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

[75] Spaziano v. Florida, 468 U.S. 447, 459 (1984).

[76] Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (per curiam) ("the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); 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); Walton v. Arizona, 497 U.S. 639 (1990) (judge may make requisite findings as to existence of aggravating and mitigating circumstances).

[77] 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).

[78] 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).

[79] 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.

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

[81] 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*, supra, at 538.

quirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[82] "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[83] 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.[84] While disproportion alone is insufficient to establish a prima facie showing of unlawful exclusion, a statistical showing of disparity combined with a demonstration of the easy manipulability of the selection process can make out a prima facie case.[85]

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.[86] A violation of a defendant's

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Congress has implemented the constitutional requirement by statute in federal courts by the Federal Jury Selection and Service Act of 1968, Pub. L. No. 90–274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq.

[82] 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).

[83] Duren v. Missouri, 439 U.S. 357, 364 (1979).

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

[85] Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-American defendant successfully made out prima facie case of intentional exclusion of persons of his ethnic background by showing a substantial underrepresentation of Mexican-Americans based on a comparison of the group's proportion in the total population of eligible jurors to the proportion called, and this in the face of the fact that Mexican-Americans controlled the selection process).

[86] 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).

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.[87] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and must be inquired into.[88] Private communications, contact, or tampering with a jury, or the creation of circumstances raising the dangers thereof, is not to be condoned.[89] 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.[90] It is undeniably a violation of due process to subject a defendant to trial in an atmosphere of mob or threatened mob domination.[91]

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.[92] Similarly invalid is a jury instruction in a joint trial to consider a confession only with regard

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[87] 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).

[88] 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, 360 U.S. 310 (1959). Essentially, the defendant must make a showing of prejudice which the court then may inquire into. 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).

[89] 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).

[90] Irvin v. Dowd, 366 U.S. 717 (1961) (felony); Groppi v. Wisconsin, 400 U.S. 505 (1971) (misdemeanor).

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

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

to the defendant against whom it is admissible, and to disregard that confession as against a co-defendant which it implicates.[93]

In *Witherspoon v. Illinois*,[94] 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. Inasmuch as the jury is given broad discretion whether or not to fix the penalty at death, the Court ruled, the jurors must reflect "the conscience of the community" on the issue, and the automatic exclusion of all scrupled jurors "stacked the deck" and made of the jury a tribunal "organized to return a verdict of death."[95] 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.[96]

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.'"[97] Thus the juror need not indicate that he would "automatically" vote against the death penalty, and his "bias [need not] be proved with 'unmistakable clarity.'"[98] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[99] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury

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[93] 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).

[94] 391 U.S. 510 (1968).

[95] Id. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968). The *Witherspoon* case 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).

[96] Morgan v. Illinois, 112 S. Ct. 2222 (1992).

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

[98] Wainwright v. Witt, 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).

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

somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints."[100] 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 evidence for the two distinct but interrelated functions.[101] 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.[102]

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion may not be subjected to harmless error analysis.[103] However, a court's error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an impartial jury if he is able to exclude the juror through exercise of a peremptory challenge.[104] 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.'"[105]

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.[106] 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.[107] 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

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[100] 476 U.S. at 183.
[101] Id. at 180.
[102] Buchanan v. Kentucky, 483 U.S. 402 (1987).
[103] Gray v. Mississippi, 481 U.S. 648 (1987).
[104] Ross v. Oklahoma, 487 U.S. 81 (1987).
[105] Id. at 86, 87.
[106] Lewis v. United States, 146 U.S. 370 (1892); Pointer v. United States, 151 U.S. 396 (1894).
[107] Reynolds v. United States, 98 U.S. 145 (1879). *See* Witherspoon v. Illinois, 391 U.S. 510, 513–15, 522 n.21 (1968).

reports to which they had been exposed did not violate the Sixth Amendment.[108] 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.[109] 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.[110] But in circumstances not suggesting a significant likelihood of racial 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.[111]

Although government is not constitutionally obligated to allow peremptory challenges, 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.[112] While, in *Swain v. Alabama*,[113] 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*,[114] with the result that a defendant may now establish an equal protection violation resulting from a prosecutor's

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

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

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

[111] 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.

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

[113] 380 U.S. 202 (1965).

[114] 476 U.S. 79 (1986).

use of peremptory challenges to systematically exclude blacks from the jury.[115] A violation can occur whether or not the defendant and the excluded jurors are of the same race.[116] Racially discriminatory use of peremptory challenges does not, however, constitute a violation of the Sixth Amendment, the Court ruled in *Holland v. Illinois*.[117] The Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics."[118] 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."[119]

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.[120] 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."[121] It followed, therefore, that the limitation on peremptory challenges does not violate a defendant's right to an impartial jury. While 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.[122]

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[115] *See* discussion under "Equal Protection and Race," infra p. 1839.

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

[117] 493 U.S. 474 (1990). *But see* Trevino v. Texas, 112 S. Ct. 1547 (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*).

[118] 493 U.S. at 487.

[119] Id. 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.

[120] Georgia v. McCollum, 112 S. Ct. 2348 (1992).

[121] Id. at 2358.

[122] Id. at 2358–59.

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,[123] but much criticism arose over the absence of any guarantee that the jury be drawn from the "vicinage" or neighborhood of the crime.[124] 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.[125] The provisions limit the Federal Government only.[126]

An accused cannot be tried in one district under an indictment showing that the offense was committed in another;[127] the place where the offense is charged to have been committed determines the place of trial.[128] In a prosecution for conspiracy, the accused may be tried in any State and district where an overt act was performed.[129] 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.[130] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates,[131] or the sending of excluded matter through the mails,[132] 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

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[123] "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."

[124] "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).

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

[126] Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96, 101 (1888).

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

[128] 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).

[129] 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).

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

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

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

was held to have been committed in that district although the letter was posted elsewhere.[133] The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdiction of the charge.[134] 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.[135] 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.[136] The place of trial may be designated by statute after the offense has been committed.[137]

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.[138] 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,[139] 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.[140] 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 which does not contain such allegation is defective.[141] Despite the omission of obscene particulars, an indictment in general language is good if the

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

[134] 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).

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

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

[137] 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).

[138] 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).

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

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

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

unlawful conduct is described so as reasonably to inform the accused of the nature of the charge sought to be established against him.[142] The Constitution does not require the Government to furnish a copy of the indictment to an accused.[143] The right to notice of accusation is so fundamental a part of procedural due process that the States are required to observe it.[144]

CONFRONTATION

"The primary object of the constitutional provision in question was 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"[145] 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."[146] Before 1965, when the Court held the right to be protected against state abridgment,[147] it had little need to clarify the relationship between the right of confrontation and the hearsay rule,[148] inasmuch as its supervisory powers over the inferior federal courts permitted it to control the admission of hearsay on this basis.[149] Thus, on the basis of the Confrontation Clause, it had concluded that evidence given at a preliminary hearing could not be used at the trial if the

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

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

[144] 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).

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

[146] 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).

[147] 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).

[148] 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 written form. 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).

[149] Thus, while 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).

absence of the witness was attributable to the negligence of the prosecution,[150] but that if a witness' absence had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial.[151] It had also recognized the admissibility of dying declarations[152] and of testimony given at a former trial by a witness since deceased.[153] 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 defendant now on trial was stolen.[154]

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.[155] Thus, in *Pointer v. Texas*,[156] the complaining witness had testified at a preliminary hearing at which he was not cross-examined and the defendant was not represented by counsel; by the time of trial, the witness had moved to another State and the prosecutor made no effort to obtain his return. Offering the preliminary hearing testimony violated defendant's right of confrontation. In *Douglas v.*

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

[151] Reynolds v. United States, 98 U.S. 145 (1879).

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

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

[154] 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.

[155] 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 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).

[156] 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; Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court permitted the State to assume the unavailability of a witness because he now resided in Sweden and to use the transcript of the witness' testimony at a former trial.

Alabama,[157] 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 defendant. Because defendant could not cross-examine the accomplice with regard to the truth of the confession, the Court held the Confrontation Clause had been violated. In *Bruton v. United States*,[158] 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 not taking the stand.[159] The Court continues to view as "presumptively unreliable accomplices' confessions that incriminate defendants."[160]

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[157] 380 U.S. 415 (1965). *See also* Smith v. Illinois, 390 U.S. 129 (1968) (informer as prosecution witness permitted to identify himself by alias and to conceal his true name and address; Confrontation Clause violated because defense could not effectively cross-examine); Davis v. Alaska, 415 U.S. 308 (1974) (state law prohibiting disclosure of identity of juvenile offenders could not be applied to preclude cross-examination of witness about his juvenile record when object was to allege possible bias on part of witness). *Cf.* Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Nobles, 422 U.S. 233, 240–41 (1975).

[158] 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).

[159] 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.

[160] Lee v. Illinois, 476 U.S. 530, 541 (1986).

More recently, however, the Court has moved away from these cases. "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." [161]

Further, the Court in *California v. Green* [162] upheld the use at trial as substantive evidence of two prior statements made by a witness who at the trial claimed that he had been under the influence of LSD at the time of the occurrence of the events in question and that he could therefore neither deny nor affirm the truth of his prior statements. One of the earlier statements was sworn testimony given at a preliminary hearing at which the defendant was represented by counsel with the opportunity to cross-examine the witness; that statement was admissible because it had been subjected to cross-examination earlier, the Court held, and that was all that was required. The other statement had been made to policemen during custodial interrogation, had not been under oath, and, of course, had not been subject to cross-examination, but the Court deemed it admissible because the witness had been present at the trial and could have been cross-examined then. "[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

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[161] California v. Green, 399 U.S. 149, 155–56 (1970); Dutton v. Evans, 400 U.S. 74, 80–86 (1970). *Compare* id. at 93, 94, 95 (Justice Harlan concurring), *with* id. at 100, 105 n.7 (Justice Marshall dissenting). *See also* United States v. Inadi, 475 U.S. 387 (1986).

[162] 399 U.S. 149 (1970).

stories."[163] But in *Dutton v. Evans*,[164] the Court upheld the use as substantive evidence at trial of a statement made by a witness whom the prosecution could have produced but did not. Presentation of a 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," the Confrontation Clause is satisfied if the circumstances of presentation of out-of-court statements are such that "the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement," and this is to be ascertained in each case by focusing on the reliability of the proffered hearsay statement, that is, 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.[165]

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[163] Id. 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 previous, out-of-court identification statement is not barred by witness' inability, due to memory loss, to explain the basis for his identification).

[164] 400 U.S. 74 (1970). The statement was made by an alleged co-conspirator of the defendant on trial and was admissible under the co-conspirator exception to the hearsay rule permitting the use of a declaration by one conspirator against all his fellow conspirators. The state rule permitted the use of a statement made during the concealment stage of the conspiracy while the federal rule permitted use of a statement made only in the course of and in furtherance of the conspiracy. Id. at 78, 81–82.

[165] Id. 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).

In *Ohio v. Roberts*,[166] the Court explained that it had construed the clause "in two separate ways to restrict the range of admissible hearsay." First, there is a rule of "necessity," under which in the usual case "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, "once 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.'"[167] That is, if the hearsay declarant is not present for cross-examination at trial, the "statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[168]

Roberts was narrowed in *United States v. Inadi*,[169] holding 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. The latter—at least those "made while the conspiracy is in progress"—have "independent evidentiary significance of [their] own"; hence in-court testimony is not a necessary or valid substitute.[170] Similarly, evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment" is not barred from trial by the Confrontation Clause.[171] Particularized guarantees of trustworthiness inherent in the circumstances under which a statement is made must be shown for admission of other hearsay evidence not covered by a "firmly rooted exception;" evidence tending to corroborate the truthfulness of a statement may not be relied upon as a bootstrap.[172]

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[166] 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.

[167] Id. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

[168] Id. at 66. 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).

[169] 475 U.S. 387 (1986).

[170] Id. at 394–95.

[171] White v. Illinois, 112 S. Ct. 736, 743 (1992).

[172] Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (insufficient 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).

Contrasting approaches to the Confrontation Clause were taken by the Court in two cases involving state efforts to protect child sex crime victims from trauma while testifying. In *Coy v. Iowa*,[173] 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.[174] 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."[175] Squarely rejecting the Wigmore view "that the only essential interest preserved by the right was cross-examination,[176] the Court emphasized the importance of face-to-face confrontation in eliciting truthful testimony.

Coy's interpretation of the Clause, though not its result, was rejected in *Maryland v. Craig*.[177] 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*.[178] Beginning with the propo-

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[173] 487 U.S. 1012 (1988).

[174] 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.

[175] Id. at 1015, 1021 (1988).

[176] Id. at 1018 n.2.

[177] 497 U.S. 836 (1990).

[178] *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.

sition 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* for face-to-face confrontation."[179] 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."[180] 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,"[181] 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."[182] 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.[183]

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, since the defendant's attorney participated in the hearing, and since the procedures allowed "full and effective" opportunity to cross-examine the witness at trial and request reconsideration of the competency ruling.[184] 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.[185]

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[179] 497 U.S. at 849 (emphasis original).

[180] Id. 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.

[181] Id. at 855.

[182] Id. at 857.

[183] Id. at 855.

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

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

COMPULSORY PROCESS

The provision requires, of course, that the defendant be afforded legal process to compel witnesses to appear,[186] but another apparent purpose of the provision was to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense.[187] "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.[188]

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.[189]

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."[190]

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

Neither in the Congress which proposed what became the Sixth Amendment guarantee that the accused is to have the assistance of counsel nor in the state ratifying conventions is there any

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

[187] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1786 (1833). *See* Rosen v. United States, 245 U.S. 467 (1918).

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

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

[190] 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).

indication of the understanding associated with the language employed. 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, a rule 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." The colonial and early state practice in this country was varied, ranging from the existent English practice to appointment of counsel in a few States where needed counsel could not be retained.[191] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the guarantee was limited to assuring that a person wishing and able to afford counsel would not be denied that right.[192] It was not until the 1930's that the Supreme Court began expanding the clause to its present scope.

Powell v. Alabama.—The expansion began in *Powell v. Alabama*,[193] 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 determining 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

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[191] W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–26 (1955).

[192] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that in federal courts parties 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." It was apparently the practice almost invariably to appoint counsel for indigent defendants charged with noncapital crimes, although it may be assumed that the practice fell short often of what is now constitutionally required. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 29–30 (1955).

[193] 287 U.S. 45 (1932).

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." [194]

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 . . . ." [195]

Johnson v. Zerbst.—Next step in the expansion came in *Johnson v. Zerbst*, [196] 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 unless he has or waives the assistance of counsel." [197] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from

[194] Id. at 68–69.
[195] Id. at 71.
[196] 304 U.S. 458 (1938).
[197] Id. at 462, 463.

a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[198]

Betts v. Brady *and Progeny.*—An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts v. Brady*.[199] 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."[200] 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.[201] 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.[202]

Over time the Court abandoned the "special circumstances" language of *Powell v. Alabama*[203] when capital cases were involved and finally in *Hamilton v. Alabama*,[204] held that in a capital case

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[198] Id. at 464–465. 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).

[199] 316 U.S. 455 (1942).

[200] Id. at 461–62, 465.

[201] Id. at 471, 473.

[202] Id. at 474 (joined by Justices Douglas and Murphy).

[203] 287 U.S. 45, 71 (1932).

[204] 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

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."[205] 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,[206] (2) the technical complexity of the charges or of possible defenses to the charges,[207] and (3) events occurring at trial that raised problems of prejudice.[208] The last characteristic especially had been utilized by the Court to set aside convictions occurring in

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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).

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

[206] 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.

[207] 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.

[208] 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.

the absence of counsel,[209] and the last case rejecting a claim of denial of assistance of counsel had been decided in 1950.[210]

Gideon v. Wainwright.—Against this background, a unanimous Court in *Gideon v. Wainwright*[211] 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."[212] 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.[213] The Court's opinion in *Gideon* left unanswered the question whether the right to assistance of counsel was claimable by defendants charged with misdemeanors or serious misdemeanors as well as with felonies, and it was not until recently 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.[214] The right to the assistance of counsel exists in juvenile proceedings also.[215]

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[209] 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.

[210] 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).

[211] 372 U.S. 335 (1963).

[212] Id. at 344.

[213] Id. 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*, supra, 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.

[214] 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.

[215] In re Gault, 387 U.S. 1 (1967). *See also* Specht v. Patterson, 386 U.S. 605 (1967).

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,[216] but also may not be subsequently used either to support guilt in a new trial or to enhance punishment upon a valid conviction.[217]

Protection of the Right to Retained Counsel.—The Sixth Amendment has also been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Thus, in *Chandler v. Fretag*,[218] when a defendant appearing to plead guilty on a house-breaking charge was orally advised for the first time that, because of three prior convictions for felonies, he would be tried also as an habitual criminal and if convicted would be sentenced to life imprisonment, the court's denial of his request for a continuance in order to consult an attorney was a violation of his Fourteenth Amendment due process rights. "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."[219] But 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. In *Caplin & Drysdale v. United States*,[220] the Court upheld a federal statute requiring forfeiture to

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[216] 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).

[217] Burgett v. Texas, 389 U.S. 109 (1967) (admission of record of prior counselless conviction 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 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 1930's; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); Baldasar v. Illinois, 446 U.S. 222 (1980) (although under Scott v. Illinois, 440 U.S. 367 (1979), an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction nonetheless may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term).

[218] 348 U.S. 3 (1954).

[219] Id. 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).

[220] 491 U.S. 617 (1989).

the government of property and proceeds derived from drug-related crimes constituting a "continuing criminal enterprise,"[221] even though a portion of the forfeited assets had been used to retain defense counsel. While a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice."[222] Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act,[223] the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.[224]

Whenever defense counsel is representing two or more defendants and asserts in timely fashion to the trial judge that because of possible conflicts of interest between or among his clients he is unable to render effective assistance, the judge must examine the claim carefully, and unless he finds the risk too remote he must permit or appoint separate counsel.[225] Subsequently, the Court elaborated upon this principle and extended it.[226] First, the Sixth Amendment right to counsel applies to defendants who retain private counsel as well as to defendants served by appointed counsel. Second, 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. Third, to establish a violation, a defendant must show an "actual conflict of interest which adversely affected his lawyer's performance." Once it is established that a conflict affected the lawyer's action, however, prejudice need not be proved.[227]

"[T]he right to the assistance of 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

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[221] 21 U.S.C. § 853.

[222] 491 U.S. at 626.

[223] 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.

[224] 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*).

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

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

[227] Id. at 348–50. 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, 365 U.S. 674 (1958).

constitutionalized in the Sixth and Fourteenth Amendments."[228] So saying, the Court invalidated a statute empowering every judge in a nonjury criminal trial to deny the parties the right to make a final summation before rendition of judgment which had been applied in the specific case to prevent defendant's counsel from making a summation. The opportunity to participate fully and fairly in the adversary factfinding process includes counsel's right to make a closing argument. And, in *Geders v. United States*,[229] the Court held that a trial judge's order preventing defendant from consulting his counsel during a 17-hour overnight recess between his direct and cross-examination, in order to prevent tailoring of testimony or "coaching," deprived defendant of his right to assistance of counsel and was invalid.[230] Other direct and indirect restraints upon counsel and his discretion have been found to be in violation of the Amendment.[231] Governmental investigative agents may interfere as well with the relationship of defense and counsel.[232]

Effective Assistance of Counsel.—"[T]he right to counsel is the right to the effective assistance of counsel."[233] From the beginning of the cases holding that counsel must be appointed for defendants unable to afford to retain a lawyer, the Court has indicated that appointment must be made in a manner that affords "effective aid in the preparation and trial of the case."[234] Of course, the government must not interfere with representation, either through the manner of appointment or through the imposition of restrictions upon appointed or retained counsel that would impede his ability fairly to provide a defense,[235] but the Sixth Amendment

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[228] Herring v. New York, 422 U.S. 853, 857 (1975).

[229] 425 U.S. 80 (1976).

[230] *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.

[231] E.g., Ferguson v. Georgia, 365 U.S. 570 (1961) (where defendant was prevented by statute from giving sworn testimony in his defense, the refusal of a state court to permit defense counsel to question him to elicit his unsworn statement denied due process because it denied him assistance of counsel); Brooks 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 decision of counsel on questions whether to testify and when).

[232] 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 held that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

[233] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

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

[235] E.g., Glasser v. United States, 315 U.S. 60 (1942) (trial court required defendant and codefendant to be represented by same appointed counsel despite diver-

goes further than that. "The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."[236] That is, a criminal trial initiated and conducted by government is state action which may be so fundamentally unfair that no conviction obtained thereby may be allowed to stand, irrespective of the possible fact that government did nothing itself to bring about the unfairness. Thus, ineffective assistance provided by retained counsel provides a basis for finding a Sixth Amendment denial in a trial.[237]

The trial judge must not only refrain from creating a situation of ineffective assistance, but may well be obligated under certain circumstances to inquire whether defendant's counsel, because of a possible conflict of interest or otherwise, is rendering or may render ineffective assistance.[238] A much more difficult issue is presented when a defendant on appeal or in a collateral proceeding alleges that his counsel was incompetent or was not competent enough to provide effective assistance. While the Court touched on the question in 1970,[239] it was not until 1984, in *Strickland v. Washington*,[240] that the Court articulated a general test for ineffective assistance of counsel in criminal trials and in capital sentencing proceedings.[241]

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gent interests); 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).

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

[237] Id. at 342–45. *But see* 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).

[238] Holloway v. Arkansas, 435 U.S. 475 (1978) (public defender representing three defendants alerted trial judge to possibility of conflicts of interest; judge should have appointed different counsel or made inquiry into possibility of conflicts); Cuyler v. Sullivan, 446 U.S. 335 (1980) (trial judge had no obligation to inquire into adequacy of multiple representation, with possible conflict of interest, in absence of raising of issue by defendant or counsel); 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).

[239] 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).

[240] 466 U.S. 668 (1984).

[241] *Strickland* involved capital sentencing, and the Court left open the issue of what standards might apply in ordinary sentencing, where there is generally far

There are two components to the test: deficient attorney performance and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question. Although the gauge of effective attorney performance is an objective standard of reasonableness, the Court concluded that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable," as are "reasonable" decisions making investigation unnecessary.[242] In order to establish prejudice resulting from attorney error, 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."[243] In *Strickland*, neither part of the test was satisfied. The attorney's decision to forego character and psychological evidence in the capital sentencing proceeding in order to avoid evidence of the defendant's criminal history was deemed "the result of reasonable professional judgment," and prejudice could not be shown because "the overwhelming aggravating factors" outweighed whatever evidence of good character could have been presented.[244] In *Hill v. Lockhart*,[245] 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, he would not have pleaded guilty.

There are times when prejudice may be presumed, i.e. there can be "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[246] These situations include actual or constructive denial of counsel, and denial of such basics as the right to effective cross-examination. However, "[a]part from circumstances of that magnitude

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more discretion than in capital sentencing, or in the guilt/innocence phase of a capital trial. 466 U.S. at 686.

[242] 466 U.S. at 689–91. The obligation is to stay within the wide range of legitimate, lawful, professional conduct; there is no obligation to assist the defendant in presenting perjured testimony. Nix v. Whiteside, 475 U.S. 157 (1986). *See also* Georgia v. McCollum, 112 S. Ct. 2348 (1992) (no right to carry out through counsel the racially discriminatory exclusion of jurors during voir dire). 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). *See also* Jones v. Barnes, 463 U.S. 745 (1983) (no obligation to present on appeal all nonfrivolous issues requested by defendant; appointed counsel may exercise his professional judgement in determining which issues are best raised on appeal).

[243] 466 U.S. at 694.

[244] 466 U.S. at 699. *Accord*, Darden v. Wainwright, 477 U.S. 168 (1986) (decision not to introduce mitigating evidence).

[245] 474 U.S. 52 (1985).

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

. . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice]." [247]

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. [248] 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.

The essential elements of self-representation were spelled out in *McKaskle v. Wiggins,* [249] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself." [250] 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. [251]

Right to Assistance of Counsel in Nontrial Situations

Judicial Proceedings Before Trial.—Dicta in *Powell v. Alabama* [252] 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, thor-

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[247] 466 U.S. at 659 n.26 (finding no inherently prejudicial circumstances in appointment of real estate attorney with no criminal law experience to defend mail fraud "check kiting" charges with approximately one month's preparation time). On the other hand, an attorney's failure to advise a client of his right to appeal, and of his right to an attorney on appeal, amounts to "a substantial showing" of denial of the right to effective counsel. Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam).

[248] Faretta v. California, 422 U.S. 806 (1975). 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. Id. at 834–35 n.46. 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).

[249] 465 U.S. 168 (1984).

[250] Id. at 178.

[251] Id. at 184.

[252] 287 U.S. 45, 57 (1932).

oughgoing 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 has gradually been expanded upon and the Court has developed a concept of "a critical stage in a criminal proceeding" as indicating when the defendant must be represented by counsel. Thus, in *Hamilton v. Alabama*,[253] 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. *White v. Maryland*[254] set aside a conviction obtained at a trial at which defendant's plea of guilty, entered at a preliminary hearing where he was without counsel, was introduced as evidence against him at trial. Finally in *Coleman v. Alabama*,[255] 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.[256]

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

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[253] 368 U.S. 52 (1961).

[254] 373 U.S. 59 (1963).

[255] 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).

[256] *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).

to counsel that his subsequent trial was tainted.[257] It was held in *Spano v. New York*[258] that under the totality of circumstances a confession obtained in a post-indictment interrogation was involuntary, 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. That holding was made in *Massiah v. United States*,[259] in which federal officers caused an informer to elicit from the already-indicted defendant, who was represented by a lawyer, incriminating admissions which were secretly overheard over a broadcasting unit. Then, in *Escobedo v. Illinois*,[260] the Court held that preindictment interrogation was a violation of the Sixth Amendment. But *Miranda v. Arizona*[261] switched from reliance on the Sixth Amendment to the Fifth Amendment's self-incrimination clause, although that case still placed great emphasis upon police warnings with regard to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.

Massiah was reaffirmed and in some respects expanded by the Court. Thus, in *Brewer v. Williams*,[262] 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. *United States v. Henry*[263] held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that even if the government agents did not intend the informant to take affirmative steps to elicit incrimi-

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

[258] 360 U.S. 315 (1959).

[259] 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).

[260] 378 U.S. 478 (1964).

[261] 384 U.S. 436 (1966).

[262] 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.

[263] 447 U.S. 264 (1980) Justices Blackmun, White, and Rehnquist dissented. Id. at 277, 289. *But cf.* Weatherford v. Bursey, 429 U.S. 545 (1977).

nating statements from the defendant in the absence of counsel, the agents must have known that result would follow.

The Court has extended the *Edwards v. Arizona*[264] rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. Thus, the Court held in *Michigan v. Jackson*, "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."[265] 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."[266] The protection, however, is not as broad under the Sixth Amendment as it is under the Fifth. While *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,[267] 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."[268] Therefore, while 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.

The remedy for violation of the Sixth Amendment rule is exclusion from evidence of statements so obtained.[269] And, while 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*,[270] 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.

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[264] 451 U.S. 477 (1981).

[265] 475 U.S. 625, 636 (1986).

[266] 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).

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

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

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

[270] 467 U.S. 431 (1984).

"Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[271] Also, an exception to the Sixth Amendment exclusionary rule has been recognized for the purpose of impeaching the defendant's trial testimony.[272]

Lineups and Other Identification Situations.—The concept of the "critical stage" was again expanded and its rationale formulated in *United States v. Wade*,[273] which, with *Gilbert v. California*,[274] 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 marshalled, 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.' "[275]

"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."[276] 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

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[271] 467 U.S. at 446.

[272] Michigan v. Harvey, 494 U.S. 344 (1990) (postarraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant's inconsistent trial testimony).

[273] 388 U.S. 218 (1967).

[274] 388 U.S. 263 (1967).

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

[276] Id. at 226 (citations omitted).

and remedied at trial.[277] 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.[278] The *Wade-Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.[279]

In *United States v. Ash*,[280] 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."[281] Therefore, unless at the pretrial stage there was involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding

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[277] Id. 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.

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

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

[280] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id. at 326.

[281] Id. 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).

hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Since the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, since therefore there was no trial-like confrontation, and since 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.[282]

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,[283] but the cases in which the rulings were denied retroactive application involved preindictment lineups.[284] Nevertheless, in *Kirby v. Illinois*[285] the Court held that no right to counsel existed 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."[286] The

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[282] 413 U.S. at 317–21. On the due process standards of identification procedure, *see* infra p. 1752.

[283] 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).

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

[285] 406 U.S. 682, 689 (1972).

[286] Id. 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, a dissenter in *Wade* and *Gilbert*, dissented 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 coun-

Court's distinguishing of the underlying basis for *Miranda v. Arizona*[287] left that case basically unaffected by *Kirby*, but it appears that *Escobedo v. Illinois*,[288] and perhaps other cases, is greatly restricted thereby.

Post-Conviction Proceedings.—Counsel is required at the sentencing stage,[289] 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.[290] Beyond this stage, however, it would appear that the issue of counsel at hearings on the granting of parole or probation, the revocation of parole which has been imposed following sentencing, and prison disciplinary hearings will be determined according to due process and equal protection standards rather than by further expansion of the Sixth Amendment.[291]

Noncriminal and Investigatory Proceedings.—Commitment proceedings which lead to the imposition of essentially criminal punishment are subject to the due process clause and require the assistance of counsel.[292] 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.[293] 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

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sel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes).

[287] "[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. 688, (Emphasis by Court).

[288] "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." Id. at 689. *But see* id. at 693 n.3 (Justice Brennan dissenting).

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

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

[291] Counsel is not a guaranteed right in prison disciplinary proceedings. Wolff v. McDonnell, 418 U.S. 539, 560–70 (1974); Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976). Other cases are assembled infra under analysis of the Fourteenth Amendment due process clause.

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

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

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.[294]

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