

**2011 SUPPLEMENT TO**

**CASES & PROBLEMS IN CRIMINAL PROCEDURE: *THE COURTROOM***

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## CHAPTER 1: THE DECISION TO PROSECUTE

### **Add on page 24:**

In *U.S. v. Khanu*, [664 F.Supp.2d 28](#) (D.D.C. 2009), Khanu (a Muslim) co-owned nightclubs (called TAF) with three others (all Christian). The government charged Khanu – but not the others – with skimming money in order to evade paying federal taxes. Khanu moved to dismiss, claiming that the Government had chosen to prosecute him because of his religion. The court denied the motion:

On the issue of selectivity, Defendant claims that he alone, as a practicing Muslim, is being singled out for prosecution among the four co-owners of the nightclubs, the other three of whom are Ethiopian Christians. Defendant argues that these three co-owners of TAF are similarly situated to Defendant because they are alleged in the indictment to be co-conspirators.

Specifically, Defendant and the unindicted co-conspirators are all alleged to have conspired to skim cash from TAF's gross receipts to pay employees in cash, conceal their income from tax authorities, fail to report cash wages paid to employees, and file false corporate tax returns.

Despite engaging in similar conduct, however, only Defendant was charged. \* \* \* \*

The Court finds that Defendant has not met his burden to show that his alleged co-conspirators are similarly situated. The Government's contention that it indicted Defendant because he was more involved and took a leadership role in the conspiracy is supported both by the facts alleged in the indictment, which the Court must accept as true when considering a motion to dismiss, and by the written agreement among the co-conspirators, attached to the Government's brief in opposition, showing that Defendant had substantial control over TAF's operations. For example, according to the indictment, Defendant (but not his co-conspirators) improperly recorded skimmed cash on TAF's books as personal loans to and from himself rather than corporate receipts, further hiding his skimming from tax authorities and making it more difficult for the IRS to track his tax liabilities. Furthermore, the Agreement signed by the four co-owners of TAF in January 2002 naming Defendant as President of TAF explicitly provided Defendant with operational control of the enterprise. \* \* \* \*

Even if Defendant could show that he was singled out for prosecution, he must further show that his prosecution was motivated by a discriminatory purpose. In other words, Defendant must show that the Government is prosecuting him "because of" his religion. \* \* \* \*

Defendant's evidence of discriminatory purpose consists of press articles and reports from non-profit groups describing government profiling of Muslims, predominantly by the FBI, in the wake of the September 11, 2001 terrorist attacks, as well as the fact that Defendant, the only Muslim among his co-conspirators, appears to have been the only one actually investigated for tax crimes. According to the reports cited by Defendant, the FBI was specifically engaged in religious profiling of Muslims during the time that Defendant's searches occurred and has continued heightened surveillance against Muslims to this day. Defendant asserts that "there was a federal policy in place that had a discriminatory effect motivated by a discriminatory purpose." Even if Defendant's allegations of government profiling of Muslims are accepted as true, however, they do not provide any evidence that the decisionmakers in his case acted with a discriminatory purpose. Defendant's allegations of religious profiling overwhelmingly focus on the FBI and investigations related to terrorism, not tax evasion (except where related to potential terrorist activities). None of Defendants' "evidence" is targeted at the IRS, which Defendant

does not dispute is the agency with exclusive jurisdiction over tax crimes and the investigation here. Nor are there allegations targeted at prosecutors in either the U.S. Attorney's Office or the Justice Department's Tax Division, who have been primarily responsible for charging Defendant in this case. Although Defendant claims to have suffered from a government-wide discriminatory focus on Muslims, his supporting evidence is too far removed from the actual prosecuting authorities in this case to allow the Court to infer a discriminatory purpose. Because discretion is essential to the criminal process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.

Moreover, as the Government points out, Defendant has not proven that his prosecutors were aware of his religious affiliation. In order to selectively prosecute on the basis of religion, the government must have knowledge or at least suspect that an individual belongs to a particular sect. Defendant contends that "while the current prosecutors may have not knowledge of Mr. Khanu's religious affiliation, the government submitted no evidence that the investigators and prosecutors involved in the indictment of this case had no such knowledge." However, he does not even identify prior investigators who may have had such knowledge. It is Defendant's burden to make out his selective prosecution claim, and he has failed to even allege that those prosecuting and investigating him were aware of his religious affiliation. Therefore, Defendant has failed to show some evidence that his prosecution was motivated by a discriminatory purpose.

## CHAPTER 2: PRETRIAL RELEASE

### Add on page 62:

In *U.S. v. Peeples*, [630 F.3d 1136](#) (9<sup>th</sup> Cir. 2010), the court stated:

Passed by Congress in 2006, the Walsh Act amended the Bail Reform Act of 1984 to require that a defendant charged with certain listed crimes involving a minor victim, if released before trial, be placed on a prescribed minimum set of release conditions. As amended, the Bail Reform Act now requires that such a defendant (1) be placed on electronic monitoring; (2) “abide by specified restrictions on personal associations, place of abode, or travel”; (3) “avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense”; (4) “report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency”; (5) “comply with a specified curfew”; and (6) “refrain from possessing a firearm, destructive device, or other dangerous weapon.” 18 U.S.C. §3142(c)(1).

### Add on page 98, at end of Note 4:

In *U.S. v. Pool*, \_\_\_ F.3d \_\_\_, 2010 WL 3554049 (9<sup>th</sup> Cir. 2010), Pool argued that a statutory requirement that he give a DNA sample as a condition to pretrial release constituted an unreasonable search and seizure under the 4<sup>th</sup> Amendment. The court disagreed:

The magistrate found that the “judicial or grand jury finding of probable cause” was the “watershed event” that distinguished Pool from the general public and allowed for the application of the totality of the circumstances test. He noted that at this point, “defendant may be deprived of his very liberty; he can be subject to electronic monitoring; he may be ordered to obey a mandatory curfew.” Certainly, the magistrate is correct that at this point the government may, through the judiciary, impose conditions on an individual that it could not otherwise impose on a citizen. Thus, the determination that there is probable cause to believe Pool committed a federal felony, allows the application of the totality of the circumstances test.

Pool argues that the presumption of innocence to which he is entitled precludes the application of the totality of the circumstances test. This approach, however, was rejected by the Supreme Court in *Bell v. Wolfish*, [441 U.S. 520, 533](#) (1979), when it stated that the presumption of innocence “has no application to the determination of the rights of a pretrial detainee during confinement before his trial has ever begun.” Indeed, in *United States v. Salerno*, [481 U.S. 739, 749](#) (1987), the Supreme Court indicated that with a person's arrest the government may have grounds to limit the arrestee's rights. The Court noted:

Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. Finally, an arrestee may be incarcerated until trial if he presents a risk of flight or a danger to witnesses.

When Pool was brought before the magistrate in this case, whatever the prerequisite for the application of the totality of the circumstances test, that requirement was met. Accordingly, we turn to balancing the intrusion upon Pool's privacy against the government's legitimate interests.

### 1. *The Degree of Intrusion on Pool's Privacy*

Precedent establishes that the physical intrusion required to take a DNA sample is minimal. *Skinner v. Railway Labor Executives' Ass'n.*, [489 U.S. 602, 625](#) (1989) (“We said also that the intrusion occasioned by a blood test is not significant, since such tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.”) *Kriesel*, [508 F.3d at 948](#) (“The additional privacy implications of a blood test collecting DNA, as opposed to a cheek swab or other mechanism, do not significantly alter our analysis.”).

Pool’s greater concern, however, is not with the physical intrusiveness of the DNA testing, but with the intrusive nature of the information gathered by the government. The government, however, asserts that it only seeks to determine Pool’s identification. Indeed, it is doubtful that Pool, or any other individual having been indicted by a grand jury or having been subjected to a judicial determination of probable cause, has any right to withhold his or her true identification from the government. *See Kincade*, [379 F.3d at 837](#) (“the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity - otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense (indeed, once lawfully arrested and booked into state custody.)”); *Jones v. Murray*, [962 F.2d 302, 306](#) (4th Cir.1992) (“when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it”).

The government argues that by design and law, the collection of DNA is limited to individual identification. The 13 markers on the DNA which the government uses to identify the donor were purposely selected because they are not associated with any known physical or medical characteristics. In implementing the Act, the Department of Justice stated that DNA profiles are to be used for identification purposes. The statute imposes criminal and financial penalties for improper use of DNA samples, [42 U.S.C. §14135e](#)(c), and limits access to DNA materials, [42 U.S.C. §14133](#)(b)(1)(A)-(C). There are also provisions for the expungement of the DNA information if the defendant is acquitted or the felony charges are dismissed. [42 U.S.C. §14132](#)(d)(1)(A).

Pool and the amicus raise two objections. First, they argue that the DNA information collected could reveal much more than the person's identification. CODIS may focus on the junk DNA, but the DNA sample contains all of an individual's DNA. Pool is not comforted by the government's assurance that it will not look at other aspects of a person's DNA. Second, Pool posits that the government through the use of familial comparisons may suspect innocent people simply because their DNA has some strands that are similar to the defendant's DNA. Pool and the amicus assert that these arguments help distinguish DNA from fingerprints because fingerprints only identify an individual; they contain no information as to an individual's heritage or predilections.

Addressing Pool’s concerns in inverse order, it is not clear that familial comparisons raise a constitutional privacy issue or, if they do, whose interests are violated. The concern with familial comparisons or partial matching is that a review of CODIS may disclose an individual whose DNA does not match precisely to crime scene DNA from a perpetrator, but is close enough to create a probability that the perpetrator is a close relative to the identified individual. The familial match is not implicated: by definition the match is not perfect, so the government knows that the match is not the perpetrator. It is questionable whether the rights of the perpetrator (if ultimately identified through the use of familial comparisons) are violated. This seems somewhat

analogous to a witness looking at a photograph of one person and stating that the perpetrator has a similar appearance which leads the police to show the witness photos of similar looking individuals, one of whom the witness identifies as the perpetrator. It is questionable whether the person whose photograph helped focus the inquiry, or whose familial comparison helped focus the inquiry, has suffered any invasion of his or her constitutional right to privacy.

Pool's concerns about the government's potential use of DNA are understandable, but several factors mitigate those concerns. The DNA collection system was designed not to reveal genetic traits such as physical and medical characteristics. Although there is some scientific evidence to suggest that the "junk DNA" that is the focus of CODIS may contain information that is not "junk," this, at most, indicates that the government *might* be able to ascertain genetic traits from the 13 loci, not that it actually *could* do so. Second, even if appellant and amicus have shown that it is physically possible for the government to extract genetic traits from the 13 loci, there is no evidence that the government could legally do so without further legislation, or that the government has any intention of doing so. As noted, [42 U.S.C. §14133\(b\)](#) limits the present use of DNA information and the government asserts that Congress has prohibited the alteration of the core loci without prior notice and explanation to Congress.

Third, the plurality opinion in *Kincade* considered and rejected similar concerns as to the government's potential use of DNA information. The opinion noted:

But beyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If, and when, some future program permits the parade of horrors the DNA Act's opponents fear - unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics - we have every confidence that courts will respond appropriately.

As currently structured and implemented, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive-both in terms of the bodily intrusion it occasions, and the information it lawfully produces. [[379 F.3d at 837-38](#)]

Although *Kincade* dealt with the taking of DNA from convicted offenders, the plurality's determination that the information produced by CODIS is minimally invasive is applicable to this case. Furthermore, Pool has not offered any evidence that might undermine our determination in *Kincade*.

In sum, prior judicial decisions hold that the physical invasion of a buccal swab or even a blood prick is minimal and that Pool has little or no right to hide his identity from the government. The nature of the privacy invasion, however, is more difficult to evaluate because although CODIS is designed only to facilitate identity, Pool raises non-frivolous concerns that the government could use the DNA materials to determine genetic traits. Nonetheless, the plurality opinion in *Kincade* holds that the Act is "minimally invasive both in terms of the bodily intrusion it occasions, and the information it lawfully produces." [397 F.3d at 838](#). We conclude that Pool has not shown any greater intrusion on his privacy than did *Kincade*.

## 2. *The Government's Interests*

The government's interests in DNA samples for law enforcement purposes are well established. It is the most accurate means of identification available.<sup>FN9</sup> Furthermore, unlike fingerprint

evidence that requires that the perpetrator leave a discernable fingerprint at the scene of a crime, it is much more difficult for a perpetrator not to leave some DNA evidence at the scene of a crime. We have recognized the government's interests as “undeniably compelling” and “monumental.” *Kriesel*, [508 F.3d at 949](#).

In *Kriesel*, we addressed collecting DNA samples from felons on supervised release. Here, we must evaluate the government's interests in collecting a DNA sample after a probable cause determination rather than after a person's conviction. Nonetheless, the government's interests remain substantial. There is usually a lengthy period of time between an initial determination of probable cause and a person's trial (and even more time before a conviction becomes final after an unsuccessful appeal). During this period of time, the government has an interest in determining whether the individual may be released pending trial without endangering society and ensuring that he or she complies with the conditions of his or her release. The collection of a DNA sample allows the government to ensure that the defendant did not commit some other crime and discourages a defendant from violating any condition of his or her pretrial release.<sup>FN10</sup> In sum, many of the government's interests in collecting a DNA sample after a person's conviction are present at this earlier stage, with the possible exception of the particular needs that arise when the government confines an individual, but these needs are replaced by the equally legitimate concerns of knowing the identity of the person being released to the public and ascertaining and imposing conditions necessary to protect the public.

### 3. *The Balance*

If not at the time that a person is arrested, certainly once there has been a determination of probable cause to believe that an individual has committed a federal felony, the individual no longer has any “right” or legitimate expectation of keeping his or her identity from the government. In light of the government's legitimate interests in determining the true identity of the person, the balance between those rights and the individual's rights favors the government, at least where, as here, the purpose and the effect of requiring DNA are only to provide the government with the person's true identity.

Here, Pool does not really challenge that identity is the primary purpose of the Act. Rather, his concerns are that despite the government's disclaimer of other interests, the collection of DNA, by its very nature, provides the government access to intimate information concerning a person's genetic traits. We determine that in light of our precedent, these concerns do not outweigh the government's interests because Pool has not shown that (1) the government could, at this time, actually use the DNA information for arguably improper purposes, (2) the government could do so without further legislation, or (3) the government has any intent to so use the information. Guided by our opinion in *Kincade*, we apply the totality of the circumstances balancing test, and conclude that the government's legitimate interest in definitively identifying Pool outweighs the intrusion into his privacy.

Judge Lucero concurred:

Despite Pool's protestations to the contrary, at present CODIS DNA profiles are essentially useless for all but identification purposes. In this respect, they are quite similar to the information gained from fingerprinting and photographing - routine booking procedures.

Pool cites to several articles suggesting that so-called “junk DNA” may actually play an important biological function, including affecting how and when genes are expressed. Yet even these articles do not support Pool’s assertion: Although biologists are discovering functions for some types of ‘junk DNA,’ none have yet claimed that the forensic STRs do function. Even if the STRs used in CODIS contained some limited biological information, the same is true of fingerprints and photographs. As the majority opinion discusses, booking photographs might yield clues as to familial relationships. Such photographs necessarily contain information regarding an individual’s race, gender, and ethnic characteristics. Fingerprints, too, may correlate with certain traits. *See* Bert-Jaap Koops & Maurice Schellekens, *Forensic DNA Phenotyping: Regulatory Issues*, [9 Colum. Sci. & Tech. L.Rev. 158, 160 & n.4](#) (2008) (noting that fingerprint patterns may correlate with gender, homosexuality, ethnicity, and health conditions such as congenital heart disease).

Pool’s efforts to categorically distinguish the information contained in CODIS DNA profiles from that contained in fingerprints are ultimately unpersuasive. Although the historical basis for allowing fingerprinting is not entirely clear, the near universal acceptance of the practice casts a long shadow over this case. As Judge Augustus Hand opined in presaging the Court’s Fourth Amendment balancing jurisprudence by several decades: “Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community. The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest.” *United States v. Kelly*, [55 F.2d 67, 68](#) (2d Cir.1932). Pool has not provided a basis for weighing the interests in DNA profiling in a manner that is different from the interests involved in fingerprinting and photography.

Yet I stress that we do not purport to decide the hypothetical case in which a future litigant may demonstrate that CODIS loci do code for RNA, or that the number of repeats at CODIS loci yield information of a type unavailable in a fingerprint or a photograph; nor do we consider a case in which the nature of the genetic information stored in the CODIS database is changed from present practice. In such a case, a defendant’s interests could be vastly different. If that day arrives, a future court will conduct a totality-of-the-circumstances test anew. But for now, Pool’s CODIS profile reveals only his identity, and the majority rightly factors only Pool’s interest in that identity into its Fourth Amendment balancing.

Judge Schroeder dissented:

Because Pool’s privacy interests have not been diminished as a result of any conviction, the “intrusion” the government must justify is significant. The government seeks to seize, and indefinitely retain, not only individuals’ DNA profiles, but rather samples of individuals’ entire DNA. *See* [42 U.S.C. §14132\(b\)\(3\)](#); [73 Fed.Reg. 74,932-01, 74,937-38](#) (Dec. 10, 2008). These samples contain “massive amounts of personal, private data” including information about a “person’s health, propensity for particular disease, race and gender characteristics, and perhaps even propensity for certain conduct.” *Kincade*, [379 F.3d at 842](#) (Gould, J., concurring). The statute permits DNA samples to be disclosed to criminal justice agencies, in judicial proceedings, for criminal defense purposes, and even, if personally identifiable information is removed, for research purposes. [42 U.S.C. §14132\(b\)\(3\)](#).

The privacy concerns implicated by the seizure, and storage, of DNA material, and the personal information it contains, is certainly substantial. The concurring opinion makes much of the difference between DNA samples and DNA profiles, but it rightly acknowledges that the DNA sample, if fully analyzed, contains a vast amount of information. The concurring opinion

diminishes the significance of the fact that the government cannot seize a DNA profile; it must seize a DNA sample in order to create a profile. The seizure and indefinite storage of the sample, which is what that the government must justify under a Fourth Amendment exception, is very different from fingerprinting and other traditional booking procedures.

## CHAPTER 3: DISCOVERY

### Add on page 113:

*Brady* requires the prosecution to let defense counsel see any exculpatory evidence. But *when*? Is the night before trial begins early enough? See *Miller v. U.S.*, \_\_\_ A.3d \_\_\_, 2011 WL 721540 (D.C.Ct.App. 2011).

### Add on page 123:

In *Connick v. Thompson*, [131 S.Ct. 1350](#) (2011), Thompson was charged with murder. He chose not to testify at trial, because if he had, the prosecutor would have impeached him with a prior conviction for attempted armed robbery. The jury convicted him of murder and sentenced him to death. Thompson spent 18 years in prison, 14 of them on death row. A month before he was scheduled to be executed, his investigator found a lab report that the prosecutor had failed to show Thompson's attorney before the attempted armed robbery conviction. The lab report showed that the robber had Type B blood, while Thompson had Type O blood. Both the robbery conviction and the murder conviction were set aside because of the *Brady* violation. Thompson then sued the District Attorney, arguing (based on the requirements of prior cases) that this *Brady* violation was an "obvious consequence" of the District Attorney's failure to properly train his lawyers about what *Brady* required. The Supreme Court set aside the \$14 million jury verdict, holding that violations of *Brady* are not an "obvious consequence" of failing to give prosecutors in-house training re *Brady's* requirements, because the prosecutors *already* should have known about these requirements:

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules.

Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. Before Louisiana adopted continuing-education requirements, it imposed similar general competency requirements on its state bar.

Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's

standards. Prosecutors have a special “duty to seek justice, not merely to convict.” ABA Standards for Criminal Justice 3–1.1(c) (2d ed.1980). Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. ABA Model Rule of Prof. Conduct 3.8(d) (1984). An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment. ABA Model Rule of Prof. Conduct 8.4 (1984). \* \* \* \*

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the “obvious consequence” of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in the usual and recurring situations with which the prosecutors must deal. A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same “highly predictable” constitutional danger as *Canton's* untrained officer.

**Add to Note 1 on page 140:**

In *Davis v. Superior Court*, [186 Cal.App.4<sup>th</sup> 1272](#) (2010), Davis moved for an order compelling the prosecutor to disclose the name of a confidential informant who had been an eyewitness to the crime. The trial court denied the motion. The appellate court held: Disclosure occurs only if the defendant makes an adequate showing that the informant can give exculpatory evidence. What is known here is merely that the confidential informant claimed to have seen Davis shoot Ochoa and led the police to Davis's home. The defense is mistaken identity, and there is a dispute whether the shooter had a tattooed neck. Whether the confidential informant can give any evidence on mistaken identity and Davis's guilt that might exonerate him has not been established. Davis thus may be entitled to the opportunity to make such a showing at an in camera hearing, but he is not, at this stage in the proceedings, entitled to automatic disclosure. Rather, the balance between the public interest in protecting the flow of information to law enforcement officers and Davis's right to prepare his defense is struck by having an *in camera* hearing prior to any disclosure. \* \* \* \*

Although we leave the manner in which the in camera hearing is to be conducted to the trial court, we direct the court to take all precautions to protect the identity of the confidential informant.

## CHAPTER 4: THE PRELIMINARY HEARING

### **Add on page 208:**

In *Peterson v. California*, [604 F.3d 1166](#) (9<sup>th</sup> Cir. 2010), the court held that California's provisions allowing hearsay to be admitted at preliminary hearings did not violate the defendant's 6<sup>th</sup> Amendment right to confront witnesses against him:

As the preliminary hearing itself is not constitutionally required, it follows that there are no constitutionally-required procedures governing the admissibility of hearsay at preliminary hearings. \* \* \* \*

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. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

## CHAPTER 7: PLEA BARGAINING

### **Add on page 354:**

3. In *Crumb v. People*, [230 P.3d 726](#) (Colo. 2010), the court held that Crumb must be permitted to withdraw his guilty plea because of the trial judge's conduct:

The trial judge stepped out of his role as a fair and impartial arbiter by making participatory comments. These comments appear to have influenced the defendant's decision to reconsider his earlier rejection of the offered plea and his ultimate decision to plead guilty. The judge gave the defendant advice, saying "let me talk to you as a human being," and then pressured the defendant to accept a plea agreement by comparing the maximum sentence the defendant faced if convicted with a potentially more lenient sentence if the defendant accepted a plea agreement. The judge departed further from his judicial role by telling the defendant that he was "not going to be a happy judge" if no plea deal were reached. Given these participatory comments, we hold that the trial court abused its discretion by denying the defendant's motion to withdraw his guilty pleas.

### **Add on page 368:**

4. In *Norris v. State*, [896 N.E.2d 1149](#) (Ind. 2008), Norris moved to set aside his guilty plea on the ground that "newly discovered evidence" showed that he was not guilty. The court held that this is not a valid ground for setting aside a guilty plea:

Though this defendant now claims that new evidence would require that his conviction be vacated, we cannot harmonize this new position taken by the defendant with the fact that he originally admitted to committing the crime by his guilty plea. It is inconsistent to allow defendants who pleaded guilty to use post-conviction proceedings to later revisit the integrity of their plea in light of alleged new evidence seeking to show that they were in fact not guilty. Both his confession and his new claims cannot be true. A defendant knows at the time of his plea whether he is guilty or not to the charged crime. With a trial court's acceptance of a defendant's guilty plea, the defendant waives the right to present evidence regarding guilt or innocence. To reinforce his claim of newly discovered evidence that the defendant's sister (whose report to law enforcement which led to his arrest and the filing of charges) has now recanted, the defendant claims that such evidence would show that, because of his limited verbal and non-verbal skills, low intellectual functioning, and mild mental retardation, the defendant's sister "could convince him to say what she wanted him to say." A defendant may have recourse to post-conviction proceedings to seek a withdrawal of his guilty plea whenever the plea was not knowingly and voluntarily made. But here the defendant is not asserting a claim challenging the knowing and voluntary nature of his plea nor seeking to withdraw his plea. The defendant has already served his sentence of imprisonment and does not wish to set aside his guilty plea and proceed to trial, but rather seeks only to set aside and vacate his conviction. This was repeatedly confirmed by defense counsel during oral argument. The issue of whether the defendant's plea was knowing and voluntary is therefore not presented.

Justice Boehm disagreed with the majority's broad holding:

I agree with the majority that Norris has not shown that the post-conviction court erred in dismissing his petition. I do not agree with the majority that a guilty plea precludes a court from granting post-conviction relief on a claim of actual innocence. Any system of justice must allow for correction of injustice based on clear and convincing evidence of innocence, even if the defendant can be said to have contributed to his own plight by pleading guilty.

The easiest example of such circumstances is irrefutable physical evidence of innocence where the defendant pleaded to a lesser charge in the face of highly persuasive but not conclusive evidence of guilt of a crime carrying a far higher penalty. An example posited at oral argument in this case assumed a defendant charged with rape. The victim is intelligent and articulate, and identifies the defendant as the perpetrator without equivocation or hesitancy. She also testifies that she had intercourse with no one other than the perpetrator within the month preceding the crime, and that the sample taken from her by examiners is from the perpetrator. The defendant has no alibi, and faced with a Class A felony conviction, pleads guilty to a Class C battery felony. DNA technology now establishes to a virtual certainty that the sample did not come from the defendant. The State in oral argument seemed to concede these circumstances would establish a claim for relief despite a guilty plea. If a more persuasive example is needed, add to these facts a confession by a third party whose DNA turns out to match the sample from the victim's rape kit. I recognize that DNA presents special issues and may permit relief where other forms of evidence do not. I cite this example simply as a case that demonstrates that not all guilty pleas should be immunized from subsequent attack, regardless of whether the convincing evidence is derived from DNA testing.

The only basis for denying relief to a defendant presenting convincing evidence of innocence is the convenience of the system in avoiding having to sort out which of such claims is indeed of sufficient merit to permit the courts to entertain them. There is no doubt that all sorts of cases will arise where evidence not adduced at trial is claimed to demonstrate innocence. But in my view, where there is a very high degree of confidence that justice did indeed misfire, no civilized system of justice would deny all relief.

**Add on page 401, at end of Note 3:**

In *U.S. v. Leyva-Matos*, \_\_\_ F.3d \_\_\_, 2010 WL 363377 (10<sup>th</sup> Cir. 2010), defendant pleaded guilty, signing a waiver of his right to appeal. He then appealed, arguing that the government breached one of its. The court dismissed the appeal:

In determining whether Defendant's appellate waiver is enforceable, we consider three prongs: (1) whether this appeal falls within the scope of Defendant's waiver of his appellate rights; (2) whether Defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice. \* \* \* \*

Enforcement of an appellate waiver results in a miscarriage of justice only if (1) the district court relied on an impermissible factor such as race," (2) counsel provided ineffective assistance in connection with the negotiation of the waiver, (3) "the sentence exceeds the statutory maximum, or (4) the waiver itself is otherwise unlawful. \* \* \* \*

An appellate waiver is "otherwise unlawful" only if it seriously affects the fairness, integrity or public reputation of judicial proceedings. This exception looks to whether the *waiver* is otherwise unlawful, not to whether another aspect of the proceeding may have involved legal

error. An appeal waiver is not ‘unlawful’ merely because the claimed error would, in the absence of waiver, be appealable. To so hold would make a waiver an empty gesture. \* \* \* \*  
Nothing in this case indicates that the waiver itself is unlawful. Defendant bears the burden to demonstrate that enforcing the waiver would result in a miscarriage of justice, and he has not done so.

Judge Hartz dissented:

In his plea agreement he waived his right to appeal his sentence. But his promise not to appeal is not binding if the government first broke its promise to him. An appellate waiver is not enforceable if the Government breaches its obligations under the plea agreement.

**Add at end of chapter:**

**U.S. v. Morris**  
--- F.3d ----, 2011 WL 310728  
U.S. Court of Appeals, 9<sup>th</sup> Circuit, 2011

PER CURIAM:

The United States appeals from the district court's order dismissing an information against Wickett Morris filed pursuant to [21 U.S.C. §851](#). We reverse and remand.

On December 9, 2008, a grand jury charged Morris with possessing more than fifty grams of crack cocaine with intent to distribute it within 1000 feet of a public housing authority. On December 11, Morris was arrested.

[Section 851 of Title 21](#) requires a United States Attorney to file an information listing previous convictions before a district court may enhance a sentence based on an applicable drug felony. Morris had been convicted of a felony drug offense in 1997. In the absence of a properly filed information, Morris would be subject to a mandatory minimum sentence of ten years' imprisonment. In the event that the government filed a [§851](#) information listing the 1997 conviction, however, Morris would face a mandatory minimum sentence of twenty years' imprisonment.

At his December 18, 2008 detention hearing, the government made an offer to Morris's counsel, later spelled out as follows: The government would agree not to file an information if Morris agreed not to litigate the case, to plead guilty, and to cooperate as a witness in the upcoming murder and drug dealing trial of Dennis Cyrus, Jr., a leader of the gang with which Morris was associated. After receiving the government's proposal, Morris's counsel sought and received a delay in the detention hearing.

On January 23, 2009, the government met with Morris and his counsel. The government reiterated its proposal. The government also discussed relocation options for Morris if he felt endangered by cooperating. The Cyrus trial was approaching. The government told Morris to

respond by January 26, 2009. On the deadline date, counsel requested and received an extension until February 2, 2009.

On January 28, 2009, counsel attempted to visit Morris in detention. Morris refused to see him. The same day, counsel asked the government for more time because Morris wished to hire another attorney. The government declined the request and filed the §851 information shortly after the February 2 deadline passed.

On March 10, 2009, the grand jury issued a superseding indictment against Morris, which charged him and co-defendant Cynthia Jones with violating the same statutory provisions as before. The superseding indictment also charged that Morris and Jones had intent to distribute 50 grams or more of crack cocaine within 1000 feet of an elementary school. The government later filed a new information against Morris tied to the superseding indictment alleging a prior felony drug conviction in 1996.

The government had the option of filing an information against Jones because of her prior drug felony conviction. The government made an offer to Jones that mirrored the one previously made to Morris. Jones rejected the government's offer, and the government filed an information against her.

Jones then successfully moved the district court to strike the information in her case. The district court held that “the prosecutor's actions offend due process.” The court reasoned that the “prosecution's tactics short-circuited the truth-finding process” by requiring Jones to forfeit most of her rights from the start of proceedings. The district court further concluded that plea bargaining requires a “give-and-take” and that no give-and-take had taken place. The government had made “an offer to possibly make an offer - after defendant had forfeited her right against self-incrimination.”

Following Jones's lead, Morris also moved to strike the information in his case. The court granted his motion, incorporating the legal analysis from its order as to Jones. The court was “convinced that the nature of the ‘deal’ offered to Morris was essentially indistinguishable from that of the ‘deal’ offered to Jones.”

The government now appeals from the district court's order striking Morris's §851 information.

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court held that a prosecutor's decision to carry out a threat made during plea discussions does not violate the Due Process Clause. The prosecutor in *Bordenkircher* had offered to recommend a five-year sentence if the accused pled guilty to a one-count indictment. If the accused did not plead guilty, the prosecutor threatened to seek an indictment under the state's habitual criminal act, which would have subjected the accused to the risk of a mandatory life term. The Court reasoned that the prosecutor's actions did not offend due process because the prosecutor had “no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution.” *Id.* at 365.

*Bordenkircher* controls, and it is indistinguishable from the instant case. As in *Bordenkircher*, the government gave Morris the choice to plead guilty or face the possibility of much greater punishment based on his prior conviction. In both cases, the accused had lawyers to help them understand the consequences of the government's offers. *See id.* at 363 (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion ....”). When the accused did not agree to the terms, the government carried out its previous threats to double the potential sentence.

Unlike *Bordenkircher*, the government's offer was conditioned on Morris's testifying in another trial. But we have repeatedly held that deals conditioned on cooperation are permissible. The government premised the plea bargain on Morris giving up many rights, including his statutory right to seek release. Relinquishment of such rights is an acceptable part of most plea deals. *See United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir.1990) (“If it is not a due process violation for a defendant to waive constitutional rights as part of a plea bargain, then a defendant's waiver of a nonconstitutional right, such as statutory right to appeal a sentence, is also waivable.”). That the government made its offer at the outset of proceedings does not change our calculus. The government gave Morris several weeks to consider the offer from the time it was first made to Morris's counsel. The timeframe is not problematic. That Morris and the government negotiated little during this timeframe does not mean that the government deprived Morris of a protected right. *See Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“there is no constitutional right to plea bargain”).

We recognize that *Bordenkircher* requires a “give-and-take,” but this does not mean that the government must engage in an extensive series of back-and-forth negotiations for a plea offer to be valid. There is nothing fundamentally wrong with the prosecution's decision to present its best offer up front. Accordingly, under the circumstances of this case, we conclude that the government did not offend due process by extending a take it or leave it plea offer to Morris.

For these reasons, the district court's order dismissing the information is REVERSED and the case is REMANDED.

**U.S. v. Kent**  
U.S. Court of Appeals, 9<sup>th</sup> Circuit  
\_\_\_ F.3d \_\_\_, 2011 WL 383977 (2011)

GOULD, Circuit Judge:

Jay Kent's appeal of his conviction and sentence for drug distribution offenses requires us to decide two questions: First, once a defendant has stated before the district court his or her intention to enter a guilty plea, is it an abuse of that court's discretion to accept a prosecutor's filing of enhanced charges against the defendant? Second, does a prosecutor act with impermissible vindictiveness when he or she makes good on a plea bargaining threat to enhance charges against a defendant, despite the defendant's willingness to plead guilty unconditionally? Answering both questions in the negative, we affirm Kent's conviction and sentence.

Kent delivered 22.7 grams of crack cocaine to an FBI source on July 16, 2008, in San Francisco. He was arrested and charged by indictment for conspiring to possess with intent to distribute five grams or more of crack cocaine and possessing with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(iii), and 841(b)(1)(B)(iii). The Government did not initially file an information pursuant to 21 U.S.C. §851 alleging Kent's prior felony convictions, which filing would have very substantially raised the penalty range applicable to Kent's sentence, as it would be changed from between five and forty years, absent the prior felonies, to between ten years and life imprisonment.

After an initial exchange of discovery, Assistant United States Attorney Drew Caputo told Kent's attorney, Daniel Blank, that the Government sought Kent's cooperation as an informant as part of a plea agreement, and that the Government would file the §851 information if Kent pushed the case toward trial. Blank asked if the Government would file the §851 information if Kent agreed to plead guilty without cooperating as an informant. Caputo answered, according to Blank, that Caputo believed it would not.

Several days later, Blank left a voicemail message for Caputo conveying Kent's intention to plead unconditionally to the indictment, as well as Kent's lack of interest in a cooperation agreement. Caputo then called back to tell Blank that the Government intended to file the §851 information unless Kent agreed to cooperate, despite his willingness to plead guilty. Caputo next mailed a letter to Blank, dated February 10, 2009, memorializing the Government's position: We intend to file an information alleging your client's prior felony drug convictions unless Mr. Kent agrees to plead guilty pursuant to a plea agreement entered into with the United States. At present, the only plea agreement that the United States is prepared to contemplate entering into with your client is a cooperation agreement.

The United States characterizes this as an offer in the context of plea negotiations, but Blank argues that formal negotiations were never initiated, or, stated differently, that Blank never began negotiating a plea agreement.

Further communications between counsel occurred when they arrived for a status conference in the district court and before the district judge on February 25, 2009. Upon their arrival to court, Blank told Caputo that his client would, at that hearing, seek to enter an unconditional guilty plea. The advantage he sought to exploit in offering a surprise plea was to prevent the Government from enhancing charges against Kent by filing the §851 information.

Blank began the proceeding by saying, “Good afternoon, your Honor. Daniel Blank on behalf of Mr. Kent. Mr. Kent is in custody. He is hoping to plead today.” Within moments, Caputo unequivocally responded:

The United States is going to file right now an Information for increased punishment by reason of prior felony drug conviction under 21 United States Code Section 851. I'm handing the original to your Honor's deputy clerk. I'm handing a service copy to Mr. Blank, and I would ask that the Court arraign Mr. Kent on that 851 information in the sense of notifying him of the increased punishment that's specified in paragraph 5 of the information in advance of his entry of the open guilty plea.

In other words, Caputo sought to file, in court, a paper copy of the §851 information, which had not yet been filed electronically. Blank objected to the courtroom filing, and urged that the district court take Kent's plea before accepting the information. Blank proposed that the court allow the parties an opportunity to prepare briefs, after which the court would decide whether to accept filing of the information before entry of the plea. In a long colloquy with the attorneys, the court stated its view that filing was a party's unilateral act, accepted the information as filed, and instructed Caputo to deliver the document to the clerk's office for electronic docketing. Blank then opted to defer his client's plea until the parties had briefed whether the now-filed information should be struck.

The parties next appeared before the district court to present argument as to whether the §851 information should be struck for prosecutorial vindictiveness. Although it was not disputed that the Government filed the §851 information in response to Kent's stated intention to plead guilty unconditionally rather than pursuant to a cooperation agreement, the district court denied Kent's motion to strike the information. Months later, Kent, with the Government's consent, entered conditional guilty pleas, reserving his right to appeal the issues described above. At a subsequent hearing, the district court sentenced Kent to ten years imprisonment, which is the enhanced mandatory minimum sentence. Kent timely appealed. \* \* \* \*

We next address whether a prosecutor who carries out a plea bargaining threat to enhance charges against a defendant, despite the defendant's willingness to plead guilty unconditionally, acts with impermissible vindictiveness. \* \* \* \*

“A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir.2000) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). A defendant may establish vindictive prosecution (1) “by producing direct evidence of the prosecutor's punitive motivation,” *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir.2007), or (2) by showing that the circumstances establish a “reasonable likelihood of vindictiveness,” thus giving rise to a presumption that the Government must in turn rebut, *United States v. Goodwin*, 457 U.S. 368, 373 (1982).

The latter route is unavailable where a prosecutor enhances charges pretrial. *Id.* at 381-84. “When the additional charges are added during pretrial proceedings, vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.” *Gamez-Orduno*, 235 F.3d at 462. For good reasons, the Supreme Court has urged deference to pretrial charging decisions. “In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At the pretrial stage, the prosecutor's assessment of the proper extent of prosecution may not have crystalized.” *Goodwin*, 457 U.S. at 381. Also, in the plea negotiation context, the prosecutor's latitude to threaten harsher charges to secure a plea agreement advances the interest in avoiding trial shared by the prosecutor, defendant, and public. *Bordenkircher*, 434 U.S. at 363-64.

Finally, prompting prosecutors to file the harshest possible charges at the outset “would cause prejudice to defendants, for an accused ‘would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea.’” Allowing prosecutors the leeway at first to withhold more severe charges also spares defendants damage to their reputation that could result from the piling on of charges. For these reasons, the prosecutor's “initial charging decision should not freeze his or her future conduct.” *Goodwin*, 457 U.S. at 382.

We reject Kent's argument that pretrial charging decisions merit deference only when enhanced charges arise from the context of explicit plea negotiations. Our cases do not draw this distinction, and we are admonished against expanding the class of cases to which the vindictiveness presumption applies. Although enhanced charges will often accompany failed plea negotiations, prosecutors may add charges pretrial for any number of permissible reasons, such as coming to a new understanding of the crime or evidence. The Supreme Court has urged deference to a prosecutor's discretion to elevate charges in light of the pretrial “timing” of such conduct, not just its factual context. Thus, defendants challenging pretrial charging enhancements cannot avail themselves of a presumption of vindictiveness.

Kent's argument fails for a second reason: The enhanced charges in his case *did* arise in the plea negotiation context. By letter to Kent's attorney dated February 10, 2009, the Government made a plea offer, threatening to file the §851 information “unless Mr. Kent agrees to plead guilty pursuant to ... a cooperation agreement.” At the February 25th hearing, Kent effectively rejected this plea offer by stating his intention to enter an unconditional plea rather than cooperate. In response, the United States carried out its plea threat by filing the §851 information. Kent offers no authority for the untenable proposition that a defense attorney who does not respond to a written plea offer has unilaterally opted out of negotiations. Our cases suggest just the opposite. But even if we accept Kent's premise that he stopped short of engaging in plea negotiations, it does not alter the prosecutor's broad discretion to make a charging decision. As a general matter, prosecutors may charge and negotiate as they wish.

Although the pretrial enhancement of charges cannot give rise to a presumption of prosecutorial vindictiveness, a defendant may still establish vindictive prosecution by adducing direct evidence

that punitive motives precipitated the harsher charges. As a matter of law, the filing of additional charges to make good on a plea bargaining threat-as occurred here-will not establish the requisite punitive motive, however. “In the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.” *Bordenkircher*, 434 U.S. at 363.

Kent argues that a prosecutor may carry out a plea bargaining threat of enhanced charges only when a defendant has refused to plead guilty, not when he or she has rejected other Government conditions. Our precedent has rejected this position. In *United States v. North*, we stated, “The government may, in the course of plea bargaining, offer to reduce charges or threaten reindictment under more serious charges, and it may make good on either promise. *It may do the same in seeking cooperation in related prosecutions.*” 746 F.2d 627, 632 (9th Cir.1984). We reaffirm this rule.

We have sanctioned the conditioning of plea agreements on acceptance of terms apart from pleading guilty, including waiving appeal, *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir.1990), disclosing evidence, *United States v. Acuna*, 9 F.3d 1442, 1445 (9th Cir.1993), providing testimony, *Morris v. Woodford*, 273 F.3d 826, 836 (9th Cir.2001), and cooperating as an informant against others, *United States v. Gardner*, 611 F.2d 770, 773 (9th Cir.1980). If prosecutors may permissibly demand these conditions, it follows that they may make good on threats to enhance charges if these conditions are not accepted. *See United States v. Stanley*, 928 F.2d 575, 579 (2d Cir.1991) (“So long as the defendant was free to accept or reject the prosecutor's offer, the prosecutor may carry out his threat.” (citing *Bordenkircher*, 434 U.S. at 363-65)). We hold that a prosecutor who, in the plea negotiation context, threatens enhanced charges to induce a defendant's cooperation as an informant may carry out that threat if the defendant declines to cooperate, regardless of the defendant's willingness to plead guilty unconditionally to the lesser charges.

“Under our system of separation of powers, the decision whether to prosecute, and the decision as to the charge to be filed, rests in the discretion of the Attorney General or his delegates, the United States Attorneys.” *United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir.1986). “A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.” *Goodwin*, 457 U.S. at 382. “Due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights.” *Wasman*, 468 U.S. at 568. The record here is devoid of evidence that the Government, in filing the §851 information, was motivated by vindictiveness toward Kent.

AFFIRMED.

## CHAPTER 6: THE RIGHT TO SPEEDY TRIAL

### **Add on page 293:**

In *Bloate v. U.S.*, [130 S.Ct. 1345](#) (2010), the Court held that the time granted to a party to prepare a pretrial motion is *not automatically* excluded from the Act's 70-day time limit to bring a case to trial. That time may be excluded only if the trial court determines in the particular case that the "ends of justice" are served better by the continuance than getting the case tried quickly.

In *U.S. v. Burrell*, [634 F.3d 284](#) (5<sup>th</sup> Cir. 2011), defendant's trial began more than 70 days after he was indicted. The Government argued that this failure should be excused by "the absence or unavailability of an essential witness."

Prior to the trial's scheduled November 5 commencement, the Government moved for a continuance because one of the arresting officers, Nathan Crawford — who allegedly overheard the defendant's confession of his possession of a firearm — would be unavailable to testify because of a prior commitment. The Government argued that this circumstance justified the unavailable essential witness and ends of justice exclusions to the speedy trial clock. The substance of the Government's motion read in full:

Deputy Nathan Crawford is unavailable to testify at the trial of this matter scheduled for November 5, 2008, due to previously scheduled official commitments, described in more detail below.

The United States has subpoenaed East Baton Rouge Parish Sheriff Deputy Nathan Crawford as a witness. Deputy Crawford was present for the arrest of the defendant, was first to approach and confront him, and ultimately heard the confessions of the defendant. Deputy Crawford is an essential witness regarding the approaching trial.

Deputy Crawford currently serves as a member of the East Baton Rouge Parish Sheriff's Office's SWAT Team. Due to man power staffing shortages and recent personnel losses, Deputy Crawford is the only "Less-lethal" instructor remaining among Sheriff's Department's staff. Routine certifications are required and Deputy Crawford's current certification will expire before another class is offered. The Sheriff's Department has already paid, on behalf of Deputy Crawford, the approximate \$4,000 cost for tuition and hotel accommodations. Should Deputy Crawford not re-certify at this opportunity, his current certification will expire and the Sheriff's Department will be without properly credentialed persons thereby placing its rating in jeopardy. In light of the above, the United States submits that Deputy Crawford is an essential witness who is unavailable for the November 5, 2008, trial and requests that the period of delay from the requested continuance be deemed excludable under the Speedy Trial Act. See 18 U.S.C. §3161(h)(3)(A)-(B).

The United States further submits that due to the necessity and urgency of his recertification, the ends of justice served by the requested continuance outweigh the best interest of the public and the defendant in a speedy trial. The United States therefore requests that the period of delay from the requested continuance be deemed excludable under the Speedy Trial Act on these grounds as well. See 18 U.S.C. §3161(h)(8)(A). \* \* \* \*

Here, the Government did not present any evidence that it made reasonable efforts to secure Deputy Crawford's presence at the scheduled trial dates. Unlike in *Patterson*, where the

Government called a United States marshal to establish that it had attempted to secure the witness's presence at the scheduled trial but found that it would be an unreasonable "hardship" to do so, in this case, the Government put on no testimony and introduced no evidence explaining why it could not arrange for Deputy Crawford to testify at Burrell's trial. The government repeatedly failed to present any evidence to explain why, through reasonable efforts, transportation could not be arranged to bring its witness to trial. In fact, the record is devoid of any evidence, or even mention, regarding where Deputy Crawford's re-certification course was located, its hours of operation, or its attendance policies, and thus, it is impossible to even surmise whether it would have been reasonably feasible for Deputy Crawford to be brought from the training facility to the court to testify without interfering with his completion of the program. Relatedly, the record does not indicate that the Government ever contacted the course administrators to explain the circumstances and determine whether there was any way in which Deputy Crawford could both testify and complete the re-certification course. Therefore, because the Government failed to present any evidence showing that Deputy Crawford's presence could not be secured through its reasonable efforts, it has not shown that his presence could not be obtained through due diligence. Thus, we conclude that the unavailable essential witness exclusion under 18 U.S.C. §3161(h)(3) cannot apply in this case. This conclusion also dictates that the ends of justice exclusion under 18 U.S.C. §3161(h)(7) cannot apply.

**CHAPTER 8:  
THE JURY VENIRE**

**Add to Note 7 on page 426:**

The Court applied *Duren* in *Berghuis v. Smith*, [130 S.Ct. 1382](#) (2010).

## CHAPTER 9: THE JURY PANEL

### Add on page 483:

9. In *State v. Tody*, [316 Wis.2d 689](#) (2009), trial judge Eaton posed a general inquiry to the 12 prospective jurors:

[THE COURT]: Is there anyone among you who is a member of any police department, sheriff's department, or other law enforcement agency? Any of you have relatives employed in a law enforcement related capacity? Ms. Eaton, do you have a relative employed in the law enforcement related capacity?

MS. EATON: The judge.

THE COURT: I like to consider myself part of law enforcement or I may be disowned. You are related to me how?

MS. EATON: Your mother.

The prosecutor briefly questioned the judge's mother about whether she thought that her relationship with the judge would interfere with her duties as a juror:

[Prosecutor]: Mrs. Eaton, I know you're the judge's mother, do you feel comfortable sitting on a trial where he's the judge but he's not party in the case?

MS. EATON: I don't think it makes any difference.

[Prosecutor]: Doesn't make any difference one way or the other to you? You have no opinion about the defendant's guilt or innocence?

MRS. EATON: I know nothing about it.

Defense counsel also questioned the judge's mother:

[Defense counsel]: Boy, Ms. Eaton, do I have a lot of questions for you. Seriously. Do you feel you could be a fair and impartial juror? Would you have to explain to His Honor Judge Eaton, let's say you voted for a verdict of not guilty, would you feel you would have to explain or justify why you voted that way?

MS. EATON: No.

[Defense counsel]: Would it be fair to say you come in here completely with an independent mind and you're without being influenced by the fact that His Honor Judge Eaton holds a very high office?

MS. EATON: Well, I feel like the jury makes the decision, he isn't part of the decision making. No.

[Defense counsel]: That's right and you'll be part of the jury, if you're retained as a juror you'll be one of twelve of the jury.

MS. EATON: Right.

Defense counsel then challenged Ms. Eaton for cause, because he “was particularly worried that the other jurors might give undue weight to the opinion of the judge's mother due to her personal relationship with the Court.” But Judge Eaton rejected the challenge, stating “I don't think I have any legal basis for excusing her.”

The Wisconsin Supreme Court reversed:

We conclude that the circuit court judge's mother was objectively biased under the standards set forth in our case law. The judge's mother has an interest in the case, namely her familial relationship with the judge, that is extraneous to the evidence on which the jury is to base its decision. A reasonable person in the position of the judge's mother would not have been able to set aside her relationship to the presiding judge when discharging her duties as a juror. Neither the judge nor the judge's mother made comments demonstrating more than a generalized admiration for law enforcement. Neither person disparaged criminal defendants or criminal defense attorneys. Indeed, when defense counsel asked the prospective jurors whether they disagreed with his view that an acquittal can be “just as much law enforcement as a conviction,” the judge's mother kept silent with the rest of the jurors in the pool. Furthermore, the mother's presence may have a potential impact on the trial proceedings or the jury's deliberations. Counsel may be reluctant to challenge the circuit court's adverse rulings with ordinary zeal if one of the jurors whom counsel needs to persuade happens to be an immediate family member of the presiding judge. The other jurors may tend to give the deference to the judge's mother that they are presumed to give to the judge. Finally, a close and familial link between the judge and a juror is not congruent with one of the basic purposes underlying the constitutional guarantee of trial by an impartial jury. The United States Supreme Court has recognized that the federal constitution, as well as the constitutions of the many states, provides for trial by jury in criminal cases in large part to protect against the abuses of judges. The presence of a member of the judge's immediate family on the jury seems conspicuously inconsistent with the jury's function as, in part, a check upon the power of the judge.

In these circumstances, a circuit court need not search for evidence of bias to protect a defendant's right to a fair trial. A presiding judge's mother as a juror is a special circumstance so fraught with the possibility of bias that objective bias must be found regardless of the particular juror's assurances of impartiality.

10. In *Harris v. Commonwealth*, \_\_\_ S.W.3d \_\_\_, 2010 WL 2016524 (2010), a *married couple* was seated in the jury box.

Arguing that these jurors would not be independent but would unduly influence each other and also that they would find it difficult not to discuss the case as it was proceeding, Harris moved to

have one member of each couple randomly selected and dismissed. The trial court denied the motion at that point in time, ruling instead that the couples could be questioned and if their answers confirmed Harris's concerns one member of the couple could then be removed. During general voir dire, Harris referred to these couples and asked them whether they would not find it difficult to refrain from discussing the case as it was going on. Both couples gave assurance, however, that they would be able to abide by the admonition not to discuss the case.

After conviction, the Kentucky Supreme Court affirmed:

No presumption of undue influence or lack of independence arises from the fact of marriage alone. While a trial court would be within its discretion to avoid even the possibility of impropriety posed by married jurors by dismissing one or the other, the trial court did not abuse its discretion here by postponing its decision on Harris' motion to dismiss until after the married jurors had been questioned. Harris's failure to renew his motion after voir dire in effect waived the issue, but in any event, since the jurors' responses included nothing that would have compelled a dismissal, the trial court cannot be said to have abused its discretion by permitting jurors 28 and 29 both to serve on Harris's jury.

11. In *State v. Speer*, [925 N.E.2d 584](#) (Ohio 2010), after the victim died in a boating incident, defendant was charged with involuntary manslaughter. The prosecution intended to introduce into evidence an audio tape of a phone call Speer made regarding the incident.

During voir dire, a venireman, Linda Leow-Johannsen, told the court that she suffered from a hearing impairment, explaining that she could hear voices, but could not understand spoken words without reading the speaker's lips. She admitted that she might miss information if the speaker did not face her and that she would "have a problem" if counsel played an audio tape. Knowing that the state intended to present an audio recording during its case-in-chief, the court nonetheless denied Speer's motion to excuse her for cause, stating that it would accommodate her impairment by permitting her to sit where she could see the faces of the witnesses and by telling her to advise the court if she missed anything. The court further arranged for her to read the court reporter's real-time transcription of the audio tape.

As part of its case-in-chief, the state played the audio tape recording of the 9-1-1 call for the jury; Leow-Johannsen read the court reporter's real-time transcription of it as it played.

During opening and closing arguments, the prosecutor urged jurors to consider the "calm tone" of Speer's voice and his demeanor during the 9-1-1 call as evidence of his guilt.

The Ohio Supreme Court reversed Speer's conviction:

Despite the efforts of the trial court to accommodate Leow-Johannsen, Speer did not receive a fair trial. Regrettably, the accommodation made by the trial court in this instance could not help Leow-Johannsen to effectively perceive or evaluate Speer's demeanor, detect any slurred speech or the lack of it, or consider the loudness or softness of his voice, the patterns of his speech, his tone-whether excited, calm, or passive - or the inflections of the voices on the 9-1-1 tape.

The right to a fair trial requires that all members of the jury have the ability to understand all of the evidence presented, to evaluate that evidence in a rational manner, to communicate effectively with other jurors during deliberations, and to comprehend the applicable legal principles as instructed by the court. An accommodation made to enable a physically impaired individual to serve as a juror must afford a fair trial to the accused.

A hearing impairment by itself does not render a prospective juror incompetent to serve on a jury, but when the accommodation afforded by the court fails to enable the juror to perceive and evaluate the evidence, an accused cannot receive a fair trial. To avoid such situations, a trial court must determine whether reasonable accommodations will enable an impaired juror to perceive and evaluate all relevant and material evidence, and when no such accommodation exists, the court must excuse the juror for cause.

Here, both the state and the defense relied on the 9-1-1 tape as evidence relevant to whether Speer had committed the charged offenses. The state suggested that Speer's "calm tone" and his "demeanor on the 9-1-1 tape" provided evidence of his guilt. Speer's defense counsel denied the state's contention that Speer had operated his craft under the influence of alcohol by pointing out that the 9-1-1 tape did not show Speer slurring his speech at the time of the call. Leow-Johannsen's hearing impairment directly affected her ability to perceive and evaluate that evidence because she only read the colloquy from a real-time transcription.

Further, the accommodation made by the trial court in this case of allowing Leow-Johannsen to read the court reporter's transcript did not provide her any means to effectively discern the demeanor, speech patterns, voice inflections, or excitement or lack of it as reflected in the voice modulations or other audio clues on the 9-1-1 tape. Because she could not perceive whether there was urgency in Speer's voice, whether he slurred his speech, or whether he sounded deceptive or hesitant, she could not include such evaluations in rendering her verdict.

Therefore, the trial court abused its discretion in denying Speer's challenge of her for cause. Her impairment directly prevented her from completely evaluating the specific evidence from the 9-1-1 recording presented in this case and relied on by both the state and the defense. Although promoting access to the courts is and should be a primary concern for the judiciary, the trial court's paramount duty is to ensure that the accused is afforded a fair trial.

## CHAPTER 11: DOUBLE JEOPARDY

### Page 643:

*People v. Taylor* was overruled in *People v. Superior Court (Sparks)*, [48 Cal.4<sup>th</sup> 1](#) (2010): Occasional inconsistent jury verdicts are inevitable in our criminal justice system. If a verdict regarding one participant in alleged criminal conduct is inconsistent with other verdicts, all of the verdicts may stand. *Standefer v. United States* (1980) 447 U.S. 10. Accordingly, a verdict regarding one defendant has no effect on the trial of a different defendant. Courts should determine the propriety of a prosecution based on that prosecution's own record, not a different record. Nonmutual collateral estoppel does not apply to verdicts in criminal cases. \* \* \* \*  
Applying the doctrine of nonmutual collateral estoppel would have another unfortunate effect on the criminal justice system. Because no criminal defendant can be bound by an adverse factual finding in a trial in which that defendant did not participate, retention of nonmutual collateral estoppel in criminal cases creates what we might call a one-way ratchet. That is, if the first coconspirator to be tried receives a favorable verdict, that verdict, if given collateral estoppel effect, ratchets down the potential punishment for other defendants whose trials might follow; in contrast, because nonmutual collateral estoppel would apply against the prosecution but not against any defendant, if the first coconspirator received an unfavorable verdict, additional defendants would still be fully eligible to argue for acquittal or a lesser punishment. All defendants may thus receive the benefit of the most favorable verdict any jury might render (provided they time their trials correctly). Nothing in our jury system suggests such a scale-tipping is either compelled or beneficial. A rule that can extend the effect of an erroneous acquittal to all persons who participated in the criminal enterprise might undermine the system more than accepting the potential for inconsistent verdicts.

### Add on page 656, at end of Note 5:

In *U.S. v. Muhlenbruch*, [634 F.3d 987](#) (8<sup>th</sup> Cir. 2011), based on evidence that defendant had downloaded images of child pornography onto his computer, he was convicted of both receiving child pornography and possessing child pornography. The court held that these were the “same offense”:  
Proof of receiving child pornography under §2252(a)(2) necessarily includes proof of illegal possession of child pornography under §2252(a)(4)(B), and Congress did not intend to impose multiplicitous punishment for these offenses.

### Page 666: Replace *Commonwealth v. Balog* with:

**RENICO v. LETT**  
United States Supreme Court  
[130 S.Ct. 1855](#) (2010)

Chief Justice ROBERTS delivered the opinion of the Court.

This case requires us to review the grant of a writ of habeas corpus to a state prisoner under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), [28 U.S.C. §2254\(d\)](#). The District Court in this case issued the writ to respondent Reginald Lett on the ground that his Michigan murder conviction violated the Double Jeopardy Clause of the Constitution, and the U.S. Court of Appeals for the Sixth Circuit affirmed. In doing so, however, these courts misapplied AEDPA's deferential standard of review. Because we conclude that the Michigan Supreme Court's application of federal law was not unreasonable, we reverse.

## I

On August 29, 1996, an argument broke out in a Detroit liquor store. The antagonists included Adesoji Latona, a taxi driver; Charles Jones, a passenger who claimed he had been wrongfully ejected from Latona's cab; and Reginald Lett, a friend of Jones's. After the argument began, Lett left the liquor store, retrieved a handgun from another friend outside in the parking lot, and returned to the store. He shot Latona twice, once in the head and once in the chest. Latona died from his wounds shortly thereafter.

Michigan prosecutors charged Lett with first-degree murder and possession of a firearm during the commission of a felony. His trial took place in June 1997. From jury selection to jury instructions the trial took less than nine hours, spread over six different days.

The jury's deliberations began on June 12, 1997, at 3:24 p.m., and ran that day until 4 p.m. After resuming its work the next morning, the jury sent the trial court a note—one of seven it sent out in its two days of deliberations - stating that the jurors had “a concern about our voice levels disturbing any other proceedings that might be going on.” Later, the jury sent out another note, asking “What if we can't agree? Mistrial? Retrial? What?”

The trial transcript does not reveal whether the judge discussed the jury's query with counsel, off the record, upon receiving this last communication. What is clear is that at 12:45 p.m. the judge called the jury back into the courtroom, along with the prosecutor and defense counsel. Once the jury was seated, the following exchange took place:

“THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?”

“THE FOREPERSON: [Identified herself.]”

“THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?”

“THE FOREPERSON: Yes, there is.”

“THE COURT: All right. Do you believe that it is hopelessly deadlocked?”

“THE FOREPERSON: The majority of us don't believe that-

“THE COURT: (Interposing) Don't say what you're going to say, okay?

“THE FOREPERSON: Oh, I'm sorry.

“THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

“THE FOREPERSON: (No response)

“THE COURT: Yes or no?

“THE FOREPERSON: No, Judge.”

The judge then declared a mistrial, dismissed the jury, and scheduled a new trial for later that year. Neither the prosecutor nor Lett's attorney made any objection.

Lett's second trial was held before a different judge and jury in November 1997. This time, the jury was able to reach a unanimous verdict - that Lett was guilty of second-degree murder-after deliberating for only 3 hours and 15 minutes.

Lett appealed his conviction to the Michigan Court of Appeals. He argued that the judge in his first trial had announced a mistrial without any manifest necessity for doing so. Because the mistrial was an error, Lett maintained, the State was barred by the Double Jeopardy Clause of the U.S. Constitution from trying him a second time. The Michigan Court of Appeals agreed with Lett and reversed his conviction.

The State appealed to the Michigan Supreme Court, which reversed the Court of Appeals. The court explained that under our decision in *United States v. Perez*, [9 Wheat. 579](#), 6 L.Ed. 165 (1824), a defendant may be retried following the discharge of a deadlocked jury, even if the discharge occurs without the defendant's consent. There is no Double Jeopardy Clause violation in such circumstances, it noted, so long as the trial court exercised its “sound discretion” in concluding that the jury was deadlocked and thus that there was a “manifest necessity” for a mistrial. The court further observed that, under our decision in *Arizona v. Washington*, [434 U.S. 497](#) (1978), an appellate court must generally defer to a trial judge's determination that a deadlock has been reached.

After setting forth the applicable law, the Michigan Supreme Court determined that the judge at Lett's first trial had not abused her discretion in declaring the mistrial. The court cited the facts that the jury “had deliberated for at least four hours following a relatively short, and far from complex, trial,” that the jury had sent out several notes, “including one that appears to indicate that its discussions may have been particularly heated,” and -“most important” - “that the jury foreperson expressly stated that the jury was not going to reach a verdict.”

Lett petitioned for a federal writ of habeas corpus. Again he argued that the trial court's declaration of a mistrial constituted an abuse of discretion because there was no manifest necessity to cut short the jury's deliberations. He further contended that the Michigan Supreme Court's rejection of his double jeopardy claim amounted to "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," and thus that he was not barred by AEDPA, [28 U.S.C. §2254\(d\)\(1\)](#), from obtaining federal habeas relief. The District Court agreed and granted the writ. On appeal, a divided panel of the U.S. Court of Appeals for the Sixth Circuit affirmed. The State petitioned for review in our Court, and we granted certiorari.

## II

It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so - the applicable standard on direct review. The question under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was "an unreasonable application of clearly established Federal law." §2254(d)(1).

We have explained that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, [529 U.S. 362, 410](#) (2000). Indeed, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, that application must be "objectively unreasonable." *Id.* at 409. This distinction creates "a substantially higher threshold" for obtaining relief than *de novo* review. *Schiro v. Landrigan*, [550 U.S. 465, 473](#) (2007). AEDPA thus imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, [521 U.S. 320, 333](#) (1997), and "demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, [537 U.S. 19, 24](#) (2002).

The "clearly established Federal law" in this area is largely undisputed. In *Perez*, we held that when a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial for the defendant before a new jury. We explained that trial judges may declare a mistrial "whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity" for doing so. The decision to declare a mistrial is left to the "sound discretion" of the judge, but "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."

Since *Perez*, we have clarified that the "manifest necessity" standard "cannot be interpreted literally," and that a mistrial is appropriate when there is a "high degree" of necessity. *Washington, supra*, at 506. The decision whether to grant a mistrial is reserved to the "broad discretion" of the trial judge, a point that "has been consistently reiterated in decisions of this Court." *Illinois v. Somerville*, [410 U.S. 458, 462](#) (1973).

In particular, “the trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court.” *Washington*, [434 U.S. at 510](#). A “mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict has been long considered the classic basis for a proper mistrial.” *Id.* [at 509](#).

The reasons for “allowing the trial judge to exercise broad discretion” are “especially compelling” in cases involving a potentially deadlocked jury. *Washington*, [434 U.S. at 509](#). There, the justification for deference is that “the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate.” *Id.* [at 510](#). In the absence of such deference, trial judges might otherwise “employ coercive means to break the apparent deadlock,” thereby creating a “significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.” *Id.* [at 510](#).

This is not to say that we grant *absolute* deference to trial judges in this context. *Perez* itself noted that the judge's exercise of discretion must be “sound”, and we have made clear that “if the record reveals that the trial judge has failed to exercise the ‘sound discretion’ entrusted to him, the reason for such deference by an appellate court disappears.” *Washington*, [434 U.S. at 510](#). Thus “if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.” *Ibid.* Similarly, “if a trial judge acts irrationally or irresponsibly, his action cannot be condoned.” *Id.* [at 514](#).

We have expressly declined to require the “mechanical application” of any “rigid formula” when trial judges decide whether jury deadlock warrants a mistrial. We have also explicitly held that a trial judge declaring a mistrial is not required to make explicit findings of “manifest necessity” nor to “articulate on the record all the factors which informed the deliberate exercise of his discretion.” *Washington, supra*, [at 517](#). And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse. In 1981, then-Justice Rehnquist noted that this Court had never “overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the ‘manifest necessity’ standard had not been met.” *Winston v. Moore*, [452 U.S. 944, 947](#). The same remains true today, nearly 30 years later.

The legal standard applied by the Michigan Supreme Court in this case was whether there was an abuse of the “broad discretion” reserved to the trial judge. This type of general standard triggers another consideration under AEDPA. When assessing whether a state court's application of federal law is unreasonable, “the range of reasonable judgment can depend in part on the nature of the relevant rule” that the state court must apply. *Yarborough v. Alvarado*, [541 U.S. 652, 664](#) (2004). Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably*, it follows that “the more general the rule” at issue - and thus the greater the potential for reasoned disagreement among fair-minded judges - “the more leeway state courts have in reaching outcomes in case-by-case determinations.” *Ibid.*

### III

In light of all the foregoing, the Michigan Supreme Court's decision in this case was not unreasonable under AEDPA, and the decision of the Court of Appeals to grant Lett a writ of habeas corpus must be reversed.

The Michigan Supreme Court's adjudication involved a straightforward application of our longstanding precedents to the facts of Lett's case. The court cited our own double jeopardy cases - from *Perez* to *Washington* - elaborating upon the “manifest necessity” standard for granting a mistrial and noting the broad deference that appellate courts must give trial judges in deciding whether that standard has been met in any given case. It then applied those precedents to the particular facts before it and found no abuse of discretion, especially in light of the length of deliberations after a short and uncomplicated trial, the jury notes suggesting heated discussions and asking what would happen “if we can't agree,” and - “most important” - “the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict.” In these circumstances, it was reasonable for the Michigan Supreme Court to determine that the trial judge had exercised sound discretion in declaring a mistrial.

The Court of Appeals for the Sixth Circuit concluded otherwise. It did not contest the Michigan Supreme Court's description of the objective facts, but disagreed with the inferences to be drawn from them. For example, it speculated that the trial judge may have misinterpreted the jury's notes as signs of discord and deadlock when, read literally, they expressly stated no such thing. It further determined that the judge's brief colloquy with the foreperson may have wrongly implied a false equivalence between “mere disagreement” and “genuine deadlock,” and may have given rise to “inappropriate pressure” on her to say that the jury would be unable to reach a verdict. The trial judge's mistakes were so egregious, in the Court of Appeals' view, that the Michigan Supreme Court's opinion finding no abuse of discretion was not only wrong but objectively unreasonable.

The Court of Appeals' interpretation of the trial record is not implausible. Nor, for that matter, is the more inventive (surely not “crude”) speculation of the dissent. After all, the jury only deliberated for four hours, its notes were arguably ambiguous, the trial judge's initial question to the foreperson was imprecise, and the judge neither asked for elaboration of the foreperson's answers nor took any other measures to confirm the foreperson's prediction that a unanimous verdict would not be reached.<sup>FN2</sup>

FN2. We do not think it reasonable, however, to contend that “the foreperson had no solid basis for estimating the likelihood of deadlock.” She had, after all, participated in the jury's deliberations.

But other reasonable interpretations of the record are also possible. Lett's trial was not complex, and there is no reason that the jury would necessarily have needed more than a few hours to deliberate over his guilt. The notes the jury sent to the judge certainly could be read as reflecting substantial disagreement, even if they did not say so outright. Most important, the

foreperson expressly told the judge-in response to her unambiguous question “Are you going to reach a unanimous verdict, or not?” - that the jury would be unable to agree.

Given the foregoing facts, the Michigan Supreme Court's decision upholding the trial judge's exercise of discretion - while not necessarily correct - was not objectively unreasonable.<sup>FN3</sup> Not only are there a number of plausible ways to interpret the record of Lett's trial, but the standard applied by the Michigan Supreme Court - whether the judge exercised sound discretion - is a general one, to which there is no “plainly correct or incorrect” answer in this case. The Court of Appeals' ruling in Lett's favor failed to grant the Michigan courts the dual layers of deference required by AEDPA and our double jeopardy precedents.

FN3. It is not necessary for us to decide whether the Michigan Supreme Court's decision - or, for that matter, the trial judge's declaration of a mistrial - was right or wrong. The latter question, in particular, is a close one. As Lett points out, at a hearing before the Michigan Court of Appeals, the state prosecutor expressed the view that the judge had in fact erred in dismissing the jury and declaring a mistrial. The Michigan Supreme Court declined to accept this confession of error, and in any event - for the reasons we have explained - whether the trial judge was right or wrong is not the pertinent question under AEDPA.

In concluding that Lett is not entitled to a writ of habeas corpus, we do not deny that the trial judge could have been more thorough before declaring a mistrial. As the Court of Appeals pointed out, she could have asked the foreperson additional followup questions, granted additional time for further deliberations, or consulted with the prosecutor and defense counsel before acting. Any of these steps would have been appropriate under the circumstances. None, however, was required - either under our double jeopardy precedents or, by extension, under AEDPA.

AEDPA prevents defendants - and federal courts - from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts. Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice STEVENS, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER joins as to Parts I and II, dissenting.

At common law, courts went to great lengths to ensure the jury reached a verdict. Fourteenth-century English judges reportedly loaded hung juries into oxcarts and carried them from town to town until a judgment “bounced out.” Less enterprising colleagues kept jurors as *de facto* “prisoners” until they achieved unanimity. The notion of a mistrial based on jury deadlock did not appear in Blackstone's Commentaries; it is no surprise, then, that colonial juries virtually always returned a verdict. Well into the 19th and even the 20th century, some American judges

continued to coax unresolved juries toward consensus by threatening to deprive them of heat, sleep, or sustenance or to lock them in a room for a prolonged period of time.

Mercifully, our legal system has evolved, and such harsh measures are no longer tolerated. Yet what this history demonstrates - and what has not changed - is the respect owed “a defendant's valued right to have his trial completed by a particular tribunal.” *Wade v. Hunter*, [336 U.S. 684, 689](#) (1949). Our longstanding doctrine applying the Double Jeopardy Clause attests to the durability and fundamentality of this interest.

“The reasons why this ‘valued right’ merits constitutional protection are worthy of repetition.” *Arizona v. Washington*, [434 U.S. 497, 503](#).

“Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Id.* at 503-505.

“The underlying idea is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, [355 U.S. 184, 187-188](#).

We have come over the years to recognize that jury coercion poses a serious threat to jurors and defendants alike, and that the accused's interest in a single proceeding must sometimes yield “to the public's interest in fair trials designed to end in just judgments,” *Wade*, [336 U.S. at 689](#); and we have therefore carved out exceptions to the common-law rule. But the exceptions are narrow. For a mistrial to be granted at the prosecutor's request, “the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one.” *Washington*, [434 U.S. at 505](#). A judge who acts *sua sponte* in declaring a mistrial must similarly make sure, and must enable a reviewing court to confirm, that there is a “manifest necessity” to deprive the defendant of his valued right.

In this case, the trial judge did not meet that burden. The record suggests that she discharged the jury without considering any less extreme courses of action, and the record makes quite clear that she did not fully appreciate the scope or significance of the ancient right at stake. The Michigan Supreme Court's decision rejecting Reginald Lett's double jeopardy claim was just as clearly in error.

## I

No one disputes that a “genuinely deadlocked jury” is “the classic basis” for declaring a mistrial or that such declaration, under our doctrine, does not preclude reprosecution; what is

disputed in this case is whether the trial judge took adequate care to ensure the jury was genuinely deadlocked. A long line of precedents from this Court establishes the “governing legal principles,” *Williams v. Taylor*, [529 U.S. 362, 413](#) (2000), for resolving this question. Although the Court acknowledges these precedents, it minimizes the heavy burden we have placed on trial courts.

The fountainhead decision is *United States v. Perez*, [9 Wheat. 579](#), 6 L.Ed. 165 (1824).” Writing for a unanimous Court, Justice Story articulated a “manifest necessity” standard that continues to govern the double jeopardy analysis for mistrial orders:

“We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.”

This passage, too, is worthy of repetition, because in it the *Perez* Court struck a careful balance. The Court established the authority of trial judges to discharge the jury prior to verdict, but in recognition of the novelty and potential injustice of the practice, the Court subjected that authority to several constraints: The judge may not declare a mistrial unless “there is a manifest necessity for the act” or “the ends of public justice” so require; and in determining whether such conditions exist, the judge must exercise “sound discretion,” “conscientiousness,” and “the greatest caution,” reserving the discharge power for “urgent circumstances” and “very plain and obvious causes.” *Ibid.* What exact circumstances and causes would meet that bar, the Court declined to specify. Recognizing that trial proceedings may raise innumerable complications, so that “it is impossible to define” in advance all of the possible grounds for “interference,” the Court set forth general standards for judicial conduct rather than categorical rules for specific classes of situations.

The seeds of our entire jurisprudence on the permissibility of retrial following an initial mistrial are packed into this one passage. Later Courts have fleshed out *Perez*, without making significant innovations or additions. Justice Story's formulation has been “quoted over and over again to provide guidance in the decision of a wide variety of cases,” *Washington*, [434 U.S. at 506](#), and it has been “consistently adhered to by this Court in subsequent decisions.”

Thus, we have repeatedly reaffirmed that the power to discharge the jury prior to verdict should be reserved for “extraordinary and striking circumstances”; that the trial judge may not take this “weighty” step, unless and until he has “scrupulously” assessed the situation and “taken care to assure himself that it warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal,” *United States v. Jorn*, [400 U.S. 470, 485](#); that, to

exercise sound discretion, the judge may not act “irrationally,” “irresponsibly,” or “precipitately” but must instead act “deliberately” and “carefully;” and that, in view of “the elusive nature of the problem,” mechanical rules are no substitute in the double jeopardy mistrial context for the sensitive application of general standards, *Jorn*, [400 U.S. at 485](#) The governing legal principles in this area are just that – principles - and their application to any particular set of facts entails an element of judgment.

As the Court emphasizes, we have also repeatedly reaffirmed that trial judges have considerable leeway in determining whether the jury is deadlocked, that they are not bound to use specific procedures or to make specific findings, and that reviewing courts must accord broad deference to their decisions. But the reviewing court still has an important role to play; the application of deference “does not, of course, end the inquiry.” “In order to ensure that the defendant’s constitutional interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised ‘sound discretion’ in declaring a mistrial.” “If the record reveals that the trial judge has failed to exercise the ‘sound discretion’ entrusted to him, the reason for deference by an appellate court disappears.” *Id.* at 510. And while trial judges need not follow any precise regimen to facilitate appellate review, they must at least take care to ensure that “the basis for a mistrial order is adequately disclosed by the record.”

Our precedents contain examples of judicial action on both sides of the line. We have, for instance, allowed a second trial when the jurors in the first trial, after 40 hours of deliberation, “announced in open court that they were unable to agree,” and no “specific and traversable facts” called their deadlock into question. *Logan v. United States*, [144 U.S. 263, 298](#) (1892). We have likewise permitted reprosecution when the initial judge heard “extended argument” from both parties on the mistrial motion, acted with evident “concern for the possible double jeopardy consequences of an erroneous ruling,” and “accorded careful consideration to the defendant’s interest in having the trial concluded in a single proceeding.” *Washington*, [434 U.S. at 501, 515](#).

On the other hand, we have barred retrial when the first judge acted “abruptly,” cutting off the prosecutor “in midstream” and discharging the jury without giving the parties an opportunity to object. *Jorn*, [400 U.S. at 487](#). And we have opined that, while trial judges have considerable leeway in deciding whether to discharge the jury, “we resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.” *Downum*, [372 U.S. at 738](#).

## II

The Court accurately describes the events leading up to this trial judge’s declaration of mistrial, but it glides too quickly over a number of details that, taken together, show her decisionmaking was neither careful nor well considered. If the “manifest necessity” and “sound discretion” standards are to have any force, we must demand more from our trial courts.

It is probably fair to say that this trial was not especially complex, but neither was it a trivial affair. Lett was charged with the most serious of crimes, first-degree murder, as well as

possession of a firearm during the commission of a felony. He faced a potential sentence of life imprisonment if convicted. Seventeen witnesses provided testimony over the course of 10 calendar days.

The jury's first period of deliberation on Thursday afternoon lasted less than 40 minutes. "The jury likely spent" that brief session "doing little more than electing a foreperson." The jury deliberated a few more hours on Friday morning prior to discharge. During that time, it sent the trial court seven notes. Most were inconsequential, routine queries. The first note on Friday morning raised "a concern about the jurors' voice levels," but nothing in the record relates this concern to the substance or tenor of their discussion. At 12:27 p.m., the jury sent the fateful missive, asking: "What if we can't agree? Mistrial? Retrial? What?" Seconds later, still at 12:27 p.m., the jury sent another note: "What about lunch?"

At 12:45 p.m., the trial judge initiated a colloquy with the foreperson that concluded in the mistrial declaration. Even accounting for the imprecision of oral communication, the judge made an inordinate number of logical and legal missteps during this short exchange. It does not take much exegetical skill to spot them.

The judge began by stating: "I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time." This "conclusion" was a non sequitur. The note asked what would happen *if* the jury could not agree; it gave no indication that the jury had *already* reached an irrevocable impasse. The judge ignored the request for information that the note actually contained. Instead, she announced that deadlock was the jury's "situation at this time," thereby prejudging the question she had ostensibly summoned the foreperson to probe: namely, whether the jury was in fact deadlocked.

The judge continued: "I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?" As the Federal Court of Appeals observed, this question "improperly conflated deadlock with mere disagreement." Deadlock is a "condition or situation in which it is impossible to proceed or act; a complete standstill." 4 Oxford English Dictionary 290 (2d ed.1989). Disagreement among jurors is perfectly normal and does not come close to approaching the "imperious necessity" we have required for their discharge. *Downum*, [372 U.S. at 736](#).

The trial judge then modulated her inquiry: "Do you believe the jury is hopelessly deadlocked?" The foreperson was in the midst of replying, "The majority of us don't believe that -" when the judge appears to have cut her off. One cannot "fault the trial judge" for wanting "to preserve the secrecy of jury deliberations," but two aspects of the foreperson's truncated reply are notable. First, it "tends to show that the foreperson did not feel prepared to declare definitively that the jury was hopelessly deadlocked." If she had been so prepared, then it is hard to see why she would begin her response with a descriptive account of the "majority" viewpoint.

Second, the foreperson's reply suggests the jury may have been leaning toward acquittal. Admittedly, this is crude speculation, but it is entirely possible that the foreperson was in the process of saying, "The majority of us don't believe that he's guilty." Or: "The majority of us don't believe that there is sufficient evidence to prove one of the counts." (On retrial, Lett was

convicted on both counts.) These possibilities are, I submit, linguistically more probable than something like the following: “The majority of us don't believe that Lett is guilty, whereas a minority of us believe that he is - *and we are hopelessly deadlocked on the matter.*” And they are logically far more probable than something along the lines of, “The majority of us don't believe that we will ever be able to reach a verdict,” as the foreperson had been given no opportunity to poll her colleagues on this point. Yet only such implausible endings could have supported a conclusion that it was manifestly necessary to discharge the jury.FN14

FN14. Another reading of the foreperson's reply is available: Her statement, “The majority of us don't believe that,” may have been a complete sentence. In other words, she may have meant to convey, “The majority of us don't believe that we are hopelessly deadlocked.” The trial-court transcript places an em dash rather than a period after the word “that,” but this is hardly dispositive evidence of intonation or intent. However, the trial judge's contemporaneous reaction, the fact that the foreperson was not permitted to consult with the other jurors on the issue of deadlock, and respondent's failure to advance this reading undercut its plausibility.

The judge then steered the conversation back to the issue of deadlock, asking: “Are you going to reach a unanimous verdict, or not?” After the foreperson hesitated, the judge persisted: “Yes or no?” The foreperson replied: “No, Judge.” Two aspects of this interchange are also notable. First, the judge's question, though “very direct,” was “actually rather ambiguous,” because it gave the foreperson no temporal or legal context within which to understand what was being asked. “The foreperson could have easily thought the judge meant, ‘Are you going to reach a unanimous verdict in the next hour?’ or ‘before the lunch recess?’ or ‘by the end of the day?’” Even if the foreperson assumed no time constraint, she could have easily thought the judge meant, “Are you, in your estimation, *more likely than not* to reach a unanimous verdict?” An affirmative answer to that question would likewise fall far short of manifest necessity.

Second, the foreperson's hesitation suggests a lack of confidence in her position. That alone ought to have called into question the propriety of a mistrial order. But the judge bore down and demanded an unqualified answer, “ ‘Yes or no.’ ” Most of the time when we worry about judicial coercion of juries, we worry about judges pressuring them, in the common-law manner, to keep deliberating until they return a verdict they may not otherwise have chosen. This judge exerted pressure so as to prevent the jury from reaching any verdict at all. In so doing, she cut off deliberations well before the point when it was clear they would no longer be fruitful. Recall that prior to summoning the foreperson for their colloquy, the trial judge gave her no opportunity to consult with the other jurors on the matter that would be discussed. So, the foreperson had no solid basis for estimating the likelihood of deadlock. Recall, as well, that almost immediately after sending the judge a note asking what would happen if they disagreed, the jury sent a note asking about lunch. Plainly, this was a group that was prepared to go on with its work.

The judge then declared a mistrial on the spot. Her entire exchange with the foreperson took three minutes, from 12:45 p.m. to 12:48 p.m. The entire jury deliberations took roughly four hours. The judge gave the parties no opportunity to comment on the foreperson's remarks, much less on the question of mistrial. Fed. Rule Crim. Proc. 26.3 (“Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the

order, to state whether that party consents or objects, and to suggest alternatives”). Just as soon as the judge declared a mistrial, she set a new pretrial date, discharged the jury, and concluded proceedings. By 12:50 p.m., everyone was free to take off for the weekend.

In addition to the remarkable haste, and inexplicable abruptness, with which she acted, it is remarkable what the trial judge did not do. Never did the trial judge consider alternatives or otherwise provide evidence that she exercised sound discretion. For example, the judge did not poll the jurors, give an instruction ordering further deliberations, query defense counsel about his thoughts on continued deliberations, or indicate on the record why a mistrial declaration was necessary. Nor did the judge invite any argument or input from the prosecutor, make any findings of fact or provide any statements illuminating her thought process, follow up on the foreperson's final response, or give any evident consideration to the ends of public justice or the balance between the defendant's rights and the State's interests. The manner in which this discharge decision was made contravened standard trial-court guidelines. The judge may not have had a constitutional obligation to take any one of the aforementioned measures, but she did have an obligation to exercise sound discretion and thus to “assure herself that the situation warranted action on her part foreclosing the defendant from a potentially favorable judgment by the tribunal.” *Jorn*, [400 U.S. at 486](#).

Add all these factors up, and I fail to see how the trial judge exercised anything resembling “sound discretion” in declaring a mistrial, as we have defined that term. Indeed, I fail to see how a record could disclose much less evidence of sound decisionmaking. Within the realm of realistic, nonpretextual possibilities, this mistrial declaration was about as precipitate as one is liable to find. Despite the multitude of cases involving hung-jury mistrials that have arisen over the years, neither petitioner nor the Court has been able to identify any in which such abrupt judicial action has been upheld. Even the prosecutor felt compelled to acknowledge that the trial court's decision to discharge the jury “clearly was error.”

The Michigan Supreme Court's contrary conclusion was unreasonable. The court suggested that an abuse of discretion should only be found “when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof.” Finding that the record in this case “provides sufficient justification for the mistrial declaration,” the court concluded that the declaration constituted a permissible exercise of judicial discretion. The court listed, without explaining, several reasons for this conclusion. The jury “had deliberated for at least four hours following a relatively short, and far from complex, trial”; it “had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated”; the parties did not object to the mistrial order; and, “most important,” “the jury foreperson expressly stated that the jury was not going to reach a verdict.”

These reasons do not suffice to justify the mistrial order. Four hours is not a long time for jury deliberations, particularly in a first-degree murder case. Indeed, it would have been “remarkable” if the jurors “could review the testimony of all the witnesses in the time they were given, let alone conclude that they were deadlocked.” The jury's note pertaining to its volume level does not necessarily indicate anything about the “heatedness” of its discussion. “There is no other suggestion in the record that such was the case, and the trial judge did not draw that

conclusion.” Although it would have been preferable if Lett had tried to lodge an objection, defense counsel was given no meaningful opportunity to do so - the judge discharged the jury simultaneously with her mistrial order, counsel received no advance notice of either action, and he may not even have been informed of the content of the jury's notes. Counsel's failure to object is therefore legally irrelevant. And, as detailed above, the foreperson's remarks were far more equivocal and ambiguous, in context, than the Michigan Supreme Court allowed.

### III

The Court does not really try to vindicate the Michigan Supreme Court on the merits, but instead ascribes today's outcome to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The foregoing analysis shows why the Michigan Supreme Court's ruling cannot be saved by [28 U.S.C. §2254\(d\)\(1\)](#), however construed. That ruling was not only incorrect but also unreasonable by any fair measure. \* \* \* \*

#### **Add on page 676:**

#### **3. Is revocation of parole “punishment”?**

In *State v. Haagenson*, [356 Mont. 177](#) (2010), defendant was convicted of drug offenses and sentenced to 10 years in prison – with 7 years suspended on condition that he obey laws and not consume alcohol. After serving about a year and a half of his prison term, he was released on parole – also on condition that he obey laws and not consume alcohol. Later, he was arrested for committing a homicide while drunk. The state then sought to revoke parole and also revoke the suspension of the sentence. The court held that double jeopardy did not bar the imposition of both remedies:

Various federal courts have determined that revocation of parole, probation, or supervised release is a penalty attributable to the original conviction, not a new punishment, and that the Fifth Amendment's Double Jeopardy Clause, therefore, is not implicated by such revocation. These courts have reasoned that a term of parole, probation, or supervised release replaces a portion of a sentence of imprisonment and is a part of the original sentence. A revocation proceeding, in turn, is a purely administrative action designed to determine whether a parolee or probationer has violated the conditions of his parole or probation, not a proceeding designed to punish a criminal defendant for violation of a criminal law. By engaging in prohibited conduct (criminal or not) during the term of parole, probation, or supervised release, the offender triggers a condition that permits modification of the terms of his original sentence. Revocation thus amounts only to a modification of the terms of the defendant's original sentence, and does not constitute punishment for the revocation-triggering offense.

Likewise, under Montana law, a term of conditional release or suspension of sentence is in lieu of a term of imprisonment and is a part of the original sentence. Parole is a privilege and not a right; and since it is granted as a matter of grace, the State may offer such grace under and subject to such conditions as it considers most conducive to accomplish the desired purpose. The same is true of a suspension of sentence: It is a discretionary act of grace by a district court, which may be made subject to such reasonable conditions as the court deems necessary. The decision to grant conditional release or to suspend a sentence is a decision to forego complete denial of liberty by incarceration in favor of a supervised period of restricted liberty in the hope

that the purposes of rehabilitation of defendant and the protection of the public can be achieved by the lesser deprivation of liberty. An offender on conditional release or under a suspended sentence thus lives with the knowledge that a fixed sentence for a definite term hangs over him. Revocation of a suspended sentence indicates a determination by the court that the purposes of rehabilitation are not being served by the suspension, and revocation of conditional release reflects a similar determination by the Board of Pardons and Parole. Revocation leaves the offender subject to execution of the original sentence as though he had never been given conditional release or a suspension of sentence. But “a revocation proceeding is not a criminal adjudication, does not require proof of a criminal offense, does not impose punishment for any new offense, and is an act in the performance of the duty of supervision of conditional liberty. Based on the foregoing, we hold that a revocation of parole or probation does not constitute a punishment for double jeopardy purposes under the Fifth Amendment or Article II, Section 25. Rather, it is a supervisory act involving the enforcement of conditions imposed on a term of parole or probation. Upon the demonstration of a probation violation, the sentencing court may modify the offender's original sentence by replacing the term of probation with imprisonment. Likewise, upon the demonstration of a parole violation, the Board of Pardons and Parole may simply return the offender to prison. This is not a “punishment”; rather it is a forfeiture of a conditional privilege previously granted by the State as a matter of grace. Thus, the same act or acts may form the basis for revoking both an offender's parole and his ensuing suspended sentence, without contravening the Double Jeopardy Clauses.

## CHAPTER 12: SENTENCING

**Add on page 782:**

**Wilson v. Knowles**  
U.S. Court of Appeals, 9<sup>th</sup> Circuit  
\_\_\_ F.3d \_\_\_, 2011 WL 383961 (2011)

NOONAN, Circuit Judge:

Rick Wilson appeals the denial of his petition for a writ of habeas corpus. Holding that the California courts violated Wilson's right to due process under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), we reverse the judgment of the district court and remand.

In 1993, Wilson pleaded no contest to gross vehicular manslaughter while driving under the influence of alcohol in violation of [California Penal Code §191.5\(a\)](#), and to proximately causing bodily injury while driving under the influence of alcohol in violation of [California Vehicle Code §23153\(b\)](#). There was a preliminary hearing but no trial. He was sentenced to a total of one year of imprisonment to be served in a residence for the treatment of addiction.

Both convictions resulted from a single accident. Wilson had driven with his girlfriend Deborah Horvat from Reno, Nevada into California. At some point, Horvat gave Wilson the keys and asked him to drive. They picked up a hitchhiker, John Haessley, along the way. Wilson had been drinking and drove at a high rate of speed. The car veered off the road and flipped over. Haessly was killed, and Horvat was injured.

In the latest case, Wilson was convicted by a jury of driving under the influence with a prior felony conviction. *See* [Cal. Veh.Code §§23152\(a\), 23550.5](#). The trial judge found this conviction to be Wilson's third strike under [California Penal Code §667\(b\)-\(i\)](#). The judge found that the 1993 convictions counted as the first and second strikes. He sentenced Wilson to imprisonment for 25 years to life.

The prosecutor had introduced numerous documents, including the information and preliminary hearing transcript from 1993, to establish that the conviction for injuring Horvat should count as a strike. The trial judge examined this evidence and announced: “So I feel the evidence presented does satisfy me that-and I'll make additional findings as well that the prior conviction alleged for felony driving under the influence of alcohol with personal infliction with great bodily injury alleged as first prior conviction within the meaning of 667(b) through 667(i) and 1170.12, that that allegation is true.”

The California Court of Appeal affirmed Wilson's sentence. Justice Rushing dissented and would have found that the trial court violated *Apprendi*. Wilson presented the issue to the state supreme court, which denied his petition for review on the merits. Wilson then sought federal habeas relief. The district court denied his petition, holding that “there is no ‘clearly established’ federal right to jury trial in determining the legal significance of a prior conviction.”

Wilson appeals.

We review a district court's denial of a habeas petition de novo. We review the state court's ruling under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) because Wilson filed his petition after AEDPA entered into effect. We may grant habeas relief only if the state court's decision was “contrary to, or involved an unreasonable application of” clearly established Supreme Court precedent, or “was based on an unreasonable determination of the facts.” 28 U.S.C. §2254(d)(1)-(2).

The Supreme Court held in *Apprendi* that, except for the fact of a prior conviction, any facts that increase a defendant's sentence beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. The trial judge in this case found three additional facts about the 1993 accident that increased Wilson's sentence to 25 years to life: First, that Wilson *personally* inflicted bodily injury on Horvat; second, that the injury was *great*; and third, that the victim was not an accomplice. These facts weren't necessary to Wilson's conviction, and there was no purpose in challenging them at the time. The issue is whether these findings fell within the prior conviction exception.

Courts may reasonably disagree about the precise boundaries of the exception. *See* For example, it isn't clearly established whether a judge may find the fact that a defendant was on probation at the time of an earlier conviction. But it would be unreasonable to read *Apprendi* as allowing a sentencing judge to find the kinds of disputed facts at issue here - such as the extent of the victim's injuries and how the accident occurred. Those are not historical, judicially noticeable facts; they require a jury's evaluation of witnesses and other evidence. Nor did Wilson have any reason to contest them when he was convicted in 1993. *See Apprendi, 530 U.S. at 488* (emphasizing importance of procedural safeguards during earlier proceeding). The judge's factfinding years later extended beyond any reasonable interpretation of the prior conviction exception.

The fallback position of the government is that the error was harmless. To make that argument work, the government imagines what would have happened if in 1993 Wilson had been charged with the infliction of great bodily injury and gone to trial. But we really don't know what would have happened. Wilson might have created reasonable doubt as to whether Horvat caused the accident by grabbing the steering wheel or acted as an accomplice by giving a drunk Wilson her keys. Wilson might also have successfully challenged the prosecution's evidence about the extent of Horvat's injuries. No court could now look at the disputed facts about an accident seventeen years ago and conclude beyond a reasonable doubt that Wilson would have been convicted of personally inflicting great bodily injury.

For these reasons, the judgment of the district court is REVERSED and the case is REMANDED.

Chief Judge KOZINSKI, dissenting:

The Supreme Court held in *Apprendi* that the government must submit to a jury, and prove beyond a reasonable doubt, any fact that exposes a criminal defendant to a higher range of

penalties. But it also carved out an exception: A judge may find “the fact of a prior conviction.” Courts have since debated and disagreed about the scope of the exception, and the Supreme Court hasn't stepped in to draw a clear line for us.

It's hard to believe that the Sixth Amendment permits a sentencing judge to find disputed facts about what happened during a defendant's prior offense. This is especially true when the defendant had no reason to challenge them at the time of the original conviction. Here, for example, there was no doubt Horvat suffered bodily injuries. Any cross-examination of the victim about the extent of those injuries would have served no purpose, wasted the judge's time and ensured he heard the victim describe her pain and suffering one more time before sentencing. The original court records thus provide incomplete information, and it's impossible for a judge today to know that a jury would have found that Horvat's injuries were “great.” Wilson may have also raised reasonable doubt as to whether he *personally* inflicted the injuries on a *non-accomplice*: Although he had little incentive to develop the record, there was at least some evidence that Horvat directly caused the accident by grabbing the wheel and that she encouraged Wilson to drive drunk.

But, under AEDPA, Wilson must point to a Supreme Court holding clearly establishing that a judge may not find facts about the offense underlying his prior conviction. Read literally, *Apprendi* itself seems to limit judges to finding the mere *fact* of the prior conviction. But courts have sometimes read the exception more expansively. *See, e.g., United States v. Santiago*, 268 F.3d 151, 156 (2d Cir.2001) (Sotomayor, J.) (“In short, we read *Apprendi* as leaving to the judge ... the task of finding not only the mere fact of previous convictions but other related issues as well. Judges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the ‘who, what, when, and where’ of a prior conviction.”). The Supreme Court hasn't straightened all this out. The best we've been able to say is that the Court's uncertain precedent “strongly *suggests* that the exception does not extend to any and all facts related to a prior conviction.” *Butler v. Curry*, 528 F.3d 624, 644 (9th Cir.2008). This means that, as of 2008, we concluded that there was no clearly established Supreme Court authority as to whether the exception applies to anything other than the fact of conviction. The law certainly wasn't clearly established when Wilson's sentence became final five years earlier. Nor was the state court's rejection of Wilson's claim on these facts an objectively unreasonable application of the ambiguous language in *Apprendi* itself.

AEDPA deference can be a bitter pill to swallow. In some habeas cases, we must reject what appear to us to be valid constitutional claims because the defendant's rights have not yet been clearly established by the Supreme Court. This is such a case.

## CHAPTER 13: APPEALS

### Add on page 804:

In *Jackson v. Virginia*, [443 U.S. 307](#) (1979), the Court held that a conviction based on “a total want of evidence” violates the Due Process Clause of the 14<sup>th</sup> Amendment: “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

In *U.S. v. Nevils*, [598 F.3d 1158](#) (9<sup>th</sup> Cir. 2010), the court held: Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, which requires a court of appeals to determine whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson* thus establishes a two-step inquiry for considering a challenge to a conviction based on sufficiency of the evidence. First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. This means that a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial. Rather, when “faced with a record of historical facts that supports conflicting inferences” a reviewing court “must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”

Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow “any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” This second step protects against rare occasions in which “a properly instructed jury may convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.” More than a “mere modicum” of evidence is required to support a verdict. At this second step, however, a reviewing court may not “ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt,” only whether “any” rational trier of fact could have made that finding.

Because the government does not need to rebut all reasonable interpretations of the evidence that would establish the defendant's innocence, or “rule out every hypothesis except that of guilt beyond a reasonable doubt” at the first step of *Jackson*, a reviewing court may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal. Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. At this second step, we must reverse the verdict if the evidence of innocence, or lack of evidence of guilt, is such that all rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt. \* \* \* \*

Although *Jackson* requires the reviewing court initially to construe all evidence in the favor of the government, the evidence so construed may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt.

Moreover, the evidence construed in favor of the government may be insufficient to establish every element of the crime.

**Add on page 797, at end of Note 6:**

In *Mosley v. State*, [908 N.E.2d 599](#) (Ind. 2009), the court held that *Anders* withdrawals will not be permitted in Indiana:

Overall *Anders* is cumbersome and inefficient. An attorney who withdraws pursuant to *Anders* must still review the record, complete at least some legal research, consult and advise the client, and draft a brief for submission to the Court of Appeals. If all this is done, the attorney may as well submit it for the purposes of an ordinary appeal. Furthermore, the Court of Appeals must conduct a full examination of all the proceedings to determine if there are any meritorious issues. Any saving of time and effort by counsel in preparing an *Anders* brief is offset by increased demands on the judiciary, which is to some extent placed in the precarious role of advocate. And if the reviewing court finds any meritorious issues, even more time and money must be spent in substituting new counsel and starting the appeal all over again. Requiring counsel to submit an ordinary appellate brief the first time - no matter how frivolous counsel regards the claims to be - is quicker, simpler, and places fewer demands on the appellate courts.

An *Anders* brief also raises issues of fairness. An *Anders* withdrawal prejudices an appellant and compromises his appeal by flagging the case as without merit, which invites perfunctory review by the court. The result is to jeopardize receptive and meaningful appellate review. *But see People v. Wende*, [25 Cal.3d 436](#) (1979) (finding that an *Anders* withdrawal may secure an appellant more comprehensive review by the appellate court). We understand the frustration of the Court of Appeals in receiving underdeveloped briefs and poorly substantiated arguments. We also recognize that our decision to prohibit *Anders* withdrawals may in some cases perpetuate the filing of “perfunctory” appeals. But in a direct appeal a convicted defendant is entitled to a review by the judiciary, not by overworked and underpaid public defenders.

The professional obligation to avoid frivolous contentions is expressly “subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited.” Ind. Professional Conduct Rule 3.1 cmt. The Indiana Oath of Attorneys expands this to permit a defense that the attorney regards as unjust whether or not constitutional rights are at stake. \* \* \* \*

In sum, we believe that disapproving *Anders* is simpler, more effective, fairer, and less taxing on counsel and the courts. Prohibiting *Anders* withdrawals may also force counsel to be more diligent and locate meritorious issues in a seemingly empty record. And in those few cases that offer no colorable argument of trial court error whatsoever, counsel may still be able to solicit a sentence revision or even a change in the law.

We conclude that in any criminal appeal as a matter of right, counsel may neither withdraw on the basis that the appeal is frivolous nor submit an *Anders* brief to the appellate court.

## CHAPTER 14: EFFECTIVE ASSISTANCE OF COUNSEL

### **Add to Note 5 on page 843:**

In *U.S. v. Nicholson*, [611 F.3d 191](#) (4<sup>th</sup> Cir. 2010), Nicholson pleaded guilty to using a firearm while a felon. During Nicholson's sentencing hearing, his lawyer (Babineau) failed to present evidence that Nicholson used the firearm to defend himself from Butts, who had threatened to kill Nicholson. The lawyer failed to do so because he was also representing Butts. The court held that Nicholson should be allowed to withdraw his guilty plea: If he made the motion, Babineau would act contrary to (and disloyal to) the interests of client Butts by portraying him as a murderer, thus potentially jeopardizing Butts's position on appeal and in any future prosecutions. By failing to make the motion, Babineau would act contrary to (and disloyal to) the interests of client Nicholson. Accordingly, Nicholson's interests, on the one hand, and Butts's interests, on the other, were in total opposition to each other during Babineau's simultaneous representation of them. This simultaneous representation placed Babineau in the untenable position of having to place the interests of one client (either Butts or Nicholson) above another (either Nicholson or Butts). In these circumstances, a conflict of interest existed regardless of whether Babineau ultimately chose to pursue a self-defense departure motion on behalf of Nicholson.

In *State ex rel. Horn v. Ray*, \_\_\_ S.W.3d \_\_\_, 2010 WL 3681330 (Mo.App. 2010), defendant was charged with domestic assault on his wife. Attorney Aubuchon told the trial court that she was representing both defendant and his wife, that both defendant and wife consented in writing to the joint representation, and that the wife did not wish to testify against defendant. The court held that such joint representation violated the defendant's right to effective assistance of counsel:

Clients cannot consent to a concurrent conflict of interest unless, *inter alia*, the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, and the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. Given these considerations, we conclude that the clients here cannot consent to the conflict of interest.

Missouri Supreme Court Rules of Professional Conduct, [Rule 4-1.7\(b\)\(1\)](#), prohibits representation where the lawyer cannot reasonably conclude that he or she can provide competent and diligent representation. While counsel avows that he reasonably believes that he can provide competent and diligent representation to each client, we hold such belief unreasonable.

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of loyalty to his or her clients is one of the most basic responsibilities incumbent on a lawyer. Here, where counsel's representation of the defendant would be "inescapably adverse" to the victim, counsel cannot possibly fulfill his duties to each client of undivided loyalty, zealous advocacy, and independent judgment. The lawyer-client relationship is grounded in the fundamental understanding that a lawyer will give his or her complete and undivided loyalty to the client, fully applying the lawyer's professional training, ability, and judgment. In our

circumstances, counsel's duty of loyalty to one client naturally compromises his duty of loyalty to the other.

Counsel has suggested that because the victim has chosen not to testify, the clients' interests are now the same. We are not persuaded. We fail to see how either client would even be free to tell counsel his or her version of the events leading to the charges against the defendant. In doing so, each client would almost certainly reveal information advantageous to one and detrimental to the other that counsel would ethically be prohibited from using. And even where a victim does not testify, that does not mean that the victim's interests are not adverse to those of the defendant. The victim may ultimately refuse to testify, but we are presently at a preliminary stage of the proceedings. At this juncture, the victim should be considering her options. Counsel's duty of loyalty to the defendant, however, prevents counsel from fairly presenting to the victim all possible courses of action because some of those options - most notably testifying against the defendant - would be detrimental to the defendant. Counsel's duty of loyalty to the defendant thus plainly forecloses alternatives that otherwise might be recommended to the victim.

Likewise, counsel's duty of loyalty to the victim prevents counsel from fairly presenting to the defendant all possible courses of action because some of those options - such as testifying that the victim lied about events leading to the instant charges or claiming self defense - would be detrimental to the victim. Thus, counsel's duty of loyalty to the victim forecloses alternatives that would otherwise be available to the defendant, and also implicates the defendant's right to a fair trial under the Sixth Amendment, which we shall consider more fully below. \* \* \* \*

A defendant's waiver of a conflict of interest does not automatically resolve the Sixth Amendment issue. Where the court finds an actual conflict of interest that impairs counsel's ability to conform to the ethical rules, as we have found here, the court should not be required to tolerate inadequate representation of the defendant.

It appears to us that the defendant is receiving quite effective legal assistance at the moment, now that the victim has retained the same counsel and declared that she will not testify against the defendant. Nonetheless, the "mere existence of such an obvious and deleterious conflict" between a defendant and the victim necessarily has an adverse impact on counsel's representation of the defendant. Where counsel's representation of a defendant may be hampered by the duty of loyalty and care to two competing interests, as when counsel represents both the defendant and the defendant's alleged victim, the defendant is precluded from receiving the advice and assistance sufficient to afford the defendant the quality of representation the Sixth Amendment guarantees. Moreover, should the victim decide at the last minute to testify against the defendant, a mistrial would result because counsel would be forced to withdraw rather than impeach his own client, and the defendant would thus require new counsel.

Despite counsel's arguments to the contrary, where an actual conflict of interest exists, as in this case, or even where the potential for a conflict of interest at trial is of the magnitude presented here, the defendant's waiver does not resolve the matter. The court's institutional interest in protecting the truth-seeking function of the proceedings over which it presides requires the court to consider whether the defendant has effective assistance of counsel, regardless of any purported waiver. While courts must recognize a presumption in favor of a defendant's counsel of choice, that presumption may be overcome either by a showing of actual conflict or by a showing of a serious potential for conflict. The right to counsel does not automatically override a broader public interest in the effective administration of justice and maintenance of public confidence in the integrity of our legal system.

On page 874, replace *State v. Pozo* with:

**PADILLA v. KENTUCKY**  
United States Supreme Court  
[130 S.Ct. 1473](#) (2010)

Justice STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.FN1

FN1. Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. §1227(a)(2)(B)(i).

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh

consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was “a period of unimpeded immigration.” An early effort to empower the President to order the deportation of those immigrants he “judged dangerous to the peace and safety of the United States,” Act of June 25, 1798, was short lived and unpopular. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country. In 1891, Congress added to the list of excludable persons those “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”

The Immigration and Nationality Act of 1917 (1917 Act) brought “radical changes” to our law. For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. Section 19 of the 1917 Act authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States.” And §19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. Congress did not, however, define the term “moral turpitude.”

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien shall not be deported.” This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was “consistently interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation,” Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

This provision was codified in 8 U.S.C. §1251(b). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter.

Although narcotics offenses - such as the offense at issue in this case - provided a distinct basis for deportation as early as 1922, the JRAD procedure was generally available to avoid deportation in narcotics convictions. Except for “technical, inadvertent and insignificant violations of the laws relating to narcotics,” it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act's broad JRAD provision.

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington*, 466 U.S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof. In its view, seeking a JRAD was “part of the sentencing” process, *Janvier*, 793 F.2d at 452, even if deportation itself is a civil

action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process - not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996. Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance.

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part-indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

## II

Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *Strickland*, 466 U.S. at 686. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court. In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” The Kentucky high court is far from alone in this view.

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty”; but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

### III

Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The first prong - constitutional deficiency - is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." We long have recognized that "prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable." Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697, 713-718 (2002); A. Campbell, Law of Sentencing §13:23, pp. 555, 560 (3d ed.2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed.1999). "Authorities of every stripe - including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications - universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients."

We too have previously recognized that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.". Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under §212(c) of the 1952 INA, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S. at 323. We expected that counsel who were unaware of the discretionary relief measures would "follow the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U.S.C.

§1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.<sup>FN10</sup> But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

FN10. As Justice ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*’s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

#### IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla’s claim only to the extent that he has alleged affirmative misadvice. In the United States’ view, “counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case,” though counsel is required to provide accurate advice if she chooses to discuss these matters.

Respondent and Padilla both find the Solicitor General’s proposed rule unpersuasive, although it has support among the lower courts. \* \* \* \* Kentucky describes these decisions isolating an affirmative misadvice claim as “result-driven, incestuous and completely lacking in legal or rational bases.” We do not share that view, but we agree that there is no relevant difference “between an act of commission and an act of omission” in this context.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.FN11 Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis.

FN11. As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client of the consequences of his plea. We think the same result should follow when the stakes are not life and death but merely “banishment or exile.”

We have given serious consideration to the concerns that the Solicitor General, respondent, and amici have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. \* \* \* \* To obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. There is no reason to doubt that lower courts - now quite experienced with applying *Strickland* - can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful collateral challenge to a guilty plea - an opportunity to withdraw the plea and proceed to trial - imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a less favorable outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation

consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. The severity of deportation - “the equivalent of banishment or exile” - only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

## V

It is our responsibility under the Constitution to ensure that no criminal defendant - whether a citizen or not - is left to the “mercies of incompetent counsel.” To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, “immigration law can be complex”; “it is a legal specialty of its own”; and “some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.” The Court nevertheless holds that a criminal defense attorney must provide advice

in this specialized area in those cases in which the law is “succinct and straightforward” - but not, perhaps, in other situations. This vague, halfway test will lead to much confusion and needless litigation.

## I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction. \* \* \* \* While the line between “direct” and “collateral” consequences is not always clear, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess - and very often do not possess - expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are “serious,” but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were “prevailing professional norms,” it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general risk of removal; it would also require counsel in at least some cases, to specify what the removal consequences of a conviction would be.

The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. Most crimes affecting immigration status are not specifically mentioned by the Immigration and Nationality Act, but instead fall under a broad category of crimes, such as crimes involving moral turpitude or aggravated felonies. As has been widely acknowledged,

determining whether a particular crime is an “aggravated felony” or a “crime involving moral turpitude (CIMT)” is not an easy task. See R. McWhirter, ABA, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* 128 (2d ed.2006) Defense counsel who consults a guidebook on whether a particular crime is an “aggravated felony” will often find that the answer is not “easily ascertained.” For example, the ABA Guidebook answers the question “Does simple possession count as an aggravated felony?” as follows: “Yes, at least in the Ninth Circuit.” After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: “Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. §1101(a)(43).” The ABA Guidebook then proceeds to explain that “attempted possession” of a controlled substance is an aggravated felony, while “conviction under the federal accessory after the fact statute is probably not an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine is an aggravated felony.” Conspiracy or attempt to commit drug trafficking are aggravated felonies, but “solicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony.”

Determining whether a particular crime is one involving moral turpitude is no easier. “Reckless assault coupled with an element of injury, but not serious injury, is probably not a CIMT” (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked); (“If there is no element of actual injury, the endangerment offense may not be a CIMT”). “Whether a child abuse conviction involves moral turpitude may depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence probably is not a CIMT.”

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien, or whether a particular state disposition will result in a “conviction” for purposes of federal immigration law. The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether an alien is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen.”

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that “nothing is ever simple with immigration law” - including the determination whether immigration law clearly makes a particular offense removable. I therefore cannot agree with the Court's apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences

may turn on how hard it is to determine those consequences. Where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences” of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. But “when the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is “succinct, clear, and explicit.” How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer?

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem - such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As amici point out, “28 states and the District of Columbia have already adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information.

Fourth, the Court's decision marks a major upheaval in Sixth Amendment law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel. \* \* \* \*

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that “a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not “within the range of competence demanded of attorneys in criminal cases.” By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, “I do not believe it is too much of a burden to place on our defense bar the duty to say, ‘I do not know.’”

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel - or that it embodies a voluntary and intelligent decision to forsake constitutional rights.

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, “the vast majority of the lower courts considering claims of ineffective assistance in the plea context have distinguished between defense counsel who remain silent and defense counsel who give affirmative misadvice.”

### III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's

determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer “for his defense” against a “criminal prosecution” - not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of Justice ALITO's concurrence, I dissent from the Court's conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and that the right to “the assistance of counsel” includes the right to effective assistance, *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions. “We have held that ‘defence’ means defense at trial, not defense in relation to other objectives that may be important to the accused.” (2008) (ALITO, J., concurring) (summarizing cases). We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense - advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States*, 377 U.S. 201, 205-206, advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine*, 475 U.S. 412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be present when the

defendant is interrogated in connection with another possible prosecution arising from the same event.

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand - to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within “the range of competence demanded of attorneys in criminal cases. We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel - even those extending beyond defense against the prosecution-become constitutional commands. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point. As the concurrence observes,

“A criminal conviction can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.... All of those consequences are ‘serious.’ (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, what would come to be known as the “*Padilla* warning” - cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U.S.C. §924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn - not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.FN1 But we should not smuggle the claim into the Sixth Amendment.

FN1. I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of “direct consequences” suffices for the validity of a guilty plea. And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due

process requirements for a valid plea, does not mention collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given. Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

**On page 896, add the following Note:**

2. In *U.S. v. Chapman*, [593 F.3d 365](#) (4<sup>th</sup> Cir. 2010), after inadmissible evidence against Chapman was heard by the jury, the judge offered Chapman a mistrial. Chapman told his attorney to accept it, but the attorney chose not to accept it. The jury convicted Chapman. On appeal, Chapman claimed that his attorney was ineffective because whether to accept a mistrial was the client's decision, not the attorney's. The court disagreed:

The only decisions that have been identified by the Supreme Court as belonging exclusively to the defendant are "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. \* \* \* \*

The decision to move for a mistrial often must be made in a split-second and it involves numerous alternative strategies such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding. Moreover, counsel is generally in a better position than a lay person to judge the impact of a potentially prejudicial incident in the context of the entire trial.

Decisions regarding a mistrial are tactical decisions entrusted to the sound judgment of counsel, not the client. Preliminarily, we note that mistrial issues bear no similarity, in nature or significance, to the decisions that the Supreme Court has identified as belonging solely to the defendant. Moreover, deciding whether to seek a mistrial (or whether to accept or reject a mistrial offered by the trial court) involves an on-the-fly balancing of the probable damage caused by the trial error against the likelihood that a different jury might be more inclined to acquit - a question that itself requires considering how receptive the current jury is to the defendant, whether key witnesses have testified as anticipated, etc. Given the many issues that must be identified, evaluated, and weighed when determining whether to seek or accept a mistrial, we think it clear that the decision is a tactical one to be made by counsel, not the client.

\* \* \* \*

Chapman, however, views his position as a necessary consequence of the agency relationship between the defendant and his attorney:

As defendant's counsel and agent, defense counsel is permitted to make decisions that bind the defendant as agents generally do with regard to matters within the scope of their authority.

However, that authority is binding only unless and until revoked. When the defendant specifically instructs his agent to accept a court's offer of a mistrial on his behalf, to the extent that the defendant's request is reasonable, defense counsel as his agent is obligated to do so - his agency to do otherwise is revoked. Brief of Appellant at 19.

While it is of course true that an attorney is the agent of his client, the attorney's obligations in a criminal case do not precisely mirror the obligations of a general agent representing his principal on civil matters. Notwithstanding the fact that an agent is generally authorized to act for the principal in all matters within the scope of the agent's authority, the law requires the criminal defendant, not his attorney, to make the critical decisions about whether to plead guilty or go to trial, whether to testify, and whether to appeal. And notwithstanding the fact that a principal generally has the authority to dictate the manner in which his agent will carry out his duties, the law places certain tactical decisions solely in the hands of the criminal defense attorney. This reallocation of rights and duties is necessary to give effect to the constitutional rights granted to criminal defendants and to insure the effective operation of our adversarial system, where defense attorneys must protect the interests of their clients while also serving as officers of the court. Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point. He is an officer of the court and a professional advocate pursuing a result - almost always, acquittal - within the confines of the law; his chief reason for being present is to exercise his professional judgment to decide tactics.

## CHAPTER 15: ETHICAL OBLIGATIONS OF CRIMINAL DEFENSE LAWYERS

### **Add on page 912:**

In *U.S. v. Nickerson*, [556 F.3d 1014](#) (9<sup>th</sup> Cir. 2009), the court held that a lawyer's violation of a rule of ethics does not constitute *per se* ineffective assistance of counsel: We are mindful of the Supreme Court's admonition that "per se rules should not be applied in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, [501 U.S. 722, 737](#) (1991). While we readily acknowledge that a violation of professional or ethical rules could lead to a deficient attorney performance that prejudices the defendant, as contemplated by *Strickland*, such is not always the case. With that uncertainty in mind, we hold that an attorney's violation of a rule of ethics or professional conduct before trial does not constitute *per se* ineffective assistance of counsel.

### **Add at end of Note 1, on page 925:**

In *State v. Smith*, \_\_\_ P.3d \_\_\_, 2011 WL 480711 (Kan. 2011), Smith was charged with robbery of a convenience store clerk. The robber's image was captured on the store's surveillance camera. Four witnesses were able to identify the robber depicted in the video as Smith. Before trial, Smith's lawyer (Rumsey) moved to withdraw as counsel, over Smith's objection:

"THE COURT: This is *State v. Charles E. Smith*, 06 CR 2174. Go ahead, Mr. Rumsey.

"MR. RUMSEY: Okay. There is a surveillance video in this case that was taken continuously during the robbery at the Presto Convenience Store and there are several views of the face of the person that committed that robbery. I have seen it more times than I can count. There is no doubt that it is the face of the defendant. He denies that it's his face and wants me to put on evidence that would tend to suggest that he was physically infirmed and unable to perform the robbery and that he had no motive to commit the robbery because he had a job, although he was, at the time- he had been off the job with a Workers' Compensation claim. He had received some benefits. My problem with doing that is that I would know that that evidence would be false and I have tried to explain to him in writing and orally on numerous occasions that I can't do those kinds of things, and he takes that to mean that I am refusing to represent him or can't represent him, and I have explained to him that I still have the ability to cross examine the State's witnesses and make the State prove beyond a reasonable doubt that he is guilty. I just can't participate in putting on evidence that I know would be fraudulent. He asked me then to file a motion to withdraw. This came up last Thursday.

"THE COURT: Mr. Smith, is that your position?

"DEFENDANT SMITH: Yes, sir. Your Honor, it is my opinion that if Mr. Rumsey feels this way, you know, I believe due process law, a person is innocent until proven guilty and he got to

feel the way he wants to feel, but at the same time, I am saying that is not me, and he being my attorney, he should be able to defend me to his full capability. My concern is how would he have a closing argument, you know, if it came to that. If he is thinking I am guilty, you know, before I go to trial, what is the point of him being my lawyer? I need a lawyer that is, as I said-if I have got evidence that is in my behalf and he don't want to put that evidence on because he feels like I am already guilty, then I don't see no-

“THE COURT: Well, Mr. Smith, no matter who I would appoint, any lawyer that the Court appoints is bound to follow rules that apply to lawyers and what evidence they can present and not present. No lawyer can present evidence that he feels is false. Knowingly making false statements to the Court can cause severe problems. Your objection would apply to any lawyer that I would appoint for you, so if that is the only reason you are seeking his removal, I am not going to approve it because he will certainly present what evidence he can in your benefit. Frequently, lawyers represent people that they feel are guilty, but that has nothing to do with whether or not the jury finds a person guilty. The burden is on the State to prove that you are guilty, so I am going to deny the motion.

The Kansas Supreme Court reversed:

The attorney's presentation of the withdrawal motion suggests that the problem may not have been based upon the falsity of the facts Smith wanted introduced. Those facts, *e.g.*, whether Smith suffered from a physical infirmity or whether he had income from a job or a workers compensation claim, were easily verifiable and apparently the attorney did have knowledge that not all of the facts were false because he related that Smith was receiving workers compensation benefits. Moreover, if the problem had been false facts, the attorney could have simply advised the court that his client wanted him to introduce false testimony and the matter could have been quickly resolved.

Instead, the defense attorney, Rumsey, commenced his presentation by explaining that he was convinced from viewing the videotape that his client was guilty. He then related that the evidence Smith wanted to introduce would create an inference that Smith lacked the motive and ability to commit the robbery. Finally, Rumsey declared that the problem was that Rumsey would know that Smith's evidence would be false or fraudulent. In context, the argument suggests that Rumsey believed that he could not introduce any evidence, even truthful facts, if that evidence might create an inference that Smith was not guilty, because Rumsey was convinced of Smith's guilt, *i.e.*, the *inference* created by the evidence would be false or fraudulent. The State makes that very argument on appeal, asserting that any attorney viewing the videotape would identify Smith as the robber and would thereby be precluded from presenting the evidence Smith wanted introduced.

The fundamental flaw in Rumsey's apparent withdrawal motion argument (and the State's position on appeal) is that it ignores the separation of duties in a criminal prosecution. The lines of demarcation separating the duties of each of the players in a criminal trial are sacrosanct, *i.e.*, the prosecutor representing the people; the defense attorney representing the accused; the trial judge representing the interpreter of the law; and the jury representing the finder of facts. If any of those lines are crossed, the criminal justice system is compromised.

Here, the jury, as factfinder and final arbiter of guilt, had the sole responsibility to view the videotape, to look at the defendant, to make a finding as to whether the person shown in the videotape was the defendant, and, ultimately, to determine whether the defendant was guilty of robbery. Rumsey's duty as defense counsel was to advocate for his client, including the presentation of any truthful, relevant evidence that would assist in his client's defense. Rumsey exceeded the scope of his duties as defense counsel and invaded the province of the jury when he performed the fact-finding function of identifying the robber in the videotape as his client and, based thereon, made the determination that his client was guilty. Accordingly, if Rumsey's refusal to introduce evidence on Smith's behalf was based upon Rumsey's out-of-bounds determination of guilt, rather than on the falsity of the evidence, Smith's dissatisfaction was justified.

**Add at end of Note 2, on page 927:**

See also *State v. Chambers*, [296 Conn. 397](#) (2010).

**Add on page 964:**

4. **Don't try this at home.** In *Schalk v. State*, [943 N.E.2d 427](#) (2011), Schalk represented Pemberton, who was charged with selling methamphetamine to Hyde. Schalk got a great idea. He would impeach Hyde at trial by showing that Hyde was a drug dealer. First, however, he needed evidence of this. So he arranged for two of Pemberton's friends to buy marijuana from Hyde, which they did. Schalk had hoped to use the purchased marijuana as evidence at Pemberton's trial, but – unbeknownst to Schalk - the friends smoked it right after they bought it. When Schalk phoned the prosecutor and asked him to take possession of the marijuana, Schalk was arrested. His conviction for attempted possession of marijuana was affirmed: Schalk also alleges that “the constitutional right of people accused of crimes to defend themselves is under attack. Chad Pemberton is not a party to this appeal, but David Schalk has standing to assert his right to defend his clients as part of the guarantees of the Sixth Amendment to the Constitution of the United States of America and Article I, Section 13 of the Constitution of Indiana.”

We agree that Schalk's client has a right to legal representation guaranteed by both the federal and state constitutions. But we reject Schalk's contention that an attorney, an officer of the court, who has given an oath to support the Constitution of the United States and the Constitution of the State of Indiana is authorized to engage in criminal activity in defense of his client under either the Sixth Amendment or Article I, Section 13. \* \* \* \* An attorney is not exempt from the criminal law even if his only purpose is the defense of his client. Under the Code of Professional Responsibility an attorney is charged with defending and advancing the interests of his clients within the framework of our legal system. It should be abundantly clear that an attorney cannot resort to illegal means in order to obtain a favorable disposition for his client. This is not a close case.

And the trial court in Pemberton's case removed Schalk as Pemberton's counsel.

## CHAPTER 16: HABEAS CORPUS

**Add on page 1009:**

*IN RE DAVIS*  
United States Supreme Court  
[130 S.Ct. 1](#) (2009)

The petition for a writ of habeas corpus is transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today this Court takes the extraordinary step-one not taken in nearly 50 years - of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus. The Court proceeds down this path even though every judicial and executive body that has examined petitioner's stale claim of innocence has been unpersuaded, and (to make matters worst) even though it would be impossible for the District Court to grant any relief. Far from demonstrating, as this Court's Rule 20.4(a) requires, "exceptional circumstances" that "warrant the exercise of the Court's discretionary powers," petitioner's claim is a sure loser. Transferring his petition to the District Court is a confusing exercise that can serve no purpose except to delay the State's execution of its lawful criminal judgment. I respectfully dissent.

Eighteen years ago, after a trial untainted by constitutional defect, a unanimous jury found petitioner Troy Anthony Davis guilty of the murder of Mark Allen MacPhail. The evidence showed that MacPhail, an off-duty police officer, was shot multiple times after responding to the beating of a homeless man in a restaurant parking lot. Davis admits that he was present during the beating of the homeless man, but he maintains that it was one of his companions who shot Officer MacPhail. It is this claim of "actual innocence" - the same defense Davis raised at trial but now allegedly supported by new corroborating affidavits - that Davis raises as grounds for relief. And (presumably) it is this claim that the Court wants the District Court to adjudicate once the petition is transferred.

Even if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief. Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996. Insofar as it applies to the present case, that statute bars the issuance of a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [28 U.S.C. §2254\(d\)\(1\)](#).

The Georgia Supreme Court rejected petitioner's "actual-innocence" claim on the merits, denying his extraordinary motion for a new trial. Davis can obtain relief only if that determination was contrary to, or an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." It most assuredly was not. This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable. See *Herrera v. Collins*, [506 U.S. 390, 400-401, 416-417](#). A state court cannot possibly have contravened, or even unreasonably applied, "clearly established Federal law, as determined by the Supreme Court of the United States," by rejecting a type of claim that the Supreme Court has not once accepted as valid.

Justice STEVENS says that we need not be deterred by the limitations that Congress has placed on federal courts' authority to issue the writ, because we cannot rule out the possibility that the District Court might find those limitations unconstitutional as applied to actual-innocence claims. (This is not a possibility that Davis has raised, but one that Justice STEVENS has imagined.) But acknowledging that possibility would make a nullity of §2254(d)(1). There is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction. If the District Court here can ignore §2254(d)(1) on the theory that otherwise Davis's actual-innocence claim would (unconstitutionally) go unaddressed, the same possibility would exist for *any* claim going beyond "clearly established Federal law."

The existence of that possibility is incompatible with the many cases in which we have reversed lower courts for their failure to apply §2254(d)(1), with no consideration of constitutional entitlement. We have done so because the argument that the Constitution requires federal-court screening of all state convictions for constitutional violations is frivolous. For much of our history, federal habeas review was not available even for those state convictions claimed to be in violation of clearly established federal law. See *Stone v. Powell*, [428 U.S. 465, 474-476](#). It seems to me improper to grant the extraordinary relief of habeas corpus on the possibility that we have approved - indeed, directed - the disregard of constitutional imperatives in the past. If we have new-found doubts regarding the constitutionality of §2254(d)(1), we should hear Davis's application and resolve that question (if necessary) ourselves.

Transferring this case to a court that has no power to grant relief is strange enough. It becomes stranger still when one realizes that the allegedly new evidence we shunt off to be examined by the District Court has already been considered (and rejected) multiple times. Davis's postconviction "actual-innocence" claim is not new. Most of the evidence on which it is based is almost a decade old. A State Supreme Court, a State Board of Pardons and Paroles, and a Federal Court of Appeals have all considered the evidence Davis now presents and found it lacking. (I do not rely upon the similar conclusion of the Georgia trial court, since unlike the others that court relied substantially upon Georgia evidentiary rules rather than the unpersuasiveness of the evidence Davis brought forward.

The Georgia Supreme Court "looked beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony

would probably find him not guilty or give him a sentence other than death.” After analyzing each of Davis's proffered affidavits and comparing them with the evidence adduced at trial, it concluded that it was not probable that they would produce a different result.

When Davis sought clemency before the Georgia Board of Pardons and Paroles, that tribunal stayed his execution and “spent more than a year studying and considering his case.” It “gave Davis' attorneys an opportunity to present every witness they desired to support their allegation that there is doubt as to Davis' guilt”; it “heard each of these witnesses and questioned them closely.” It “studied the voluminous trial transcript, the police investigation report and the initial statements of the witnesses,” and “had certain physical evidence retested and Davis interviewed.” “After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board ... determined that clemency is not warranted.”

After reviewing the record, the Eleventh Circuit came to a conclusion “wholly consonant with the repeated conclusions of the state courts and the State Board of Pardons and Paroles.” “When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would not have found him guilty of Officer MacPhail's murder.”

Today, without explanation and without any meaningful guidance, this Court sends the District Court for the Southern District of Georgia on a fool's errand. That court is directed to consider evidence of actual innocence which has been reviewed and rejected at least three times, and which, even if adequate to persuade the District Court, cannot (as far as anyone knows) form the basis for any relief. I truly do not see how the District Court can discern what is expected of it. If this Court thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of “actual innocence,” it should set this case on our own docket so that we can (if necessary) resolve that question. Sending it to a district court that “might” be authorized to provide relief, but then again “might” be reversed if it did so, is not a sensible way to proceed.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, concurring with the majority.

Justice SCALIA's dissent is wrong in two respects. First, he assumes as a matter of fact that petitioner Davis is guilty of the murder of Officer MacPhail. He does this even though seven of the State's key witnesses have recanted their trial testimony; several individuals have implicated the State's principal witness as the shooter; and *no* court, state or federal, has ever conducted a hearing to assess the reliability of the score of postconviction affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence. The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently “exceptional” to warrant utilization of this Court's Rule 20.4(a), [28 U.S.C. §2241](#)(b), and our original habeas jurisdiction.

Second, Justice SCALIA assumes as a matter of law that, “even if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief” in light of [28 U.S.C. §2254\(d\)\(1\)](#). For several reasons, however, this transfer is by no means “a fool's errand.” The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. The court may also find it relevant to the AEDPA analysis that Davis is bringing an “actual innocence” claim. Even if the court finds that §2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it “would be an atrocious violation of our Constitution and the principles upon which it is based” to execute an innocent person. Cf. *Teague v. Lane*, [489 U.S. 288, 311-313](#), (1989).

Justice SCALIA would pretermitt all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.