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¹ : Landsman
S. Reading in Adversarial Justice: The American Approach to Adjudication (American Bar Association
Section on Litigation). West Publishing, 1988; Burnham W. Introduction to the Law and Legal System of
the United States. West Publishing, 1994;

² :
89, . . . , 1995. . 93-110; . . . : . . . , 1979. . 87-

³ . . . : , 1998. . 224-226.

⁴ »⁴ . . . , [Report of the Joint Conference on professional Responsibility of the American Bar Association (1958)]. . . : . . . , 1995. 94

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⁷ . : . . 1999. . 304-310.

⁸ , : Dworkin R Natural Law Revisited // University of Florida Law Review. 1982. N 34. P. 165.

⁹ 306.

¹⁰ : Judicial Conflict and Consensus : Behavioral Studies of American Appellate Courts. Ed. by Goldman and Lamb, 1968; Shapiro M Courts New York, 1981; Nolfinger R.. Shapiro M., Greenstien F. Dynamics of American Politics. Englewood Cliffs, 1980:

¹¹ .. Brody D, The American Legal System : Concepts and Principles Lexington, 1978. p.9.

¹² .. Harris J. Legal Philosophies. New York, 1980 P. 83; Grossman J Wellss R. Constitutional Law and Judicial Policymaking. New York, 1980. P. 49:

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-36;

¹⁴ 307.

¹⁵ . . 307-308.

¹⁶ , : Bell J. Policy Arguments in Judicial Decisions 1983.

¹⁷ : 310.

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²¹ Pasker H. Two Models of the Criminal Procedure // U.P.L.R. 1964. N 113.

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²³ : r . The Limits of the Cniminal Sanction. Stanford. 1968, o
: Scolnick J justice without Trail. New York, 1966,

²⁴ Packer H. . P. 153.

²⁵ Packer H. Two Models...P 162.

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²⁶ ., : King . The Framework of Criminal Justice. London, 1981. P. 12. Кр y

²⁷ . : Griffiths J. The Ideology in Criminal Procedure or A Third Model of the Criminal Process //The Yale Law Journal. 1970. Vol. 79,). 3. January

²⁸ P. 359, 370, 417.

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³⁵ C .: Criminal Justice, n Introduction... P 23; . A. . . . 116-117 .

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³⁷ Ashworth A. Punishment and Compensation: Victims, Offenders and State //Oxford Journal of Legal Studies. 1986 . 6. P. 86 - 122.

³⁸ Dignan J, Cavadino M. Towards a Framework for Conceptualizing and Evaluating Victim-Oriented Models of Criminal Justice. Centre for Criminological and Legal Research. University of Sheffield. Sheffield, 1995. P.3.

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⁴⁰ H. . . , 1985. . . 53-54.
⁴¹ . . . , 1994. . . 368.

⁴² Dignan J, Cavadino 3.

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⁴⁸ Erez . Victim Participation in Sentencing : An the Debate does on...// International Review of
Victimology. 1994. 3. P. 17-28; Joutsen M. Victim in Proceedings and Sentencing in Europe //
International Review of Victimology. 1994. N 3. P. 57-67.

⁴⁹ () : . 365.

⁵⁰ Watson D., Boucherar J., Davis D. Reparation for Retributivists //Mediation and Criminal Justice
Victims, Offenders and Community. London, 1989

⁵¹ . . . 364.

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⁵² Miers D. Compensation for Criminal Inquires, London. 1 990.

⁵³ [Dignan J. Cavadino M. . . P. 7-8.

⁵⁴ Mexon D., Corkey J., Hedderman C. Developments in Use of Compensation Orders in Magistrates Courts since October. 1988. London, 1992. P. 29.

⁵⁵ exon D. Corkey J., Hedderman . Developments in Use of Compensation Orders in Magistrates Court.since October 1988. London 1992.

⁵⁶ Dignan J. Cavadin. M. . . P. 8-9.

⁵⁷ Walklate S., Mawbe R. A Victim Oriented Criminal Justice System // Paper presented to British Criminology Conference in Cardiff. July 1993.

⁵⁸ Dignan J., Cavadino M. P 11-16.

⁵⁹ 1973 . : Jofsen
⁶⁰ e
⁶¹ . The Criminal Justice System of Finland. A General Introduction. Helsinki, 1995. P. 17-18.

⁶¹ Ashworth A. The Criminal Process: An Evaluative Study. Oxford, 1994. P. 35.

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⁶² Maguire ... Corbett . Effects of Crime and the Work of Victim Support Schemes. Aldershot, 1987.
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⁶³ Dignan J. Catadino M. . . .15.

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⁷⁰ Zehr . Changing Lenses: A New Focus for Criminal fustics Scottdale,1990.

⁷¹ H. . M., 1985. 98-125

⁷² Marshall . Merry S. Crime and Accountability : Victim; Offender Mediation in Practice London, 1 990

⁷³ Relational Justice : Repairing the Bragch/ Eds. J. Burnside, N. Baker Winchester, 1994.

⁷⁴ Perspectives on Cnme Victims, Eds. . Galawa . J Hudson. St. Louis-Toronto-London/ 1981. P 412-418.
 . 365-366.

⁷⁵ .
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⁷⁶ Dignan J, Cavadino 22.

⁷⁷ M wbe R, Gill . Crime Victims : Needs, Services and the Voluntary Sector London and New York, 1987. P. 54-56;

⁷⁸ Marshall . Merry S. . . .

⁷⁹ Dign n J., Cavadino 22; Wright . Justice for Victims and offenders Milton Keynes, 1991. P. 86

⁸⁰ Davis G., Watson D., Boucherat J., Reparation in the Service of Diversion : the subordination of a good idea// Howard Journal of Criminal Justice. 1988. N 27. P. 127-162.

⁸¹ CM. Penal Theory and Penal Practice : Tradition and innovation in Criminal Justice / Eds A. Duff, S. Marshall et al. Manchester, 1994.

⁸² Braithwaite J., Mugford S. Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders// British Journal of Criminology. . 34.1994. P. 139-141; Moris A., Maxwell., Robertson J., Giving Victims a Voice . A New Zealand Experiment// The Howard Journal of Criminal Justice. 32. 1993. P. 304-321.

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⁸³ Dignan J, Cavadmo 23-30.

⁸⁴ .: Braithwaite J. Crime. Shame and Reintegration. Cambrigo, 1989.

⁸⁵ Braithwaite J, Mugford S. Conditions of Successful Reintegration Ceremonies. Dealing with Juvenile Offenders//British Journal of Criminology N 34.1994. P 140-141.

⁸⁶ Relational Justice Repairing the Breach /Eds J. Bunside, N. Baker. Winchester, 1994.

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⁸⁷ Braithwaite J., Mugford S. Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders //British Journal of Criminology. N.34.1994. P. 162-163.

⁸⁸ Braithwaite J., Mugford S. . P. 167-168.

⁸⁹ Braithwaite J., Mugford S. . P. 169.

⁹⁰ Dignan J, Cavadino M . P. 26-27.

⁹¹ . P. 27; Moris A . Maxwell G. Robertson J, Giving Victims a Voice : A New Zealand Experiment //The Howard Journal of Criminal Justice., N 32. 1993. P. 309; Braithwaite J. Mugford S. . P. 148.

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⁹³ Dignan J., Cavadino. M. 29.

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⁹⁴ Reid .Crime and Criminology. New York. 1976. P 260.

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⁹⁵ Ponzi v. Fessenden. 258. US 254 (1922)

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⁹⁸ O'Sullivan J. The Independent Counsel Statute: Bad Law, Bad li // merican Criminal Law Review. 1996. Vol. 33. P. 463.

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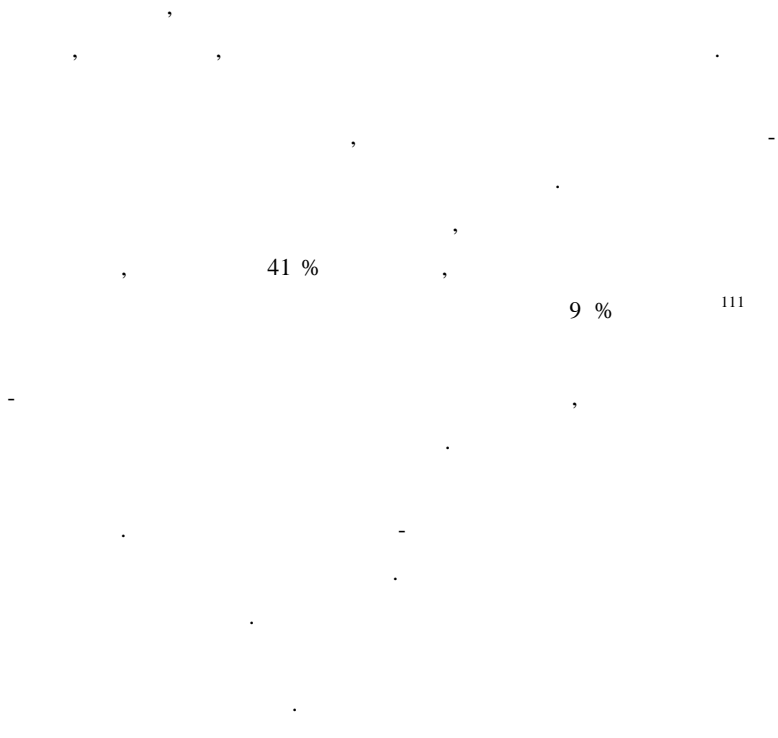
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¹¹⁴ // : . 1996. 2. . 100; Weinreb L.L. The Law of Criminal investigation. A book of Law Enforcement Personnel. Cambridge. Bullingel Publ. Co 1982. XV. P.48-50.

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¹¹⁷ Israel J. La Fave W. Crimiinal procedure in a nutschell. St. Paul. 1979. p.149.

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¹¹⁹ " " : . 1998. 10. . 114.

¹²⁰ Goldsmith . Eavesdropping Reform: The Legality of Roving Surveillance, University of Illinois//Law Review. 1987.N 3.P 411.

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¹²¹ Kamisar. A. Dissent from Mirand Dissent: some Comments the "New" Fifth Amendment and the Old Voluntaries Nest, 65 MiCH. L. REV. 59. 59 (1966).

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¹²⁴ Report to the nation on crime and justice (Washington. US Department of justice. Bureau of justice statistics. 1988. P. 74- 75)

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¹²⁵ Smith . Christopher. Courts. Politics, and the Judicial Process. Chicago. P.169-170.

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¹²⁸ Mauro Cappolletti. The judicial process in comparative perspective Oxford. 1989. P. 152.

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¹³¹ Nutter R. . The Quality of Justice in Misdemeanor Arraignment Court//The Journal of Criminal Law, Criminology and Police Science. 1962. Vol. 153.N 2.

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¹³² . ., 1969. 172.

¹³³ 1839 - 22 %; ! 920 - 88%,
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Raymond Moley. Politics and Criminal prosecution Minton Balch.
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¹³⁴ Federal Rules of Appellate Procedure /Rule 8.4.5.

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¹³⁵ . Mayers L. The American legal System. New York. 1964. P. 101.

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¹³⁷ se v. Nebraska 381 US 336 (1965).

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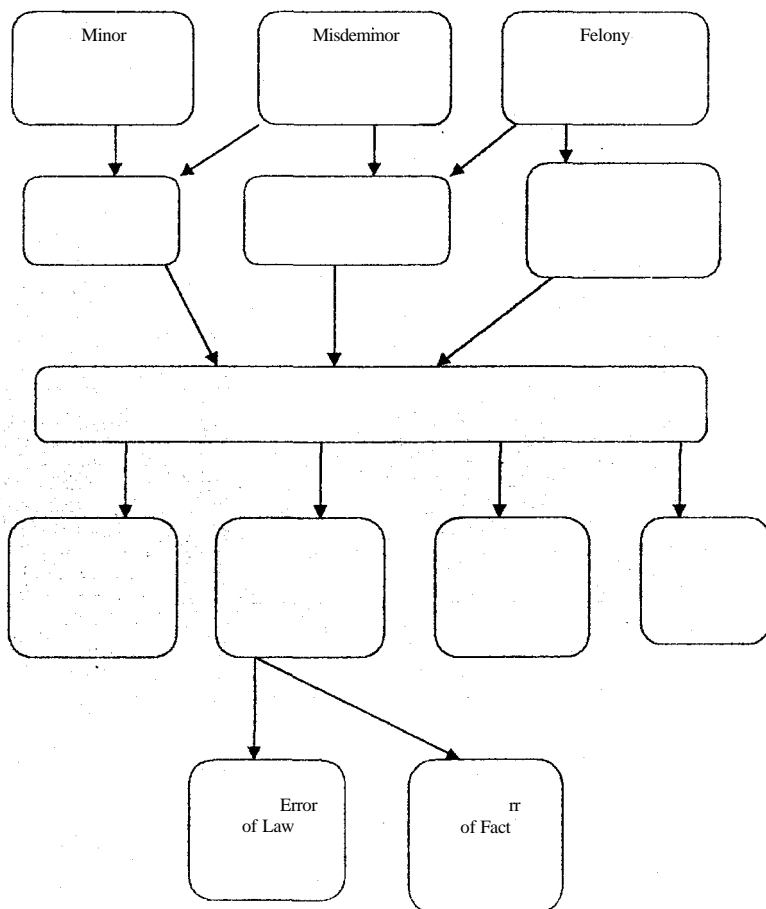
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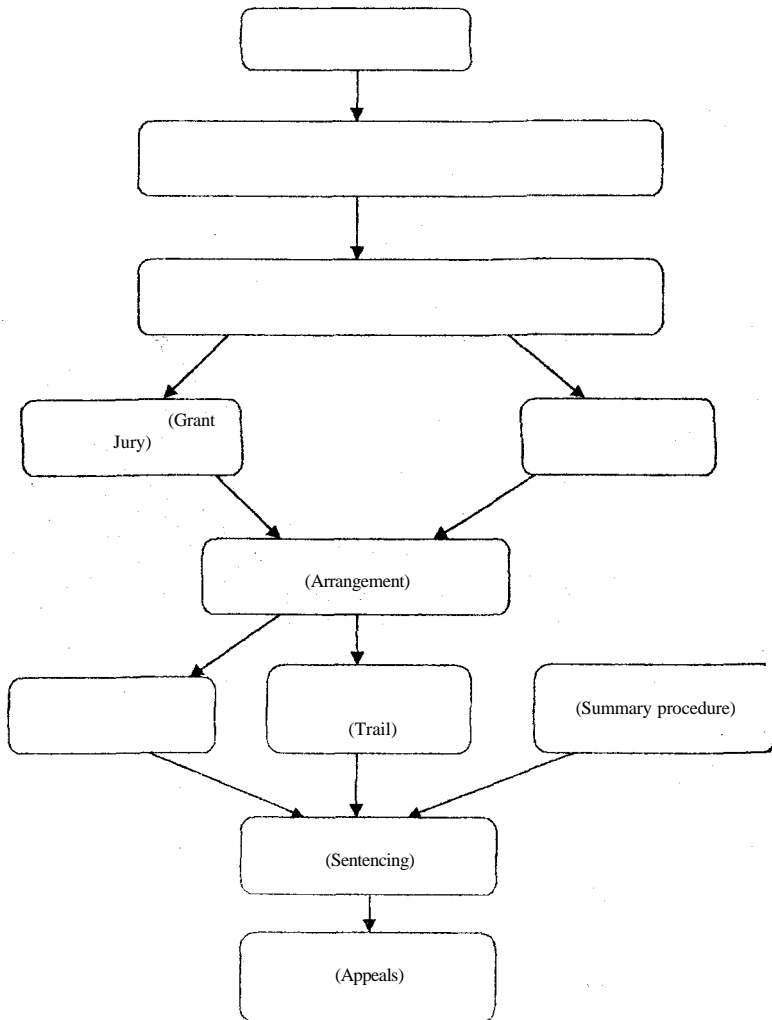
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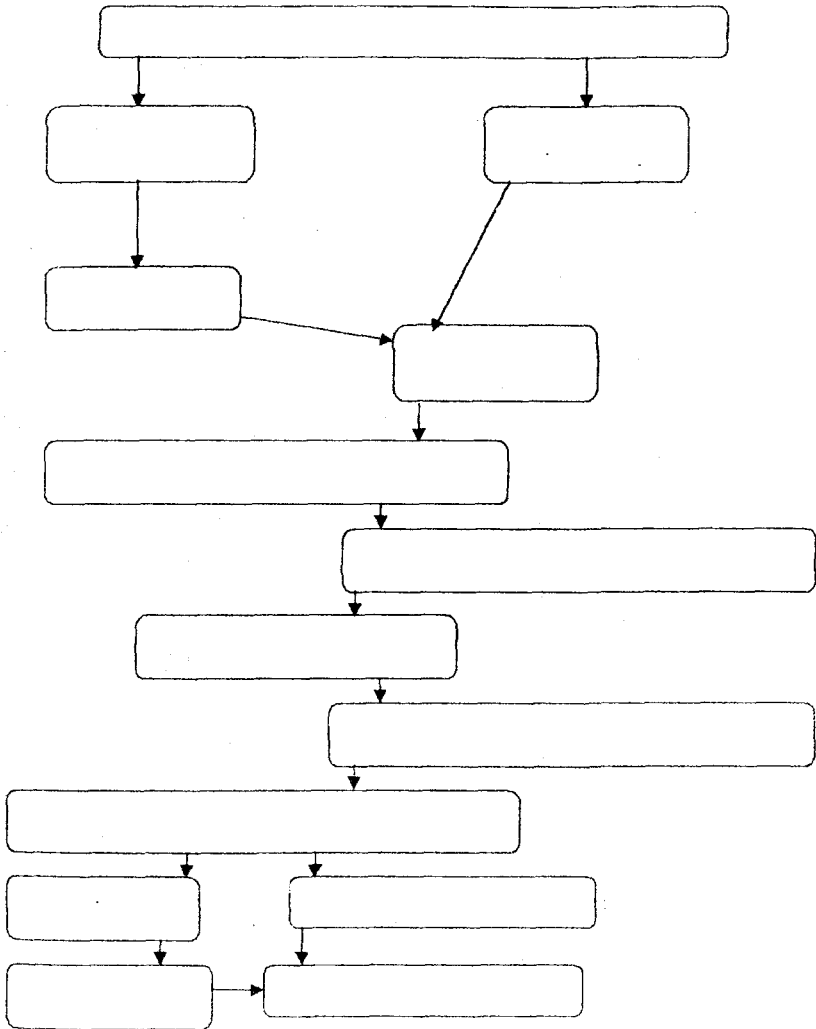
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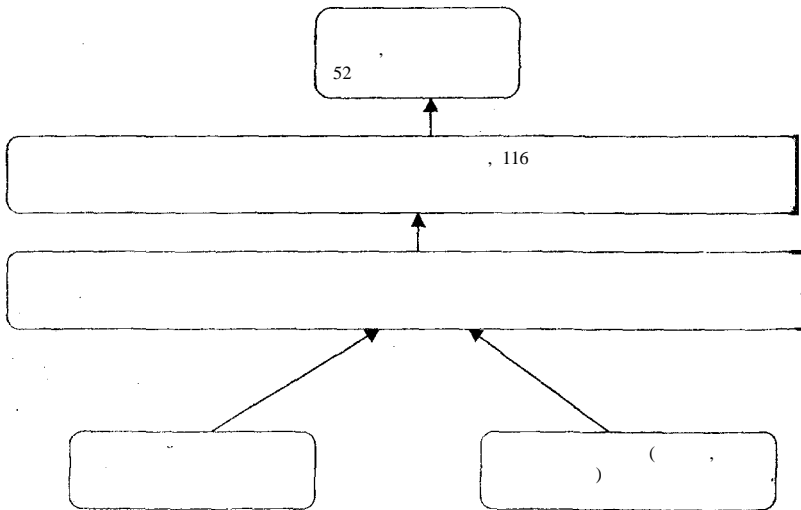
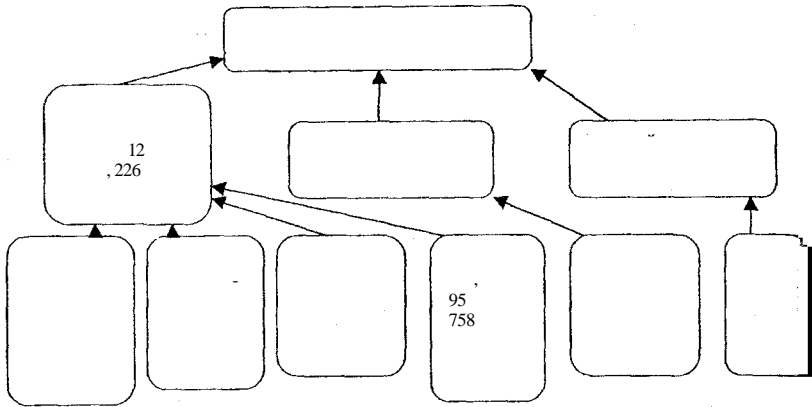
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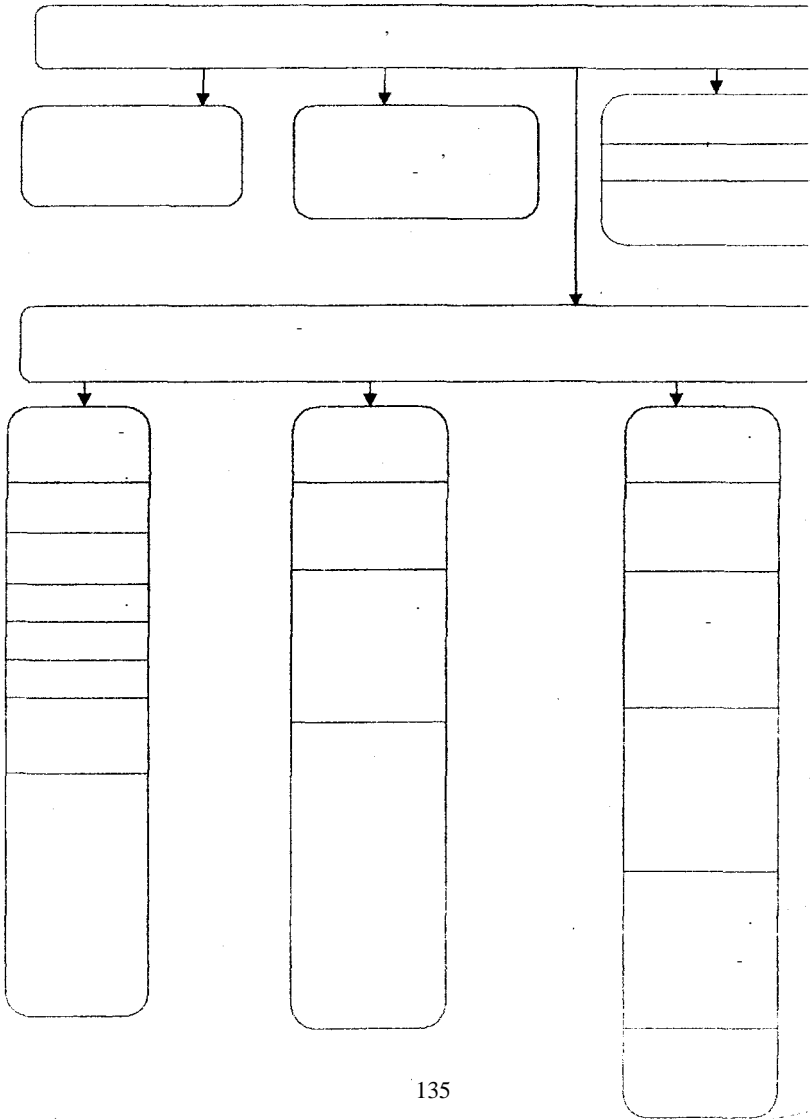
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I. THE CONSTITUTION OF THE UNITED STATES: SELECTED PROVISIONS

The Bill of Rights (Amendments 1-10) and the Fourteenth Amendment §§
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AMENDMENT I

Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

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

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

II. GRISWOLD v. CONNECTICUT

381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven — a center open and operating from November 1 to November 10, 1961 when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned".

Section 54-196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender".

The appellants were found guilty as accessories and fined \$100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A.2d 479. We noted probable jurisdiction. 379 U.S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship...

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation.... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This **law**, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, [268 U.S. 510 (1925)], the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, [262 U.S. 390 (1923)] the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available

knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . —indeed the freedom of the entire university community.... Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations", noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association". *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. ... In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.*, at 244) and was not action of a kind proving bad moral character. . .

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. . . . The right of "association", like the right of belief... is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.

Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees folly meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". The Fifth Amendment in its Self-incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life". We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people" ...

We have had many controversies over these penumbral rights of "privacy and repose" These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". *NAACP v. Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights— older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

MR. JUSTICE HARIAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth

Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them....

In my view, the proper constitutional inquiry in this case is whether this. Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty", *Paiko v. Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *v. Ullman*, [367 U.S. 497 (1961)], I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers Black and Stewart for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stan.L.Rev.* 5 (1949)), but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsc-

where in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause". *Rochin v. California*, 342 U.S.165, 170.

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process", lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" (post, p. 522) ...

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother Black, and now in part espoused by my Brother Stewart. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. ... Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren . . . who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures". But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy". To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be

just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures". "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. . . . For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to

keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. That formula, based on subjective considerations of "natural justice", is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all...

... So *far us* I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We *are* told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case; With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws...

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. It has not even

been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof.

And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees". With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards". But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States"¹, it is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected

representatives to repeal it. That is the constitutional way to take this law off the books¹.

III. MARYLAND v. BUIE

494 U.S. 326, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)

JUSTICE WHITE delivered the opinion of the Court.

A "protective sweep" is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case we must decide what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. The Court of Appeals of Maryland held that a running suit seized in plain view during such a protective sweep should have been suppressed at respondent's armed robbery trial because the officer who conducted the sweep did not have probable cause to believe that a serious and demonstrable potentiality for danger existed. 314 Md. 151, 166, 550 A.2d 79, 86 (1988). We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing", *Michigan v. Long*, 463 U.S. 1032, 1049-1050 (1983) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)), that the

¹ Justice Goldberg wrote a concurring opinion, which Chief Justice Warren and Justice Brennan joined..

area swept harbored an individual posing a danger to the officer or others. We accordingly vacate the judgment below and remand for application of this standard.

I

On February 3, 1986, two men committed an armed robbery of a Godfather's Pizza restaurant in Prince George's County, Maryland. One of the robbers was wearing a red running suit. That same day, Prince George's County police obtained arrest warrants for respondent Jerome Edward Bute and his suspected accomplice in the robbery, Lloyd Alien. Buie's house was placed under police surveillance.

On February 5, the police executed the arrest warrant for Bute. They first had a police department secretary telephone Buie's house to verify that he was home. The secretary spoke to a female first, then to Buie himself. Six or seven officers proceeded to Buie's house. Once inside, the officers fanned out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands". App. 5. Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. Id., at 14. He noticed a red running suit lying in plain view on a stack of clothing and seized it.

The trial court denied Buie's motion to suppress the running suit, stating in part: "The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense". *Id.*, at 19. The State introduced the running suit into evidence at Buie's trial. A jury convicted Buie of robbery with a deadly weapon and using a handgun in the commission of a felony.

The Court of Special Appeals of Maryland affirmed the trial court's denial of the suppression motion. The court stated that Detective Frolich did not go into the basement to search for evidence, but to look for the suspected accomplice anyone else who might pose a threat to the officers on the scene. 72 Md.App. 562, 571-572, 531 A.2d 1290, 1295 (1987).

"Traditionally, the sanctity of a person's home—his castle— requires that the police may not invade it without a warrant except under the most exigent of circumstances. But once the police are lawfully within the home, their conduct is measured by a standard of reasonableness... [I]f there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause—reasonable suspicion— should be sufficient to justify a *limited additional intrusion* to investigate the possibility of their presence". *Id.*, at 575-576, 531 A.2d, at 1297 (emphasis in original).

The Court of Appeals of Maryland reversed by a 4 to 3 vote. 314 Md. 151, 550 A.2d 79 (1988). The court acknowledged that "when the intrusion is slight, as in the case of a brief stop and frisk on a public street, and the public interest in prevention of crime is substantial, reasonable articulable suspicion may be enough to pass constitutional muster", *id.*, at 159, 550 A.2d, at 83. The court, however, stated that when the sanctity of the home is

involved, the exceptions to the warrant requirement are few, and held: "[T]o justify a protective sweep of a home, the government must show that there is probable cause to believe that 'a serious and demonstrable potentiality for danger' ' exists". *Id.*, at 159-160, 550 A.2d, at 83 (citation omitted). The court went on to find that the State had not satisfied that probable-cause requirement. *Id.*, at 165-166, 550 A.2d, at 86. We granted certiorari

II

It is not disputed that until the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement. . . . There is also no dispute that if Detective Frolich's entry into the basement was lawful, the seizure of the red running suit, which was in plain view and which the officer had probable cause to believe was evidence of a crime, was also lawful under the Fourth Amendment. . . . The issue in this case is what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there.

Petitioner, the State of Maryland, argues that, under a general reasonableness balancing test, police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime. As an alternative to this suggested bright-line rule, the State contends that protective sweeps fall within the ambit of the doctrine announced in *Terry v. Ohio*. 392 U.S. 1 (1968), and that such sweeps may be conducted in conjunction with a valid in-home arrest whenever the police reasonably suspect a risk of danger to the officers or others at the arrest scene. The United States, as *amicus curiae* supporting the State, also argues for a Ferry-

type standard of reasonable, articulable suspicion of risk to the officer, and contends that that standard is met here. Respondent argues that a protective sweep may not be undertaken without a warrant unless the exigencies of the situation render such warrantless search objectively reasonable. According to Buie, because the State has shown neither exigent circumstances to immediately enter Bute's house nor an unforeseen danger that arose once the officers were in the house, there is no excuse for the failure to obtain a search warrant to search for dangerous persons believed to be on the premises. Buie further contends that, even if the warrant requirement is inapplicable, there is no justification for relaxing the probable-cause standard. If something less than probable cause is sufficient, respondent argues that it is no less than individualized suspicion—specific, articulable facts supporting a reasonable belief that there are persons on the premises who are a threat to the officers. According to Buie, there were no such specific, articulable facts to justify the search of his basement.

III

I goes without saying that the Fourth Amendment bars only unreasonable searches and seizures... Our cases show that in determining reasonableness, "we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.... Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause. There are other contexts, however, where the public interest is such that neither a warrant nor probable cause is required...

The *Terry* ease is most instructive for present purposes. There we held that an on-the-street "frisk" for weapons must be tested by the Fourth

Amendment's general proscription against unreasonable searches because such a frisk involves "an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure". *Ibid.* We stated that there is "no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails". *Id.*, at 21 (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 536-537 (1967)). Applying that balancing test, it was held that although a frisk for weapons "constitutes a severe, though brief, intrusion upon cherished personal security", 392 U.S., at 24-25, such a frisk is reasonable when weighed against the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest". *Id.*, at 24. We therefore authorized a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on "specific and articulable facts", *id.*, at 21, and not on a mere "inchoate and unparticularized suspicion or 'hunch,'" *id.*, at 27, "that he is dealing with an armed and dangerous individual". *Ibid.*

In *Michigan v. Long*, 463 U.S. 1032 (1983), the principles of *Terry* were applied in the context of a roadside encounter: "[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based "on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons". *Id.*, at 1049-1050 (quoting *Terry*,

supra, at 21). The *Long* Court expressly rejected the contention that *Terry* restricted preventative searches to the person of a detained suspect... In a sense, *Long* authorized a "frisk" of an automobile for weapons.

The ingredients to apply the balance struck in *Terry* and *Long* are present in this case. Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.

That Buie had an expectation of privacy in those remaining areas of his house, however, does not mean such rooms were immune from entry. In *Terry* and *Long* we were concerned with the immediate interest of the police officers in, taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them. In the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being or has just been arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A *Terry* or *Long*, frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home

arrest puts the officer at the disadvantage of being on his adversary's "turf". An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

We recognized in *Terry* that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience". *Terry*, supra at 24-25. But we permitted the intrusion, which was no more than necessary to protect the officer from harm. Nor do we here suggest, as the State does, that entering rooms not examined prior to the arrest is a *de minimis* intrusion that may be disregarded. We are quite sure, however, that the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.

We agree with the State, as did the court below, that a warrant was not required¹. We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was

¹ Buie suggests that because the police could have sought a warrant to search for dangerous persons in the house, they were constitutionally required to do so. But the arrest warrant gave the police every right to enter, home to search for Buie. Once inside the potential for danger justified a standard or less than probable cause for conducting a limited protective sweep.

required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one.

We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

IV

Affirmance is not required by *Chimel v. California*, 395 U.S. 752 (1969), where it was held that in the absence of a search warrant, the justifiable search incident to an in-home arrest could not extend beyond the arrestee's person and the area from within which the arrestee might have obtained a weapon. First, *Chimel* was concerned with a foil-blown search of the entire house for evidence of the crime for which the arrest was made . . . not the more limited intrusion contemplated by a protective sweep. Second, the justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house. To reach our conclusion today, therefore, we need not disagree with the Court's statement in *Chimel*, *id.*, at 766-767, n. 12, that "the invasion of privacy that results from a top-to-bottom search of a man's house [cannot be characterized] as 'minor' ", nor hold that "simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should

automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require", *ibid.* The type of search we authorize today is far removed from the "top-to-bottom" search involved in *Chimel*; moreover, it is decidedly not "automati[c]", but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.

V

We conclude that by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. We therefore vacate the judgment below and remand this case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court for the first time extends *Terry v. Ohio*, 392 U.S. 1 (1968), into the home, dispensing with the Fourth Amendment's general requirements of a warrant and probable cause and carving a "reasonable suspicion" exception for protective sweeps in private dwellings....

While the Fourth Amendment protects a person's privacy interests in a variety of settings, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed". *United States v. United States District Court, Eastern District of Michigan*, 407 U.S. 297, 313 (1972). The Court discounts the nature of the intrusion because it believes that the scope of the intrusion is limited. The Court explains that a protective sweep's scope is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding", ante, at 327, and confined in duration to a period "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises". Ante, at 335-336. But these spatial and temporal restrictions are not particularly limiting. A protective sweep would bring within police purview virtually all personal possessions within the house not hidden from view in a small enclosed space. Police officers searching for potential ambushers might enter every room including basements and attics; open up closets, lockers, chests, wardrobes, and cars; and peer under beds and behind furniture. The officers will view letters, documents and personal effects that are on tables or desks or are visible inside open drawers; books, records, tapes, and pictures on shelves; and clothing, medicines, toiletries and other paraphernalia not carefully stored in dresser drawers or bathroom cupboards. While perhaps not a "full-blown" or "top-to-bottom" search, ante, at 336, a protective sweep is much closer to it than to a "limited patdown for weapons" or a " 'frisk' of an automobile". Ante, at 332. Because the nature and scope of the intrusion sanctioned here are far greater than those upheld in *Terry* and *Long*, the Court's conclusion that "[t]he ingredients to apply the balance struck in *Terry* and *Long* are

present in this case", *ibid.*, is unwarranted. The "ingredient" of a minimally intrusive search is absent, and the Court's holding today therefore unpalatably deviates from *Terry* and its progeny.

In light of the special sanctity of a private residence and the highly intrusive nature of a protective sweep, I firmly believe that police officers must have probable cause to fear that their personal safety is threatened by a hidden confederate of an arrestee before they may sweep through the entire home. Given the state-court determination that the officers searching Buie's home lacked probable cause to perceive such a danger and therefore were not lawfully present in the basement, I would affirm the state court's decision to suppress the incriminating evidence. I respectfully dissent².

IV. DUNAWAY v. NEW YORK

442 U.S. 200, 99 S.Ct. 2248, 60 UEd.2d 824 (1979).

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We decide in this case the question reserved 10 years ago in *Morales v. New York*, 396 U.S. 102 (1969), namely, "the question *of* the legality of custodial questioning on less than probable cause for a full-fledged arrest". *Id.*, at 106.

1

On March 26, 1971, the proprietor of a pizza parlor in Rochester, NT. was killed during an attempted robbery. On August 10, 1971, Detective

² Justice Stevens and Justice Kennedy wrote concurring opinions.

Anthony Fantigrossi of the Rochester Police was told by another officer that an informant had supplied a possible lead implicating petitioner in the crime. Fantigrossi questioned the supposed source of the lead—a jail inmate awaiting trial for burglary—but learned nothing that supplied "enough information to get a warrant" for petitioner's arrest. App. 60. Nevertheless, Fantigrossi ordered other detectives to "pick up" petitioner and "bring him in". *Id.*, at 54. Three detectives located petitioner at a neighbor's house on the morning of August 11. Petitioner was taken into custody; although he was not told he was under arrest, he would have been physically restrained if he had attempted to leave. *Opinion in People v. Dunaway* (Monroe County Ct, Mar. 11, 1977). He was driven to police headquarters in a police car and placed in an interrogation room, where he was questioned by officers after being given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioner waived counsel and eventually made statements and drew sketches that incriminated him in the crime.

At petitioner's jury trial for attempted robbery and felony murder his motions to suppress the statements and sketches were denied, and he was convicted. On appeal, both the Appellate Division of the Fourth Department and the New York Court of Appeals initially affirmed the conviction without opinion... However, this Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of the Court's supervening decision in *Brown v. Illinois*, 422 U.S. 590 (1975). 422 U.S. 1053 (1975). The petitioner in *Brown*, like petitioner *Dunaway*, made inculpatory statements after receiving *Miranda* warnings during custodial interrogation following his seizure—in that case a formal arrest—on less

than probable cause. Brown's motion to suppress the statements was also denied and the statements were used to convict him. Although the Illinois Supreme Court recognized that Brown's arrest was unlawful, it affirmed the admission of the statements on the ground that the giving of *Miranda* warnings break the causal connection between the illegal arrest and the giving of the statements. This Court reversed, holding that the courts erred in adopting a *a. per se* rule that *Miranda* warnings if themselves sufficed to cure the Fourth Amendment rather the Court held that in order to use such statements prosecution must show not only that the statements Fifth Amendment voluntariness standard, but also that the connection between the statements and the illegal arrest is sufficiently to purge the primary taint of the illegal arrest in the distinct policies and interests of the Fourth Amendment.

In compliance with the remand, the New York Court of Appeals held the Monroe County Court to make further factual findings as to whether there was a detention of petitioner, whether the police had probable cause, "and, in the event there was a detention and probable cause is not found for such detention, to determine the further question as to whether the making of the confessions rendered infirm by the illegal arrest (see *Brown v. Illinois*, 422 supra)". *People v. Dunaway*, 38 N.Y.2d 812, 813-814, 1583, 584 (1975).

The County Court determined after a supplementary suppression that Dunaway's motion to suppress should have been granted...

A divided Appellate Division reversed... The Court of Appeals dismissed petitioner's application for leave to appeal....

We granted certiorari ... to clarify the Fourth Amendment's limits as to the requirements as to the permissible grounds for custodial interrogation and to review the New York court's application of *Brown v. Illinois*. We reverse.

II

We first consider whether the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took petitioner into custody, transported him to the police, and detained him there for interrogation.

...There can be little doubt that petitioner was "seized" in the same sense when he was taken involuntarily to the police. And respondent State concedes that the police lacked probable cause to arrest petitioner before his incriminating statement during interrogation. Nevertheless respondent contends that the seizure of petitioner did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a "reasonable suspicion" that petitioner possessed "intimate knowledge about a serious and unsolved crime". Brief for Respondent 10. We disagree.

Before *Terry v. Ohio*, 392 U.S. 1 (1968), the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term "arrest" was synonymous with those seizures governed by the Fourth Amendment. While warrants were not required in all circumstances, the requirement of probable cause, as elaborated in numerous precedents, was treated as absolute. The "long prevailing standards" of probable cause embodied "the best compromise that has been found for accommodating the [] often opposing interests" in "safeguarding] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection". *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The standard of probable cause

thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular situations...

Terry for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause. That case involved a brief on-the-spot stop on the street and a frisk for weapons, a situation that did not fit comfortably within the traditional concept of an "arrest". Nevertheless, the Court held that even this type of "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" constituted a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment", 392 U.S., at 20, 17, and therefore "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures". *Id.*, at 20. However, since the intrusion involved in a "stop and frisk" was so much less severe than that involved in traditional "arrests", the Court declined to stretch the concept of "arrest"—and the general rule requiring probable cause to make arrests "reasonable" under the Fourth Amendment—to cover such intrusions. Instead, the Court treated the stop and frisk intrusion as a *sui generis* "rubric of police conduct," *ibid.* And to determine the justification necessary to make this specially limited intrusion "reasonable" under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety. *Id.*, at 22-27. As a consequence, the Court established a narrowly drawn authority to permit a reasonable

search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime". *Id.*, at 27. Thus, *Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment "seizures" so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope. *Terry* itself involved a limited, on-the-street frisk for weapons...

Respondent State now urges the Court to apply a balancing test, rather than the general rule, to custodial interrogations, and to hold that "seizures" such as that in this case may be justified by mere "reasonable suspicion". *Terry* and its progeny clearly do not support such a result. The narrow intrusions involved in those cases were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the "long prevailing standards" of probable cause, *Brinegar v. United States*, 338 U.S., at 176, only because these intrusions fell far short of the kind of intrusion associated with an arrest...

In contrast to the brief and narrowly circumscribed intrusions involved in those cases, the detention of *peuonei* was in important respects

indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes. . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause.

The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history". *Henry v. United States*, 361 U.S. 98, 100 (1959). Hostility to seizures; based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed ~~that~~ "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest". *Id.*, at 101 (footnotes omitted). The familiar threshold standard of probable cause for Fourth Amendment

seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.

In effect, respondents urge us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime". *Johnson v. United States*, 333 U.S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Moreover, two important decisions since *Terry* confirm the conclusion that the treatment of petitioner, whether or not it is technically characterized as an arrest, must be supported by probable cause. *Davis v. Mississippi*, 394 U.S. 721 (1969), decided the term after *Terry*, considered whether fingerprints taken from a suspect detained without probable cause must be

excluded from evidence. The State argued that the detention "was of a type which does not require probable cause", 394 U.S., at 726, because it occurred during an investigative, rather than accusatory stage, and because it was for the sole purpose of taking fingerprints. Rejecting the State's first argument, the Court warned:

"[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'". *Id.*, at 726-727.

The State's second argument in *Davis* was more substantial, largely because of the *distinctions* between taking fingerprints and interrogation:

"Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree'. Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time". *Id.*, at 727.

In *Davis*, however, the Court found it unnecessary to decide the validity of a "narrowly circumscribed procedure for obtaining" the fingerprints of

suspects without probable cause—in part because, as the Court emphasized, "petitioner was not merely fingerprinted during the ... detention but *also subjected to interrogation*". *Id.*, at 728 (emphasis added). The detention therefore violated the Fourth Amendment.

Brown v. Illinois, 422 U.S. 590 (1975), similarly disapproved arrests made for "investigator," purposes on less than probable cause. Although Brown's arrest had more of the trappings of a technical formal arrest than petitioner's, such differences in form must not be exalted over substance. Once in the police station, Brown was taken to an interrogation room, and his experience was indistinguishable from petitioner's. Our condemnation of the police conduct in Brown fits equally the police conduct in this case:

"The impropriety of the arrest was obvious; awareness of the feet was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning'... The arrest, both in design d in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up". *Id.*, at 605. See also *id.*, at 602.

These passages from *Davis* and *Brown* reflect the conclusion that detention for custodial interrogation—regardless of its label— intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station tor interrogation.

III

There remains the question whether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches...

The New York courts have consistently held, and petitioner does not contest, that proper *Miranda* warnings were given and that his statements were "voluntary" for purposes of the Fifth Amendment. But *Brown v. Illinois*, *supra*, settled that "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment serves interests and policies that are distinct from those it serves under the Fifth". 422 U.S., at 601, and held therefore that "Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation". *Ibid.*...

Consequently, although a confession after proper *Miranda* warnings may be found "voluntary" for purposes of the Fifth Amendment, this type of "voluntariness" is merely a "threshold requirement" for Fourth Amendment! analysis, 422 U.S. at 604. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.

Beyond this threshold requirement. *Brown* articulated a test designed to vindicate the "distinct policies and interests of the Fourth Amendment". *Id.*, at 602. Following *Wong Sun*, the Court eschewed any *per se* or "but for" rule, and identified the relevant inquiry as "whether Brown's statements were obtained by exploitation of the illegality of his arrest", 422 U.S.. at 600; see *Wong Sun v. United States*, *supra*, at 488. *Brown's* focus on "the causal

connection between the illegality and the confession", 422 U.S., at 603, reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

Brown identified several factors to be considered "in determining whether the confession is obtained by exploitation of an illegal arrest [:] [t] he temporal proximity of the arrest and the confession, the presence of intervening circumstances,. . . and, particularly, the purpose and flagrancy of the official misconduct... And the burden of showing admissibility rests, of course, on the prosecution". *Id.*, at 603-604. Examining the case before it, the Court readily concluded that the State had failed to sustain its burden of showing the confession was admissible. In the "less than two hours" that elapsed between the arrest and the confession "there was no intervening event of significance whatsoever". *Ibid.* Furthermore, the arrest without probable cause had a "quality of purposefulness" in that it was an "expedition for evidence" admittedly undertaken "in the hope that something might turn up". *Id.*, at 605.

The situation in this case is virtually a replica of the situation in *Brown*. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance. Nevertheless, three members of the Appellate Division purported to distinguish *Brown* on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was "highly protective of defendant's

Fifth and Sixth Amendment rights". 61 App.Div.2d, at 303. 402 N.Y.S.2d, at 493. This betrays a lingering confusion between "voluntariness" for purposes of the Fifth Amendment and the "causal connection" test established in *Brown*. Satisfying the Fifth Amendment is only the "threshold" condition of the Fourth Amendment analysis required by *Brown*. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth"¹.

Reversed².

V. KATZ v. UNITED STATES

389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of

¹ Comment 25 Emory L.J. 227, 238 (1976).

²Justice White and Justice Stevens wrote concurring opinions. Justice .Rehnquist wrote a dissenting opinion wuch Chief Justice Burger joined.

the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[there was no physical entrance into the area occupied by [the petitioner]]"¹. We granted certiorari in order to consider the constitutional questions thus presented.

The petitioner has phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution".

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area". Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy". That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

¹ 369 F.2d 130, 134.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area". The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area", viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected...

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry; *Olmstead v. United States*, 277 U.S. 438, 457, 464, 466; *Goldman v. United States*, 316 U.S. 129, 134-136, for that Amendment was thought to limit only searches and seizures of tangible property. But "[t]he premise that property interests control the right of the Government to search and seize has been discredited". *Warden v. Hayden*, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under...local property law". *Silverman v. United States*, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's

activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic¹ communications. The agents confined their surveillance to the brief periods during which he used the telephone booth², and they took great care to overhear only the conversations of the petitioner himself.³

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation,

² Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. SIX recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information

³ On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place...[A]...judicial order could have accommodated "the legitimate needs of law enforcement"⁴ by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should , retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause", *Agnello v. United States*, 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer ... be interposed between

⁴ *Lopez v. United States*, 373 U.S. 427, 464 (dissenting opinion of Mr. Justice Brennan).

the citizen and the police . . ." *Wong Sun v. United States*, 371 U.S. 471, 481-482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit". And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the... search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment". *Beck v. Ohio*, 579 U.S. 89, 96.

And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police". *M. at. 97*.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification...that is central to the Fourth Amendment"⁵, a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home...and unlike a field... a person has a constitutionally protected reasonable expectation of privacy, (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment, and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places". The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place". My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an

⁵ See *Oshorn v United States*, 386 U.S. 323, 330.

actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable...

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. Ante, at 352. The point is not that the booth is "accessible to the public" at other times, ante, at 351, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable...⁶

VI. DOUGLAS v. CALIFORNIA

372 U.S. 353, 83 S.Ct 814, 9 L.Ed2d 8U (1963).

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners, Bennie Will Meyes and William Douglas, were jointly tried and convicted in a California court on an information charging them with 13 felonies. A single public defender was appointed to represent them. At the commencement of the trial, the defender moved for a continuance, stating

⁶ Justice Douglas wrote a concurring opinion which Justice Brennan joined. Justice White also wrote a concurring opinion. Justice Black wrote a dissenting opinion.

that the case was very complicated, that he was not as prepared as he felt he should be because he was handling a different defense every day, and that there was a conflict of interest between the petitioners requiring the appointment of separate counsel for each of them. This motion was denied. Thereafter, petitioners dismissed the defender, claiming he was unprepared, and again renewed motions for separate counsel and for a continuance. These motions also were denied, and petitioners were ultimately convicted by a jury of all 13 felonies, which included robbery, assault with a deadly weapon, and assault with intent to commit murder. Both were given prison terms. Both appealed as of right to the California District Court of Appeal. That court affirmed their convictions. 187 Cal.App.2d 802, 10 Cal.Rptr. 188. Both Meyes and Douglas then petitioned for further discretionary review in the California Supreme Court, but their petitions were denied without a hearing. 187 Cal.App.2d, at 813, 10 Cal.Rptr., at 195. We granted certiorari...

Although several questions are presented in the petition for certiorari, we address ourselves to only one of them. The record shows that petitioners requested, and were denied, the assistance of counsel on appeal, even though it plainly appeared they were indigents. In denying petitioners' requests, the California District Court of Appeal stated that it had "gone through" the record and had come to the conclusion that "no good whatever could be served by appointment of counsel". 187 Cal.App.2d 802, 812, 10 Cal.Rptr. 188, 195. The District Court of Appeal was acting in accordance with a California rule of criminal procedure which provides that state appellate courts, upon the request of an indigent for counsel, may make "an independent investigation of the record and determine whether it would be of

advantage to the defendant or helpful to the appellate court to have counsel appointed...

After such investigation, appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court". *People v. Hyde*, 51 Cal.2d 152, 154, 331 P.2d 42, 43.

We agree, however, with Justice Traynor of the California Supreme Court, who said that the "[d]enial of counsel on appeal [to an indigent] would seem to be a discrimination at least as invidious as that condemned in *Griffin v. Illinois*..." *People v. Brown*, 55 Cal.2d 64, 71, 357 P.2d 1072, 1076 (concurring opinion). In *Griffin v. Illinois*, 351 U.S. 12, we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There ... the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has". *Griffin v. Illinois*, *supra*, at p. 19.

In spite of California's forward treatment of indigents, under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs *and* oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceed

ings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required.

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike... from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction...or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489... Absolute equality is not required; lines can be and are drawn and we often sustain them. ... But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

When an indigent is forced to run tin's gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. In the federal courts, on the other hand, an indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good feith...The federal courts must honor his request for counsel regardless of what they think: the merits of the case may be; and "representation in the role of advocate is required". *Ellis v. United States*, 356 U.S. 674, 675. In California, however, once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases", but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, *enjoys the* benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

We vacate the judgment of the District Court of Appeal and remand the case to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

In holding that an indigent has an absolute right to appointed counsel on appeal of a state criminal conviction, the Court appears to rely both on the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause of the Fourteenth Amendment, with obvious emphasis on "equal protection". In my view the Equal Protection Clause is not apposite, and its application to cases like the present one can lead only to mischievous results. This case should be judged solely under the Due Process Clause, and I do not believe that the California procedure violates that provision.

EQUAL PROTECTION

To approach the present problem in terms of the Equal Protection Clause is, I submit, but to substitute resounding phrases for analysis. I dissented from this approach in *Griffin v. Illinois*, 351 U.S. 12, 29, 34-36, and I am constrained to dissent from the implicit extension of the equal protection approach here—to a case in which the State denies no one an appeal, but seeks only to keep within reasonable bounds the instances in which appellate counsel will be assigned to indigents.

The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.

Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich. And surely, there would be no basis for attacking a state law which provided benefits for the needy simply because those benefits fell short of the goods or services that others could purchase for themselves.

Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances"¹. To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

Thus it should be apparent that the present case ... is not one properly regarded as arising under this clause. California does not discriminate between rich and poor in having a uniform policy permitting everyone to appeal and to retain counsel, and in having a separate rule dealing *only* with

¹ Griffin a Illinois supra at. 34 (dissenting opinion of this writer).

the standards for the appointment of counsel for those unable to retain their own attorneys. The sole classification established by this rule is between those cases that are believed to have merit and those regarded as frivolous. And, of course, no matter how far the state rule might go in providing counsel for indigents, it could never be expected to satisfy an affirmative duty—if one existed—to place the poor on the same level as those who can afford the best legal talent available.

Parenthetically, it should be noted that if the present problem may be viewed as one of equal protection, so may the question of the right to appointed counsel at trial, and the Court's analysis of that right in *Gideon v. Wainwright*, ante, p. 335, decided today, is wholly unnecessary. The short way to dispose of *Gideon v. Wainwright*, in other words, would be simply to say that the State deprives the indigent of equal protection whenever it fails to furnish him with legal services, and perhaps with other services as well, equivalent to those that the affluent defendant can obtain.

The real question in this case, I submit, and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure guaranteed by the Due Process Clause. Of course, in considering this question, it must not be lost sight of that the State's responsibility under the Due Process Clause is to provide justice for all. Refusal to furnish criminal indigents with some things that others can afford may fall short of constitutional standards of fairness. The problem before us is whether this is such a case.

DUE PROCESS

It bears reiteration that California's procedure of screening its criminal appeals to determine whether or not counsel ought to be appointed denies to

no one the right to appeal. This is not a case ... in which a court rule or statute bars all consideration of the merits of an appeal unless docketing fees are prepaid. Nor is it like *Griffin v. Illinois*, supra, in which the State conceded that "petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors". 351 U.S., at 16. Here it is *this* Court which finds, notwithstanding California's assertions to the contrary, that as a matter of constitutional law "adequate appellate review" is impossible unless counsel has been appointed. And while *Griffin* left it open to the States to devise "other means of affording adequate and effective appellate review to indigent defendants", 351 U.S., at 20, the present decision establishes what is seemingly an absolute rule under which the State may be left without any means of protecting itself against the employment of counsel in frivolous appeals.

It was precisely towards providing adequate appellate review— as part of what the Court concedes to be "California's forward treatment of indigents"—that the State formulated the system which the Court today strikes down. That system requires the state appellate courts to appoint counsel on appeal for any indigent defendant except "if in their judgment such appointment would be of no value to either the defendant or the court". *People v. Hyde*, 51 Cal.2d 152, 154, 331 P.2d 42, 43. This judgment can be reached only after an independent investigation of the trial record by the reviewing court. And even if counsel is denied, a full appeal on the merits is accorded to the indigent appellant, together with a statement of the reasons why counsel was not assigned. There is nothing in the present case, or in any other case that has been cited to us, to indicate that the system has resulted in injustice. Quite the contrav, there is every reason to believe that

California appellate courts have made a painstaking effort to apply the rule fairly and to live up to the State Supreme Court's mandate...

We have today held that in a case such as the one before us, there is an absolute right to the services of counsel at trial... But the appellate procedures involved here stand on an entirely different constitutional footing. *First*, appellate review is in itself not required by the Fourteenth Amendment.... and thus the question presented is the narrow one whether the State's rules with respect to the appointment of counsel are so arbitrary or unreasonable, *in the context of the particular appellate procedure that it has established*, as to require their invalidation. Second, the kinds of questions that may arise on appeal are circumscribed by the record of the proceedings that led to the conviction; they do not encompass the large variety of tactical and strategic problems that must be resolved at the trial. *Third*, as California applies its rule, the indigent appellant receives the benefit of expert and conscientious legal appraisal of the merits of his case on the basis of the trial record, and whether or not he is assigned counsel, is guaranteed full consideration of his appeal. It would be painting with too broad a brush to conclude that under these circumstances an appeal is just like a trial.

What the Court finds constitutionally offensive in California's procedure bears a striking resemblance to the rules of this Court and many state courts of last resort on petitions for certiorari or for leave to appeal filed by indigent defendants *pro se*. Under the practice of this Court, only if it appears iron-the petition for certiorari that a case merits review is leave to proceed *in forma pauperis* granted, the transferred to the Appellate Docket, and counsel appointed. Since our review is generally discretionary and since we

arc often not even given the benefit of a record in the proceedings below, the disadvantages to the indigent petitioner might be regarded as more substantial than in California. But as conscientiously committed as this Court is to the great principle of "Equal Justice Under Law", it has never deemed itself constitutionally required to appoint counsel to assist in the preparation of each of the more than 1,000 *pro se* petitions for certiorari currently being filed each Term. We should know from our own experience that appellate courts generally go out of their way to give fair consideration to those who are unrepresented.

The Court distinguishes our review from the present case on the grounds that the California rule relates to "the *first appeal*, granted as a matter of right." Ante, p. 356. But I fail to see the significance of this difference. Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review... Nor can it well be suggested that having appointed counsel is more necessary to the fair administration of justice in an initial appeal taken as a matter of right, which the reviewing court on the full record has already determined to be frivolous, than in a petition asking a higher appellate court to exercise its discretion to consider what may be a substantial constitutional claim.

Further, there is no indication in this record, or in the state cases cited to us, that the California procedure differs in any material respect from the screening of appeals in federal criminal cases that is prescribed by 28 U.S. § 1915. As recently as last Term, in *Coppedge v. United States*, 369 U.S. 438 we had occasion to pass upon the application of this statute. Although

to reject an application for leave to appeal *in forma pauperis*, it nonetheless recognized that the federal courts could prevent the needless expenditure of public funds by summarily disposing of frivolous appeals. Indeed in some respects, California has outdone the federal system, since it provides a transcript and an appeal on the merits in *all* cases, *no* matter how frivolous.

I cannot agree that the Constitution prohibits a State, in seeking to redress economic imbalances at its bar of justice and to provide indigents with full review, from taking reasonable steps to guard against needless expense. This is all that California has done. Accordingly, I would affirm the state judgment².

VII. GARRITY v. NEW JERSEY

386 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to

² Justice Brandeis wrote a dissenting opinion.

incriminate him; but (3) that if he refused to answer he would be subject to removal from office.

Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department. See 44 N.J. 209, 207 A.2d 689, 44 N.J. 259, 208 A.2d 146.

The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers v. Florida*, 309 U.S. 227, and related cases can be "mental as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition". *Blackburn v. Alabama*, 361 U.S. 199, 206. Subtle pressures . . . may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer". *Lisenbav. California*, 314 U.S. 219, 241.

We adhere to *Boyd v. United States*, 116 U.S. 616, a civil forfeiture action against property. A statute offered the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment...

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay

the penalty of self-incrimination is the antithesis of free choice to speak out to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona*, 384 U.S. 436, 464-465, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice". We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

It is said that there was a "waiver". That, however, is a federal question for us to decide...

Where the choice is "between the rock and the whirlpool", duress is inherent in deciding to "waive" one or the other...

... In these cases . . . though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. . . The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information.

Mr. Justice Holmes in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517, stated a dictum on which New Jersey heavily relies:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control". *Id.*, at 220, 29 N.E., at 517-518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in *Slochower v. Board of Education*, 350 U.S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury... The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances". *Id.*, at 557-558.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. ...Resort to the federal courts in diversity of citizenship cases is another. . . Assertion of a First Amendment right is still another. . .The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

The majority employs a curious mixture of doctrines to invalidate these convictions, and I confess to difficulty in perceiving the intended relationships among the various segments of its opinion. I gather that the majority believes that the possibility that these policemen might have been discharged had they refused to provide information pertinent to their public responsibilities is an impermissible "condition" imposed by New Jersey upon petitioners' privilege against self-incrimination. From this premise the majority draws the conclusion that the statements obtained from petitioners after a warning that discharge was possible were inadmissible. Evidently recognizing the weakness of its conclusion, the majority attempts to bring to its support illustrations from the lengthy series of cases in which this Court, in light of all the relevant circumstances, has adjudged the voluntariness *in fact* of statements obtained from accused persons.

The majority is apparently engaged in the delicate task of riding two unruly horses at once: it is presumably arguing simultaneously that the statements were involuntary as a matter of fact . . . and that the statements were inadmissible as a matter of law, on the premise that they were products of an impermissible condition imposed on the constitutional privilege. These are very different contentions and require separate replies, but in my opinion both contentions are plainly mistaken, for reasons that follow.

I

I turn first to the suggestion that these statements were involuntary in fact. An assessment of the voluntariness of the various statements in issue

here requires a more comprehensive examination of the pertinent circumstances than the majority has undertaken.

It would be difficult to imagine interrogations to which these criteria of duress were more completely inapplicable, or in which the requirements which have subsequently been imposed by this Court on police questioning were more thoroughly satisfied. Each of the petitioners received a complete and explicit reminder of his constitutional privilege. Three of the petitioners had counsel present, at least a fourth had consulted counsel but freely determined that his presence was unnecessary. These petitioners were not in any fashion "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . ." *Miranda v. Arizona*, 384 U.S. 436, 461. I think it manifest that, under the standards developed by this Court to assess voluntariness, there is no basis for saying that any of these statements were made involuntarily.

The issue remaining is whether the statements were inadmissible because they were "involuntary as a matter of law", in that they were given after a warning that New Jersey policemen may be discharged for failure to provide information pertinent to their public responsibilities. What is really involved on this score, however, is not in truth a question of "voluntariness" at all, but rather whether the condition imposed by the State on the exercise of the privilege against self-incrimination, namely dismissal from office, in this instance serves in itself to render the statements inadmissible. Absent

evidence of involuntariness in fact, the admissibility of these statements thus hinges on the validity of the consequence which the State acknowledged might have resulted if the statements had not been given. If the consequence is constitutionally permissible, there can surely be no objection if the State cautions the witness that it may follow if he remains silent. If both the consequence and the warning are constitutionally permissible, a witness is obliged, in order to prevent the use of his statements against him in a criminal prosecution, to prove under the standards established since *Brown v. Mississippi*, 297 U.S. 278, that as a matter of fact the statements were involuntarily made. The central issues here are therefore ... whether consequences may properly be permitted to result to a claimant after his invocation of the constitutional privilege, and if so, whether the consequence in question is permissible... [I]n my view nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect.

It can hardly be denied that New Jersey is permitted by the Constitution to establish reasonable qualifications and standards of conduct for its public employees. Nor can it be said that it is arbitrary or unreasonable for New Jersey to insist that its employees furnish the appropriate authorities with information pertinent to their employment.... Finally, it is surely plain that New Jersey may in particular require its employees to assist in the prevention and detection of unlawful activities by officers of the state government. The urgency of these requirements is the more obvious here.

where the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our systems of justice of the integrity of local police forces can scarcely be exaggerated. Thus, it need only be recalled that this Court itself has often intervened in state criminal prosecutions precisely on the ground that this might encourage high standards of police behavior... It must be concluded, therefore, that the sanction at issue here is reasonably calculated to serve the most basic interests of the citizens of New Jersey.

The final question is the hazard, if any, which this sanction presents to the constitutional privilege. The purposes for which, and the circumstances in which, an officer's discharge might be ordered under New Jersey law plainly may vary. It is of course possible that discharge might in a given case be predicated on an imputation of guilt drawn from the use of the privilege, as was thought by this Court to have occurred in *Slochower v. Board of Education*, [350 U.S. 551 (1956)]. But from our vantage point, it would be quite improper to assume that New Jersey will employ these procedures for purposes other than to assess in good faith an employee's continued fitness for public employment. This Court, when a state procedure for investigating the loyalty and fitness of public employees might result either in the *Slochower* situation or in an assessment in good faith of an employee, has until today consistently paused to examine the actual circumstances of each case... I am unable to see any justification for the majority's abandonment of that process; it is well calculated both to protect the essential purposes of the privilege and to guarantee the most generous opportunities for the pursuit of other public values. The majority's broad prohibition, on the other hand, extends the scope of the privilege beyond its essential purposes, and

The following morning the FBI obtained from another of Andrews' sisters some snapshots of Andrews and of petitioner Simmons, who was said by the sister to have been with Andrews the previous afternoon. These snapshots were shown to the five bank employees who had witnessed the robbery. Each witness identified pictures of Simmons as representing one of the robbers. A week or two later, three of these employees identified photographs of petitioner Garrett as depicting the other robber, the other two witnesses stating that they did not have a clear view of the second robber.

The petitioners, together with William Andrews, subsequently were indicted and tried for the robbery, as indicated. Just prior to the trial, Garrett moved to suppress the Government's exhibit consisting of the suitcase containing the incriminating items. In order to establish his standing so to move, Garrett testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned, and that he was the owner of clothing found inside the suitcase. The District Court denied the motion to suppress. Garrett's testimony at the "suppression" hearing was admitted against him at trial.

During the trial, all five bank employee witnesses identified Simmons as one of the robbers. Three of them identified Garrett as the second robber, the other two testifying that they did not get a good look at the second robber...

The jury found Simmons and Garrett, as well as Andrews, guilty as charged. On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery. 371 F.2d 296.

We granted certiorari as to Simmons and Garrett ... to consider the following claims. First, Simmons asserts that his pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of our supervisory power over the lower federal courts. . Garrett urges that his constitutional rights were violated when testimony given by him in support of his "suppression" motion was admitted against him at trial. For reasons which follow, we affirm the judgment of the Court of Appeals as to Simmons, but reverse as to Garrett.

I

The facts as to the identification claim are these. As has been noted previously, FBI agents on the day following the robbery obtained from Andrews' sister a number of snapshots of Andrews and Simmons. There seem to have been at least six of these pictures, consisting mostly of group photographs of Andrews, Simmons, and others. Later the same day, these were shown to the five bank employees who had witnessed the robbery at their place of work, the photographs being exhibited to each employee separately. Each of the five employees identified Simmons from the photographs. At later dates, some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again all identified Simmons. At trial, the Government did not introduce any of the photographs but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers.

In support of his argument, Simmons looks to last Term's "lineup" decisions—*United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*,

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In support of his argument Simmons looks to last Term's "lineup" decisions - *United States v. Wade* 388 U.S. 218. and *Gilbert v. California*,

388 U.S. 263—in which this Court first departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissibility, of identification testimony at trial. The rationale of those cases was that an accused is entitled to counsel at any "critical stage of the prosecution", and that a post-indictment lineup is such a "critical stage". See 388 U.S., at 236-237. Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances... Viewed in that context, we find the claim untenable.

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him /under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the

photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification...

Applying the standard to this case, we conclude that petitioner Simmons' claim on this score must fail. In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities...

In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.

Under these conditions, all five eyewitnesses identified Simmons as one of the robbers; None identified Andrews, who apparently was as prominent in the photographs as Simmons. These initial identifications were confirmed by all five witnesses in subsequent viewings of photographs and at trial, where each witness identified Simmons in person. Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal. We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

III

Finally, it is contended that it was reversible error to allow the Government to use against Garrett on the issue of guilt the testimony given by him upon his unsuccessful motion to suppress as evidence the suitcase seized from Mrs. Mahon's basement and its contents. That testimony established that Garrett was the owner of the suitcase.

In order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof to have excluded from trial evidence which had been secured by means of an unlawful search and seizure... More recently, this Court has held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments ..." *Mapp v. Ohio*, 367 U.S. 643, 657.

However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure... Throughout this case, petitioner Garrett has justifiably, and without challenge from the Government, proceeded on the assumption that the standing requirements must be satisfied. On that premise, he contends that testimony given by a defendant to meet such requirements should not be admissible against him at trial on the question of guilt or innocence. We agree.

...Garrett evidently was not in Mrs. Mahon's house at the time his suitcase was seized from her basement. The only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner. Thus, his testimony is to be

regarded as an integral part of his Fourth Amendment exclusion claim. Under the rule laid down by the courts below, he could give that testimony only by assuming the risk that the testimony would later be admitted against him at trial. Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.

It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. The likelihood of inhibition is greatest when the testimony is known to be admissible regardless of the outcome of the motion to suppress. But even in jurisdictions where the admissibility of the testimony depends upon the outcome of the motion, there will be a deterrent effect in those marginal cases in which it cannot be estimated with confidence whether the motion will succeed. Since search-and-seizure claims depend heavily upon their individual facts, and since the law of search and seizure is in a state of flux, the incidence of such marginal cases cannot be said to be negligible. In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the

Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

...Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-incrimination Clause because the testimony was voluntary. As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds,

his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

...1,2

IX. PRELIMINARY EXAMINATION

COLEMAN v. ALABAMA

399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered the following opinion.

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder in the shooting of one Reynolds after he and his wife parked their car on an Alabama highway to change a flat tire. The Alabama Court of Appeals affirmed...and the Alabama Supreme Court denied review, 282 Ala. 725, 211 So.2d 927 (1968). We granted certiorari, 394 U.S. 916 (1969). We vacate and remand.

Petitioners ... argue that the preliminary hearing prior to their indictment was a "critical stage" of the prosecution and that Alabama's failure to provide them with appointed counsel at the hearing therefore unconstitutionally denied them the assistance of counsel.

¹Justice Black wrote an opinion concurring in part and dissenting in part. Justice White also wrote a brief opinion concurring in part and dissenting in part.

² In *United States v. Ash*, 413 U.S. 300 (1973), the Supreme Court held that the Sixth Amendment (see *United States v. Wade*, 388 U.S. 218 (1967). above) does not require the presence of counsel at a post-indictment photographic identification.

II¹

This Court has held that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him", *Powell v. Alabama*, 287 U.S. 45, 69 (1932). and that that constitutional principle is not limited to the presence of counsel at trial. "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial". *United States v. Wade*, [388 U.S. 218 (1967)], at 226...

The preliminary hearing is not a required step in an Alabama prosecution. The prosecutor may seek an indictment directly from the grand jury without a preliminary hearing... The opinion of the Alabama Court of Appeals in this case instructs us that under Alabama law the sole purposes of a preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable... The court continued:

"At the preliminary hearing...the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case. Also *Pointer v. State of Texas* [380 U.S. 400 (1965)] bars the admission of testimony given at a pre-trial proceeding where the accused did not have the benefit of cross-examination by and through counsel. Thus, nothing occurring at the

¹ Mr. Justice Douglas, Mr. Justice White, and Mr. Justice Marshall join this part II [Mr. Justice Black and Mr. Justice Harlan concurred in the conclusion of this Part in separate opinions.

preliminary hearing in absence of counsel can substantially prejudice the rights of the accused on trial". 44 Ala. App.. at 433, 211 So. 2d, at 921.

This Court is of course bound by this construction of the governing Alabama law... However, from the fact that in cases where the accused has no lawyer at the hearing the Alabama courts prohibit the State's use at trial of anything that occurred at the hearing, it does not follow that the Alabama preliminary hearing is not a "critical stage" of the State's criminal process. The determination whether the hearing is a "critical stage" requiring the provision of counsel depends, as noted, upon an analysis "whether potential substantial prejudice to defendant's rights inheres in the ... confrontation and the ability of counsel to help avoid that prejudice." *United States v. Wade*, supra, at 227. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] ... as at the trial itself. *Powell v. Alabama*, *supra*, at 57:

III²

There remains, then, the question of the relief to which petitioners are entitled. The trial transcript indicates that the prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed. Cf. *White v. Maryland*, *supra*. But on the record it cannot be said whether or not petitioners were otherwise prejudiced by the absence of counsel at the preliminary hearing. That inquiry in the first instance should more properly be made by the Alabama courts. The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error...

We accordingly vacate the petitioners' convictions and remand the case to the Alabama courts for such proceedings not inconsistent with this opinion as they may deem appropriate to determine whether such denial of counsel was harmless error ... and therefore whether the convictions should be reinstated or a new trial ordered.

It is so ordered.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, dissenting.

² Mr. Justice Black, Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall join this Part. III.

On a July night in 1966 Casey Reynolds and his wife stopped their car on Green Springs Highway in Birmingham, Alabama, in order to change a flat tire. They were soon accosted by three men whose evident purpose was armed robbery and rape. The assailants shot Reynolds twice before they were frightened away by the lights of a passing automobile. Some two months later the petitioners were arrested, and later identified by Reynolds as two of the three men who had assaulted him and his wife.

A few days later the petitioners were granted a preliminary hearing before a county judge. At this hearing the petitioners were neither required nor permitted to enter any plea. The sole purpose of such a hearing in Alabama is to determine whether there is sufficient evidence against the accused to warrant presenting the case to a grand jury, and, if so, to fix bail if the offense is bailable. At the conclusion of the hearing the petitioners were bound over to the grand jury, and their bond was set at \$10,000. No record or transcript of any kind was made of the hearing.

Less than a month later the grand jury returned an indictment against the petitioners, charging them with assault to commit murder. Promptly after their indictment a lawyer was appointed to represent them. At their arraignment two weeks later, where they were represented by their appointed counsel, they entered a plea of not guilty} '...Some months later they were brought to trial, again represented by appointed counsel... The jury found them guilty as charged, and they were sentenced to the penitentiary.

If at the trial the prosecution had used any incriminating statements made by the petitioners at the preliminary hearing, the convictions before us would quite properly have to be set aside... But that did not happen in this case. Or if the prosecution had used the statement of other witness at the

preliminary hearing against the petitioners at their trial, we would likewise quite properly have to set aside these convictions.... But that did not happen in this case either. For, as the prevailing opinion today perforce concedes, "the prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed".

Nevertheless, the Court sets aside the convictions because, it says, counsel should have been provided for the petitioners at the preliminary hearing...

...[T]he prevailing opinion holds today that the Constitution required Alabama to provide a lawyer for the petitioners at their preliminary hearing, not so much, it seems, to assure a fair trial as to assure a fair preliminary hearing. A lawyer at the preliminary hearing, the opinion says, might have led the magistrate to "refuse to bind the accused over". Or a lawyer might have made "effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail".

If *those* are the reasons a lawyer must be provided, then the most elementary logic requires that a new preliminary hearing must now be held, with counsel made available to the petitioners. In order to provide such relief, it would, of course, be necessary not only to set aside these convictions, but also to set aside the grand jury indictments, and the magistrate's orders fixing bail and binding over the petitioners. Since the petitioners have now been found by a jury in a constitutional trial to be guilty beyond a reasonable doubt, the prevailing opinion understandably boggles at these logical consequences of the reasoning therein. It refrains, in short, from now turning back the clock by ordering a new preliminary hearing to determine all over again whether there is sufficient evidence

against the accused to present their case to a grand jury. Instead, the Court sets aside these convictions and remands the case for determination "whether the convictions should be reinstated or a new trial ordered", and this action seems to me even more quixotic.

The petitioners have simply not alleged that anything that happened at the preliminary hearing turned out in this case to be critical to the fairness of their trial. They have not alleged that they were affirmatively prejudiced at the trial by anything that occurred at the preliminary hearing. They have not pointed to any affirmative advantage they would have enjoyed at the trial if they had had a lawyer at their preliminary hearing.

No record or transcript of any kind was made of the preliminary hearing. Therefore, if the burden on remand is on the petitioners to show that they were prejudiced, it is clear that that burden cannot be met, and the remand is a futile gesture. If on the other hand, the burden is on the State to disprove beyond a reasonable doubt any and all speculative advantages that the petitioners might conceivably have enjoyed if counsel had been present at their preliminary hearing, then obviously that burden cannot be met either, and the Court should simply reverse these convictions. All I can say is that if the Alabama courts can figure out what they are supposed to do with this case now that it has been remanded to them, their percepriveness will far exceed mine.

The record before us makes clear that no evidence of what occurred at the preliminary hearing, was used against the petitioners at their now completed trial. I would hold, therefore, that the absence of counsel at the

preliminary hearing deprived the petitioners of no constitutional rights. Accordingly, I would affirm these convictions .

X. STACK v. BOYLE
342 U.S. 1, 72 S. Ct. 1, 96 L.Ed. 3 (1951).

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Indictments have been returned in the Southern District of California charging the twelve petitioners with conspiring to violate the Smith Act, 18 U.S.C. (Supp. IV) §§ 371, 2385. Upon their arrest, bail was fixed for each petitioner in the widely varying amounts of \$2,500, \$7,500, \$75,000 and \$100,000. On motion of petitioner Schneiderman following arrest in the Southern District of New York, his bail was reduced to \$50,000 before his removal to California. On motion of the Government to increase bail in the case of other petitioners, and after several intermediate procedural steps not material to the issues presented here, bail was fixed in the District Court for the Southern District of California in the uniform amount of \$50,000 for each petitioner.

Petitioners moved to reduce bail on the ground that bail as fixed was excessive under the Eighth Amendment. In support of their motion, petitioners submitted statements as to their financial resources, family relationships, health, prior criminal records, and other information. The only

³ Justice Black and Justice White wrote concurring opinions. Justice Douglas wrote an opinion. Justice Brandeis wrote an opinion concurring in part and dissenting in part. Chief Justice Burger wrote a dissenting opinion. Justice Stewart wrote a dissenting opinion, which Chief Justice Burger joined.

evidence offered by the Government was a certified record showing that four persons previously convicted under the Smith Act in the Southern District of New York had forfeited bail. No evidence was produced relating those four persons to the petitioners in this case. At a hearing on the motion, petitioners were examined by the District Judge and cross-examined by an attorney for the Government. Petitioners' factual statements stand uncontroverted.

After their motion to reduce bail was denied, petitioners filed applications for habeas corpus in the same District Court. Upon consideration of the record on the motion to reduce bail, the writs were denied. The Court of Appeals for the Ninth Circuit affirmed. 192 F.2d 56. Prior to filing their petition for certiorari in this Court, petitioners filed with Mr. Justice Douglas an application for bail and an alternative application for habeas corpus seeking interim relief. Both applications were referred to the Court and the matter was set down for argument on specific questions covering the issues raised by this case.

Relief in this type of case must be speedy if it is to be effective. The petition for certiorari and the full record are now before the Court and, since the questions presented by the petition have been fully briefed and argued, we consider it appropriate to dispose of the petition for certiorari at this time. Accordingly, the petition for certiorari is granted for review of questions important to the administration of criminal justice.

First. From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the

infliction of punishment prior to conviction... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty... Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment...

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant. In this case petitioners are charged with offenses under the Smith Act and, if found guilty, their convictions are subject to review with the scrupulous care demanded by our Constitution... Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than \$10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an

unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.

If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail.

The Court concludes that bail has not been fixed by proper methods in this case and that petitioners' remedy is by motion to reduce bail, with right of appeal to the Court of Appeals. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to vacate its order denying petitioners' applications for writs of habeas corpus and to dismiss the applications without prejudice. Petitioners may move for reduction of bail in the criminal proceeding so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner.

It is so ordered¹.

¹ Justice Jackson wrote an opinion, which Justice Frankfurter joined.

XI. UNITED STATES v. ARMSTRONG

617 U.S. 456, 116 S.Ct 1480, 134 L.Ed.2d 687 (1996).

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U.S.C. §§ 841 and 846 (1988 ed. and Supp. IV), and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents earning firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment alleging that they were selected for federal prosecution because they are black. In support of their motion they offered

only an affidavit by a "Paralegal Specialist", employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 §§ 841 or 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.

The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation "that the Government has acted uniairly or has prosecuted non-black defendants or failed to prosecute them". App. 150. The District Court granted the motion. It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses...

The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because "there was over 100 grams of cocaine base involved, over twice the threshold

necessary for a ten year mandatory' minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring;

... there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; ... and several of the defendants had criminal histories including narcotics and firearms violations". *Id.*, at 81.

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack". J. Featherly & E. Hill, *Crack Cocaine Overview 1989*; App.103.

In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of Caucasian users and dealers to minority users and dealers". *Id.*, at 138. Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, *id.*, at 141, and a newspaper article reporting that Federal "crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black", Newton, *Harsher Crack Sentences Criticized as Racial Inequity*. *Los Angeles Times*, Nov. 23, 1992. p. 1: App.208-210.

The District Court denied the motion for reconsideration. When the Government indicated it would not comply with the court's discovery order, the court dismissed the case¹.

A divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, holding that, because of the proof requirements for a selective-prosecution claim, defendants must "provide a colorable basis for believing that 'others similarly situated have not been prosecuted' " to obtain discovery. 21 F.3d 1431, 1436 (1994) (quoting *United States v. Wayte*, 710 F.2d 1385, 1387 (C.A.9 1983), *aff'd*, 470 U.S. 598 (1985)). The Court of Appeals voted to rehear the case *en banc*, and the *en banc* panel affirmed the District Court's order of dismissal, holding that "a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated." 48 F.3d 1508, 1516 (1995) (emphasis deleted). We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim...

* * *

[The Court held that Rule 16(a)(XIXC), Federal Rules of Criminal Procedure, authorizes a defendant to obtain discovery of government documents material to preparation of a defense to the Government's case-in-chief but not to preparation of a claim of selective prosecution].

In *Wade v. United States*, 504 U.S. 181 (1992), we considered whether a federal court may review a Government decision not to file a motion to

¹ We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race. Here, "it was the government itself that suggested dismissal of the indictments to the district court so that an appeal might lie". 48 F.3d 1508, 1610 (C.A.9 1995).

reduce a defendant's sentence for substantial assistance to the prosecution, to determine whether the Government based its decision on the defendant's race or religion. In holding that such a decision was reviewable, we assumed that discovery would be available if the defendant could make the appropriate threshold showing, although we concluded that the defendant in that case did not make such a showing... We proceed *on* a like assumption here.

A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption", cf. *United States v. Mezzanatto*, 513 U.S. 196, ___ (1995) that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. *Heckler v. Chancy*, 470 U.S. 821, . 832 (1985). The Attorney General and United States Attorneys retain " 'broad discretion' " to enforce the Nation's criminal laws. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n. II (1982)). They have this latitude because they are designated by statute as *the* President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed". U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and

"in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties". *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to hie or bring before a grand jury, generally rests entirely in his discretion". *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

Of course, a prosecutor's discretion is "subject *to* constitutional constraints". *United States v. Batchelder*, 442 U.S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment ... is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification", *Oyler v. Boles*, 368 U.S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *YickWo v. Hopkins*, 118 U.S. 356, 373 (1886).

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary". *Chemical Foundation*, *supra*, at 14-15. We explained in *Wayte* why courts are "properly hesitant to examine the decision whether to prosecute". 470 U.S., at 608. Judicial deterence to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement

priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake". *Id.*, at 607. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy". *Ibid.*

The requirements for a selective-prosecution claim draw on "ordinary equal protection standards". *Id.*, at 608. The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose". *Ibid.*... To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted...

The similarly situated requirement does not make a selective-prosecution claim impossible to prove... [W]e invalidated an ordinance ... adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. *Yick Wo*, 118 U.S.. at 374. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings "under similar conditions". *Ibid.*...

Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a *prima facie* case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

... The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense", discriminatory effect and discriminatory intent. *United States v. Berrios*, 501 F.2d 1207, 1211 (C.A.2 1974).

In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant... We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law... As the three-judge panel explained, "[s]elective prosecution implies that a selection has taken place". 21 F.3d. at 1436.

The Court of Appeals reached its decision in part because it started "with the presumption that people of all races commit all types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group". 48 F.3d. at 1516-1517. It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show that: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black .; 93.4% of convicted LSD dealers were white .; and 91% of those convicted for pornography prostitution were white..; Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

The Court of Appeals also expressed concern about the "evidentiary obstacles defendants face". 48 F.3d, at 1514. But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California, were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of a selective-prosecution claim. *Berrios*, supra, at 1211. The study failed to identify individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered².

XII. UNITED STATES v. WILLIAMS

504 U.S. 36, 112 S.Ct. 1736, 118 L.Ed.2d 352 (1992).

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether a district court may dismiss an otherwise valid indictment because the Government failed to

² Justice Souter and Justice Ginsburg wrote brief concurring opinions, limiting their agreement with the Court's opinion with respect to the scope of Rule 16. Justice Breyer wrote an opinion concurring in part and concurring in the judgment, in which he disagreed with the Court's opinion with respect to the scope of Rule 16. Justice Stevens wrote a dissenting opinion.

disclose to the grand jury "substantial exculpatory evidence" in its possession.

I

On May 4, 1988, respondent John H. Williams, Jr., a Tulsa, Oklahoma investor, was indicted by a federal grand jury on seven counts of "knowingly mak[ing] [a] false statement or report ... for the purpose of influencing ... the action [of a federally insured financial institution]," in violation of 18 U.S.C. § 1014 (1988 ed., Supp., II). According to the indictment, between September 1984 and November 1985 Williams supplied four Oklahoma banks with "materially false" statements that variously overstated the value of his current assets and interest income in order to influence the banks' actions on his loan requests.

Williams' misrepresentation was allegedly effected through two financial statements provided to the banks, a "Market Value Balance Sheet" and a "Statement of Projected Income and Expense". The former included as "current assets" approximately \$6 million in notes receivable from three venture capital companies. Though it contained a disclaimer that these assets were carried at cost rather than at market value, the Government asserted that listing them as "current assets"—i.e., assets quickly reducible to cash—was misleading, since Williams knew that none of the venture capital companies could afford to satisfy the notes in the short term. The second document—the Statement of projected Income and Expense--allegedly misrepresented Williams' interest income, since it failed to reflect that the interest payments received on the notes of the venture capital companies

were funded entirely by Williams' own loans to those companies. The Statement thus falsely implied, according to the Government, that Williams was deriving interest income from "an independent outside source". Brief for United States 3.

Shortly after arraignment, the District Court granted Williams' motion for disclosure of all exculpatory portions of the grand jury transcripts... Upon reviewing this material, Williams demanded that the District Court dismiss the indictment, alleging that the Government had failed to fulfill its obligation... to present "substantial exculpatory evidence" to the grand jury (emphasis omitted). His contention was that evidence which the Government had chosen not to present to the grand jury—in particular, Williams' general ledgers and tax returns, and Williams' testimony in his contemporaneous Chapter 11 bankruptcy proceeding—disclosed that, for tax purposes and otherwise, he had regularly accounted for the "notes receivable" (and the interest on them) in a manner consistent with the Balance Sheet and the Income Statement. This, he contended, belied an intent to mislead the banks, and thus directly negated an essential element of the charged offense.

The District Court initially denied Williams' motion, but upon reconsideration ordered the indictment dismissed without prejudice. It found, after a hearing, that the withheld evidence was "relevant to an essential element of the crime charged," created "a reasonable doubt about [respondent's] guilt", App. to Pet. for Cert. 23a-24a (quoting *United States v. Gray*, 502 F.Supp. 150, 152 (DC 1980)), and thus "render[ed] the grand jury's decision to indict gravely suspect". App. to Pet. for Cert. 26a. Upon the Government's appeal, the Court of Appeals affirmed the District Court's order... It fust sustained as not clearly erroneous" the District Court's

determination that the Government had withheld "substantial exculpatory evidence" from the grand jury, see 899 F.2d 898, 900-903 (C.A.10 1990). It then found that the Government's behavior "substantially influence[d] " the grand jury's decision to indict, or at the very least raised a " grave doubt that the decision to indict was free from such substantial influence ". Id., at 903 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988)); see 899 F.2d, at 903-904. Under these circumstances, the Tenth Circuit concluded, it was not an abuse of discretion for the District Court to require the Government to begin anew before the grand jury. We granted certiorari...

III

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress", *United States v. Hastings*, 461 U.S. 499, 505 (1983), he argues that imposition of the Tenth Circuit's disclosure rule is supported by the courts' "supervisory power". We think not...

A

"[R]ooted in long centuries of Anglo-American history", *Hannah v. Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It " is a constitutional fixture in its own right". *United States v. Chanen*, 549 F.2d 1306, 1312 (C.A.9 1977) (quoting *Nixon v. Sirica*, 159 U.S.App.D.C. 58, 70, n. 54, 487 F.2d 700, 712,

. 54 (1973)), cert. denied, 434 U.S. 825 (1977). In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people... Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office...

The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised. "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not' ". *United States v. R. Enterprises*, 498 U.S. 292, 297 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)). It need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair v. United States*, 250 U.S. 273, 282 (1919). The grand jury requires no authorization from its constituting court to initiate an investigation ... not does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge.. It swears in its own witnesses, Fed. Rule Crim. Proc. 6(c), and deliberates in total secrecy ...

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion

is required...And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution ... or even testimonial privileges recognized by the common law... Even in this setting, however, we have insisted that the grand jury remain "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it". *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973). Recognizing this tradition of independence, we have said that the Fifth Amendment's "constitutional guarantee *presupposes* an investigative body 'acting independently of either prosecuting attorney *or judge* ..." *Id.*, at 16 (emphasis added) (quoting *Stirone* [v. United States, 361 U.S. 212 (1960)], at 218).

No doubt in view of the grand jury proceeding's status as other than a constituent element of a "criminal prosecutio[n]", U.S. Const., Amdt. VI, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so... We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation... And although "the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee" against self-incrimination, [*United States v.*] *Calandra*, [414 U.S. 338 (1974)], at 346 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)), our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the

privilege against self-incrimination "is nevertheless valid". *Calandra*, *supra*, at 346...

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today. In *United States v. Calandra*, *supra*, a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of "the potential injury to the historic role and functions of the grand jury". 414 U.S., at 349. In *Costello v. United States*, 350 U.S. 359 (1956), we declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules". *Id.*, at 364.

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings... It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself... As we proceed to discuss, that would be the consequence of the proposed rule here.

Respondent argues that the Court of Appeals' rule can be justified as a sort of Fifth Amendment "common law", a necessary means of assuring the constitutional right to the judgment "of an independent and informed grand jury", *Wood v. Georgia*, 370 U.S. 375, 390 (1962). Brief for Respondent 27

Respondent makes a generalized appeal to functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, i.e., bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution... We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge... That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side... As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify, or to have exculpatory evidence presented...

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows

in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury—unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure...

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the *grand jury* itself chooses to hear no more evidence than that which suffices to convince it an indictment is proper... Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution". Brief for Respondent 27. We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges". *United States v. Thompson*, 251 U.S., at 414. If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

There is yet another respect in which respondent's proposal not only fails to comport with, but positively contradicts, the "common law" of the Fifth Amendment grand jury. Motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at

common law in England... And the traditional American practice was described by Justice Nelson, riding circuit in 1852, as follows:

"No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint..." *United States v. Reed*, 27 Fed.Cas. 727, 738 (No. 16,134) (CC NDNY 1852).

We accepted Justice Nelson's description in *Costello v. United States*, where we held that "it would run counter to the whole history of the grand jury institution" to permit an indictment to be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury". 350 U.S., at 363-364. And we reaffirmed this principle recently in *Bank of Nova Scotia*, where we held that "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment", and that "a challenge to the reliability or competence of the evidence presented to the grand jury" will not be heard. 487 U.S., at 261. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading"...

... The judgment of the Court of Appeals is accordingly reversed and the cause remanded for further proceedings consistent with this opinion.

So ordered¹.

XIII. UNITED STATES v. MARION
404 U.S. 307, 92 S.Ct 455, 30L.Ed.2d 468 (1971).

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal requires us to decide whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment.

On April 21, 1970, the two appellees were indicted and charged in 19 counts with operating a business known as Allied Enterprises, Inc., which was engaged in the business of selling and installing home improvements such as intercom sets, fire control devices, and burglary detection systems. Allegedly, the business was fraudulently conducted and involved misrepresentations, alterations of documents, and deliberate nonperformance of contracts. The period covered by the indictment was March 15, 1965, to February 6, 1967; the earliest specific act alleged occurred on September 3, 1965, the latest on January 19, 1966.

On May 5, 1970, appellees filed a motion to dismiss the indictment "for failure to commence prosecution of the alleged offenses charged therein within such time as to afford [them their] rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States". No evidence was submitted, but from the motion itself and the

¹Justice Stevens wrote dissenting opinion, which Justice Blackmun and Justice O'Connor joined and Parts II and of which Justice Thomas joined.

arguments of counsel at the hearing on the motion, it appears that Allied Enterprises had been subject to a Federal Trade Commission cease-and-desist order on February 6, 1967, and that a series of articles appeared in the Washington Post in October 1967, reporting the results of that newspaper's investigation of practices employed by home improvement firms such as Allied. The articles also contained purported statements of the then United States Attorney for the District of Columbia describing his office's investigation of these firms and predicting that indictments would soon be forthcoming. Although the statements attributed to the United States Attorney did not mention Allied specifically, that company was mentioned in the course of the newspaper stories. In the summer of 1968, at the request of the United States Attorney's office, Allied delivered certain of its records to that office, and in an interview there appellee Marion discussed his conduct as an officer of Allied Enterprises. The grand jury that indicted appellees was not impaneled until September 1969, appellees were not informed of the grand jury's concern with them until March 1970, and the indictment was finally handed down in April.

Appellees moved to dismiss because the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses". They argued that the indictment required memory of many specific acts and conversations occurring several years before, and they contended that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury. No specific prejudice was claimed or demonstrated. The District Court judge dismissed the indictment for "lack of speedy prosecution" at the conclusion of the

hearing and remarked that since the Government must have become aware of the relevant facts in 1967, the defense of the case "is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968".

The United States appeals directly to this Court pursuant to 18 U.S. § 3731 (1964 ed., Supp. V). We postponed consideration of the question of jurisdiction until the hearing on the merits of the case. We now hold that the Court has jurisdiction, and on the merits we reverse the judgment of the District Court.

Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused", an event that occurred in this case only when the appellees were indicted on April 21, 1970.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the

course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch which is appropriate to- assure him an early and proper disposition of the charges against him. "[T]he essential ingredient is orderly expedition and not mere speed". *Smith v. United States*, 360 U.S. 1,10 (1959).

Our attention is called to nothing in the circumstances surrounding the adoption of the Amendment indicating that it does not mean what it appears to say, nor is there more than marginal support for the proposition that, at the time of the adoption of the Amendment, the prevailing rule was that prosecutions would not be permitted if there had been long delay in presenting a charge. The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay. No opinions of this Court intimate support for appellees thesis, and the Courts of Appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved.

Legislative efforts to implement federal and state speedy trial provisions also plainly reveal the view that these guarantees are applicable only after a person has been accused of a crime... The statutes vary greatly in substance, structure, and interpretation, but a common denominator is that "[i]n no event . . . [does] the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long

before this". Note, *The Right to a Speedy Trial*, 57 Col.L.Rev. 846, 84 (1957).

No federal statute of general applicability has been enacted by Congress to enforce the speedy trial provision of the Sixth Amendment, but Rule 48(b) of the Federal Rules of Criminal Procedure, which has the force of law, authorizes dismissal of an indictment, information, or complaint "[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing a complaint against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial ..." The rule clearly is limited to post-arrest situations.

Appellees' position is, therefore, at odds with longstanding legislative and judicial constructions of the speedy trial provisions in both national and state constitutions.

It is apparent also that very little support for appellees' position emerges from a consideration of the purposes of the Sixth Amendment's speedy trial provision, a guarantee that this Court has termed "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. *United States v. Ewell*, 383 U.S. 116, 120 (1966)... Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to

believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends... So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Invocation of the speedy trial provision thus need not await indictment information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case.

The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States v. Ewell*, supra, at 122, "the applicable statute of limitations ... is ... the primary guarantee against bringing overly stale criminal charges". Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the

repose of society and the protection of those who may [during the limitation] ... have lost their means of defence". *Public Schools v. Walker*, 9 Wall. 282, 288 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.

Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the indictment, see Part IV, *infra*, we perhaps need go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals and that event occurred within the statute of limitations. Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused... However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate

judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

IV

In the case before us, neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was this event, therefore, which transformed the appellees into "accused" defendants who are subject to the speedy trial protections of the Sixth Amendment.

The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations here. Appellees have not, of course, been able to claim undue delay pending trial, since the indictment was brought on April 21, 1970, and dismissed on June 8, 1970. Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

Reversed¹.

XIV. BORDENKIRCHER v. HAYES
434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

I

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of \$88.30, an offense then punishable by a term of 2 to 10 years in prison. Ky.Rev.Stat. § 434.130 (1973) (repealed 1975). After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial", he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, then Ky.Rev.Stat. § 431.190 (1973) (repealed 1975), which would subject Hayes to a mandatory sentence

¹ Justice Douglas wrote an opinion concurring in the result, which Justice Brennan and Justice Marshall joined.

of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which Hayes had been convicted¹, and that the prosecutor's decision to indict him as a habitual offender was a legitimate use of available leverage in the plea-bargaining process.

On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ. The Court of Appeals for the Sixth Circuit reversed the

¹ According to his own testimony, Hayes had pleaded guilty in 1961, when he was 17 years old, to a charge of detaining a female, a lesser included offense of rape, and as a result had served five years in the state reformatory. In 1970 he had been convicted of robbery and sentenced to five years' imprisonment, but had been released on probation immediately

District Court's judgment. *Hayes v. Cowan*, 547 F.2d 42... [T]he court ordered that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument". *Id.*, at 45. We granted certiorari to consider a constitutional question of importance in the administration of criminal justice ...

II

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment", and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness. Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea. The ultimate

conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

III

We have recently had occasion to observe: "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned". *Blackledge v. Allison*, 431 U.S. 63, 71. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations ... the need for a public record indicating that a plea was knowingly and voluntarily made ... and the requirement that a prosecutor's plea-bargaining promise must be kept... The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment... For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

IV

This Court held in *North Carolina v. Pearce*, 395 U.S. 711, 725, that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial".

The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanor on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of vindictiveness' ". *Blackledge v. Perry*, 417 U.S. [21 (1974)], at 27.

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power". *Parker v. North Carolina*, 397 U.S. 790, 809 (opinion of Brennan, J) The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right., but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction...

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort ... and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional". *Cham v. Stynchcombe*, [412 U.S. 17] at 32-33, n. 20... But 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.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial... Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to

prosecutorial persuasion, and unlikely to be driven to false self-condemnation...Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial...

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas" *Chaffin v. Sfyndcombe*, *supra*, at 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary

classification". *Oyler v. Boles*, 368 U.S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard", which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged...

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which 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, did not violate the Due Process Clause of the Fourteenth Amendment.

Accordingly, the judgment of the Court of Appeals is Reversed².

² Justice Blackmun wrote a dissenting opinion, which Justice Brennan and Justice Marshall joined. Justice Powell also wrote a dissenting opinion.

XV. SULLIVAN v. LOUISIANA
508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

JUSTICE SCALIA delivered the opinion of the Court.

The question presented is whether a constitutionally deficient reasonable-doubt instruction may be harmless error.

1

Petitioner was charged with first-degree murder in the course of committing an armed robbery at a New Orleans bar. His alleged accomplice in the crime, a convicted felon named Michael Hill-house, testifying at the trial pursuant to a grant of immunity, identified petitioner as the murderer. Although several other people were in the bar at the time of the robbery, only one testified at trial. This witness, who had been unable to identify either Hill-house or petitioner at a physical lineup, testified that they committed the robbery, and that she saw petitioner hold a gun to the victim's head. There was other circumstantial evidence supporting the conclusion that petitioner was the triggerman... In closing argument, defense counsel argued that there was reasonable doubt as to both the identity of the murderer and his intent.

In his instructions to the jury, the trial judge gave a definition of "reasonable doubt" that was, as the State conceded below, essentially identical to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam)... The jury found petitioner guilty of first-degree murder and subsequently recommended that he be sentenced to death. The trial court agreed. On direct appeal, the Supreme Court of Louisiana held...that the

erroneous instruction was harmless beyond a reasonable doubt. 596 So.2d, at 186. It therefore upheld the conviction, though remanding for a new sentencing hearing because of ineffectiveness of counsel in the sentencing phase. We granted certiorari...

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." In *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice", and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty"...Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence...

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged...and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., *In re Winship*, 397 U.S. 358, 364 (1970)... This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings...

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have

a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our *per curiam* opinion in *Cage*, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict. Petitioner's Sixth Amendment right to jury trial was therefore denied.

III

In *Chapman v. California*, 386 U.S. 18 (1967), we rejected the view that all federal constitutional errors in the course of a criminal trial require reversal. We held that the Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of the conviction if the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". *Id.*, at 24. The *Chapman* standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial". *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Although most constitutional errors have been held amenable to harmless-error analysis...some will always invalidate the conviction... The question in the present case is to which category the present error belongs.

Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand...Harmless-error review looks, we have said, to the basis on

which "the jury *actually rested* its verdict". *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee...

Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough ...The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty...

... [T]he essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a

misdescription of the burden of proof, which *vitiates* all the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done...

Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: In [*Arizona v.*] *Fulminante*, [499 U.S. 279 (1991)], we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error' standards", 499 U.S., at 309, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented", *id.*, at 307-308. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose [v. Clark]*, 478 U.S. 570 (1986), at 577. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered". *Duncan v. Louisiana*, 391 U.S., at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error".

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

It is so ordered¹.

¹ Chief Justice Rehnquist wrote a concurring opinion

XVI. TAYLOR v. ILLINOIS

484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

JUSTICE STEVENS delivered the opinion of the Court.

As a sanction for failing to identify a defense witness in response to a pretrial discovery request, an Illinois trial judge refused to allow the undisclosed witness to testify. The question presented is whether that refusal violated the petitioner's constitutional right to obtain the testimony of favorable witnesses. We hold that such a sanction is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment and find no constitutional error on the specific facts of this case.

I

A jury convicted petitioner in 1984 of attempting to murder Jack Bridges in a street fight on the south side of Chicago on August 6, 1981. The conviction was supported by the testimony of Bridges, his brother, and three other witnesses. They described a twenty-minute argument between Bridges and a young man named Derrick Travis, and a violent encounter that occurred over an hour later between several friends of Travis, including the petitioner, on the one hand, and Bridges, belatedly aided by his brother, on the other. The incident was witnessed by twenty or thirty bystanders. It is undisputed that at least three members of the group which included Travis and petitioner were carrying pipes and clubs that they used to beat Bridges. Prosecution witnesses also testified that petitioner had a gun, that he shot Bridges in the

back as he attempted to flee, and that, after Badges fell, petitioner pointed the gun at Bridges' head but the weapon misfired.

Two sisters, who are friends of petitioner, testified on his behalf. In many respects their version of the incident was consistent with the prosecution's case, but they testified that it was Bridges' brother, rather than petitioner, who possessed a firearm and that he had fired into the group hitting his brother by mistake. No other witnesses testified for the defense.

Well in advance of trial, the prosecutor filed a discovery motion requesting a list of defense witnesses. In his original response, petitioner's attorney identified the two sisters who later testified and two men who did not testify. On the first day of trial, defense counsel was allowed to amend his answer by adding the names of Derrick Travis and a Chicago police officer; neither of them actually testified.

On the second day of trial, after the prosecution's two principal witnesses had completed their testimony, defense counsel made an oral motion to amend his "Answer to Discovery" to include two more witnesses, Alfred Wonnley and Pam Berkhalter. In support of the motion, counsel represented that he had just been informed about them and that they had probably seen the "entire incident".

In response to the court's inquiry about the defendant's failure to tell him about the two witnesses earlier, counsel acknowledged that defendant had done so, but then represented that he had been unable to locate Wormley. After noting that the witnesses' names could have been supplied even if their addresses were unknown, the trial judge directed counsel to bring them in the next day, at which time he would decide whether they could testify. The

judge indicated that he was concerned about the possibility "that witnesses are being found that really weren't there".

The next morning Wormley appeared in court with defense counsel. After further colloquy about the consequences of a violation of discovery rules, counsel was permitted to make an offer of proof in the form of Wormley's testimony outside the presence of the jury. It developed that Wormley had not been a witness to the incident itself. He testified that prior to the incident he saw Jack Bridges and his brother with two guns in a blanket, that he heard them say "they were after Ray [petitioner] and the other people", and that on his way home he "happened to run into Ray and them" and warned them "to watch out because they got weapons". On cross-examination, Wormley acknowledged that he had first met the defendant "about four months ago" (i.e., over two years after the incident). He also acknowledged that defense counsel had visited him at his home on the Wednesday of the week before the trial began. Thus, his testimony rather dramatically contradicted defense counsel's representations to the trial court.

After hearing Wormley testify, the trial judge concluded that the appropriate sanction for the discovery violation was to exclude his testimony...

The Illinois Appellate Court affirmed petitioner's conviction. 141 Ill.App.3d 839, 491 N.E.2d 3 (1986). It held that when "discovery rules are violated, the trial judge may exclude the evidence which the violating party wishes to introduce" and that "[t]he decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial court". The court concluded that in this case "the trial court was within its discretion in refusing to allow the additional witnesses to

testify". *Id.*, at 844-845, 491 N.E.2d, at 7. The Illinois Supreme Court denied leave to appeal and we granted the petition for certiorari...

In this Court petitioner makes two arguments. He first contends that the Sixth Amendment bars a court from ever ordering the preclusion of defense evidence as a sanction for violating a discovery rule. Alternatively, he contends that even if the right to present witnesses is not absolute, on the facts of this case the preclusion of Wormley's testimony was constitutional error. Before addressing these contentions, we consider the State's argument that the Compulsory Process Clause of the Sixth Amendment is merely a guarantee that the accused shall have the power to subpoena witnesses and simply does not apply to rulings on the admissibility of evidence.

In the State's view, no Compulsory Process Clause concerns are even raised by authorizing preclusion as a discovery sanction, or by the application of the Illinois rule in this case. The State's argument is supported by the plain language of the Clause ... by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law, by some scholarly comment, and by a brief excerpt from the legislative history of the Clause. We have, however, consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions.

As we noted just last Term, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt". *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Few rights are more

fundamental than that of an accused to present witnesses in his own defense...Indeed, this right is an essential attribute of the adversary system itself.

The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words...

The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States". [Washington v. Texas, 388 U.S. 14 (1967)], at 18. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

Petitioner's claim that the Sixth Amendment, creates an absolute bar to the preclusion of the testimony of a surprise witness is just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.

There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment—its

availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.

The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony. Neither may insist on the right to interrupt the opposing party's case, and obviously there is no absolute right to interrupt the deliberations of the jury to present newly discovered evidence. The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.

The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the

facts". *United States v. Nixon*, 418 U.S. [683 (1974)], at 709. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose. Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The "State's interest in protecting itself against an eleventh hour defense"¹ is merely one component of the broader public interest in a full and truthful disclosure of critical facts.

To vindicate that interest we have held that even the defendant may not testify without being subjected to cross-examination... Moreover, in *United States v. Nobles*, 422 U.S. 225 (1975), we upheld an order excluding the testimony of an expert witness tendered by the defendant because he had refused to permit discovery of a "highly relevant" report...

Petitioner does not question the legitimacy of a rule requiring pretrial disclosure of defense witnesses, but he argues that the sanction of preclusion of the testimony of a previously undisclosed witness is so drastic that it should never be imposed. He argues, correctly, that a less drastic sanction is always available. Prejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation; moreover, further violations can be deterred by disciplinary sanctions against the defendant or defense counsel.

It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm

¹ ... *Williams v. Florida*. 399 U.S. 78, 81-82 (1970)...

to the adversary process. One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.

We presume that evidence that is not discovered until after the trial is over would not have affected the outcome. It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the eleventh hour has passed. If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited.

In order to reject petitioner's argument that preclusion is never a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of

justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony...

The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation.

It would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury. We reject petitioner's argument that a preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be.

IV

Petitioner argues that the preclusion sanction was unnecessarily harsh in this case because the *voir dire* examination of Wormley adequately protected the prosecution from any possible prejudice resulting from surprise. Petitioner

also contends that it is unfair to visit the sins of the lawyer upon his client. Neither argument has merit.

More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself. The trial judge found that the discovery violation in this case was both willful and blatant. In view of the fact that petitioner's counsel had actually interviewed Wormley during the week before the trial began and the further fact that he amended his Answer to Discovery on the first day of trial without identifying Wormley while he did identify two actual eyewitnesses whom he did not place on the stand, the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony. Evidentiary rules which apply to categories of inadmissible evidence—ranging from hearsay to the fruits of illegal searches—may properly be enforced even though the particular testimony being offered is not prejudicial. The pretrial conduct revealed by the record in this case gives rise to a sufficiently strong inference that "witnesses are being found *thai* really weren't there", to justify the sanction of preclusion.

The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. Although there are, basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer

has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. Moreover, given the protections afforded by the attorney-client privilege and the fact that extreme cases may involve unscrupulous conduct by both the client and the lawyer, it would be highly impracticable to require an investigation into their relative responsibilities before applying the sanction of preclusion. In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he or she speaks for the client. Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial. In this case, petitioner has no greater right to disavow his lawyer's decision to conceal Wormley's identity until after the trial had commenced than he has to disavow the decision to refrain from adducing testimony from the eyewitnesses who were identified in the Answer to Discovery. Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client.

The judgment of the Illinois Appellate Court is Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence. Violations of discovery rules thus cannot go uncorrected or undeterred without undermining the truthseeking process. The question in this case, however, is not whether discovery rules

should be enforced but whether the need to correct and deter discovery violations requires a sanction that itself distorts the truthseeking process by excluding material evidence of innocence in a criminal case. I conclude that, at least where a criminal defendant is not personally responsible for the discovery violation, alternative sanctions are not only adequate to correct and deter discovery violations but are far superior to the arbitrary and disproportionate penalty imposed by the preclusion sanction. Because of this, and because the Court's balancing test creates a conflict of interest in every case involving a discovery violation, I would hold that, absent evidence of the defendant's personal involvement in a discovery violation, the Compulsory Process Clause *per se* bars discovery sanctions that exclude criminal defense evidence².

² Justice Blackmun wrote a brief dissenting opinion.

XVII. WITTE v. UNITED STATES
515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995).

JUSTICE O'CONNOR delivered the opinion of the Court¹.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits successive prosecution or multiple punishment for "the same offence". This case, which involves application of the United States Sentencing Guidelines, asks us to consider whether a court violates that proscription by convicting and sentencing a defendant for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction.

In June 1990, petitioner Steven Kurt Witte and several co-conspirators, including Dennis Mason and Tom Pokorny, arranged with Roger Norman, an undercover agent of the Drug Enforcement Administration, to import large amounts of marijuana from Mexico and cocaine from Guatemala. Norman had the task of flying the contraband into the United States, with Witte providing the ground transportation for the drugs once they had been brought into the country. The following month, the Mexican marijuana source advised the conspiracy participants that cocaine might be added to the first shipment if there was room on the plane or if an insufficient quantity of marijuana was available. Norman was informed in August 1990 that the source was prepared to deliver 4,400 pounds of marijuana. Once Norman learned the location of the airstrip from which the narcotics would be transported, federal agents arranged to have the participants in the scheme apprehended in Mexico. Local authorities arrested Mason and four others on August 12 and seized 591

¹ F. Justice and Justice Kennedy join all but part III of this opinion, and Justice Stevens joins only part III.

kilograms of cocaine at tire landing field. While still undercover, Norman met Witte the following day to explain that the pilots had been unable to land in Mexico because police had raided the airstrip. Witte was not taken into custody at that time, and the activities of the conspiracy lapsed for several months.

Agent Norman next spoke with Witte in January 1991 and asked if Witte would be interested in purchasing 1,000 pounds of marijuana. Witte agreed, promised to obtain a \$50,000 down payment, and indicated that he would transport the marijuana in a horse trailer he had purchased for the original 1990 transaction and in a motor home owned by an acquaintance, Sam Kelly. On February 7, Witte, Norman, and Kelly met in Houston, Texas. Norman agreed to give the drugs to Witte in exchange for the \$25,000 in cash Witte had been able to secure at that time and for a promise to pay the balance of the down payment in three days. Undercover agents took the motor home and trailer away to load the marijuana, and Witte escorted Norman to Witte's hotel room to view the money. The agents returned the vehicles the next morning loaded with approximately 375 pounds of marijuana, and they arrested Witte and Kelly when the two men took possession of the contraband.

In March 1991, a federal grand jury in the Southern District of Texas indicted Witte and Kelly for conspiring and attempting to possess marijuana with intent to distribute it, in violation of 21 U.S. §§ 841(a) and 846. The indictment was limited on its face to conduct occurring on or about January 25 through February 8, 1991, thus covering only the later marijuana transaction. On February 21, 1992, Witte pleaded guilty to the attempted possession count and agreed to cooperate "with the Government by providing truthful and complete information concerning this and all other offenses about which [he] might be questioned by agents of law

enforcement", and by testifying if requested to do so. App. 14. In exchange, the Government agreed to dismiss the conspiracy count and, if Witte's cooperation amounted to "substantial assistance", to file a motion for a downward departure under the Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual § 5K1.1 (Nov. 1994).

In calculating Witte's base offense level under the Sentencing Guidelines, the presentence report prepared by the United States Probation Office considered the total quantity of drugs involved in all of the transactions contemplated by the conspirators, including the planned 1990 shipments of both marijuana and cocaine. Under the Sentencing Guidelines, the sentencing range for a particular offense is determined on the basis of all "relevant conduct" in which the defendant was engaged and not just with regard to the conduct underlying the offense of conviction. USSG § 1B1.3. The Sentencing Commission has noted that, "[w]ith respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook". USSG § 1B1.3, comment., n. 2; see also USSG §2D1.1, comment., nn. 6, 12. The presentence report therefore suggested that Witte was accountable for the 1,000 pounds of marijuana involved in the attempted possession offense to which he pleaded guilty, 15 tons of marijuana that Witte, Mason, and Pokorny had planned to import from Mexico in 1990, 500 kilograms of cocaine that the conspirators originally proposed to import from Guatemala, and the 591 kilograms of cocaine seized at the Mexican airstrip in August 1990.

At the sentencing hearing, both petitioner and the Government urged the court to hold that the 1990 activities concerning importation of cocaine and marijuana were not part of the same course of conduct as the 1991 marijuana offense to which Witte had pleaded guilty, and therefore should not be considered in sentencing for the 1991 offense. The District Court concluded, however, that because the 1990 importation offenses were part of the same continuing conspiracy, they were "relevant conduct" under § 1B1.3 of the Guidelines and should be taken into account. The court therefore accepted the presentence report's aggregation of the quantities of drugs involved in the 1990 and 1991 episodes, resulting in a base offense level of 40, with a Guideline range of 292 to 365 months' imprisonment... From that base offense level, Witte received a two-level increase for his aggravating role in the offense, see USSG § 3B1.1, and an offsetting two-level decrease for acceptance of responsibility, see USSG § 3E1.1. Finally, the court granted the Government's § 5K1.1 motion for downward departure based on Witte's substantial assistance. By virtue of that departure, the court sentenced Witte to 144 months in prison, see App. 76, which was 148 months below the minimum sentence of 292 months under the pre-departure Guideline range. Witte appealed, but the Court of Appeals dismissed the case when Witte failed to file a brief.

In September 1992, another grand jury in the same district returned a two-count indictment against Witte and Pokorny for conspiring and attempting to import cocaine, in violation of 21 U.S.C. §§ 952(a) and 963. The indictment alleged that, between August 1989 and August 1990, Witte tried to import about 1,091 kilograms of cocaine from Central America. Witte moved to dismiss, arguing that he had already been punished for the cocaine offenses because the cocaine involved in the 1990 transactions had been considered as "relevant conduct" at sentencing for the 1991

marijuana offense. The District Court dismissed the indictment in February 1993 on grounds that punishment for the indicted offenses would violate the prohibition against multiple punishments contained in the Double Jeopardy Clause of the Fifth Amendment...

The Court of Appeals for the Fifth Circuit reversed. 25 F.3d 250 (1994). Relying on our decision in *Williams v. Oklahoma*, 358 U.S. 576 (1959), the court held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct". 25 F.3d, at 258. Thus, although the sentencing court took the quantity of cocaine involved in the 1990 importation scheme into account when determining the sentence for Witte's 1991 marijuana possession offense, the Court of Appeals concluded that Witte had not been punished for the cocaine offenses in the first prosecution—and that the Double Jeopardy Clause therefore did not bar the later action. In reaching this result, the court expressly disagreed with contrary holdings...that when a defendant's actions are included in relevant conduct in determining the punishment under the Sentencing Guidelines for one offense, those actions may not form the basis for a later indictment without violating double jeopardy. We granted certiorari to resolve the conflict among the circuits ... and now affirm.

II

Petitioner clearly was neither prosecuted for nor convicted of the cocaine offenses during the first criminal proceeding. The offense to which petitioner pleaded guilty and for which he was sentenced in 1992 was attempted possession of marijuana with intent to distribute it, whereas the

crimes charged in the instant indictment are conspiracy to import cocaine and attempted importation of the same... [T]he indictment in this case did not charge the same offense to which petitioner formerly had pleaded guilty.

Petitioner nevertheless argues that, because the conduct giving rise to the cocaine charges was taken into account during sentencing for the marijuana conviction, he effectively was "punished" for that conduct during the first proceeding. As a result, he contends, the Double Jeopardy Clause bars the instant prosecution...[I]f petitioner is correct that the present case constitutes a second attempt to punish him criminally for the same cocaine offenses . . . then the prosecution may not proceed. We agree with the Court of Appeals, however, that petitioner's double jeopardy theory—that consideration of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range constitutes "punishment" for that conduct—is not supported by our precedents, which make clear that a defendant in that situation is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted.

Traditionally, "[sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior". *Nichols v. United States*, 511 U.S. 738, 747 (1994)...

Against this background of sentencing history, we specifically have rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime...

... Here, petitioner pleaded guilty to attempted possession of marijuana with intent to distribute it, in violation of 21 U.S. §§ 841(a) and 846. The

statute provides that the sentence for such a crime involving 100 kilograms or more of marijuana must be between 5 and 40 years in prison. § 841(b)(1)(B). By including the cocaine from the earlier transaction—and not just the marijuana involved in the offense of conviction—in the drug quantity calculation, the District Court ended up with a higher offense level (40), and a higher sentence range (292 to 365 months), than it would have otherwise under the applicable Guideline, which specifies different base offense levels depending on the quantity of drugs involved. USSG § 2D 1.1. This higher guideline range, however, still falls within the scope of the legislatively authorized penalty (5-40 years)... [T]he uncharged criminal conduct was used to enhance petitioner's sentence within the range authorized by statute... [I]t is impossible to conclude that taking account of petitioner's plans to import cocaine in fixing the sentence for the marijuana conviction constituted "punishment" for the cocaine offenses.

... [T]his case ... [concerns] the double jeopardy implications of taking the circumstances surrounding a particular course of criminal activity into account in sentencing for a conviction arising therefrom. Similarly, we have made clear in other cases, which involved a defendant's background more generally and not conduct arising out of the same criminal transaction as the offense of which the defendant was convicted, that "[e]nhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction". *Nichols*, 511 U.S., at 747 (approving consideration of a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense). In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense

"is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes", but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one". *Gryger v. Burke*, 334 U.S. 728, 732 (1948)...

We are not persuaded by petitioner's suggestion that the Sentencing Guidelines somehow change the constitutional analysis. A defendant has not been "punished" any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account... As the Government argues, "[t]he fact that the sentencing process has become more transparent under the Guidelines ... does not mean that the defendant is now being 'punished' for uncharged relevant conduct as though it were a distinct criminal 'offense' ". Brief for United States 23. The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional... Regardless of whether particular conduct is taken into account by judge or as an act of discretion, the defendant is still being punished only for the offense of conviction.

The relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and ... recidivism statutes ... are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity. Petitioner does not argue that the range fixed by Congress is so broad, and the enhancing role played by the relevant conduct so significant, that

consideration of that conduct in sentencing has become "a tail which wags the dog of the substantive offense". *McMillan* [v. Pennsylvania], 477 U.S. [79 (1986)], at 88... We hold that, where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry. Accordingly, the instant prosecution for the cocaine offenses is not barred by the Double Jeopardy Clause as a second attempt to punish petitioner for the same crime.

IV

Because consideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct, the instant prosecution does not violate the Double Jeopardy Clause's prohibition against the imposition of multiple punishments for the same offense. Accordingly, the judgment of the Court of Appeals is Affirmed².

² Justice Scalia wrote an opinion concurring in the judgment, which justice Thomas joined. Justice Stevens wrote an opinion concurring in part and dissenting in part

XVIII. UNITED STATES v. GRAYSON

438 U.S. 41, 98 S.Ct. 2610, 57 L Ed 2d 582 (1978).

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a holding of the Court of Appeals that it was improper for a sentencing judge, in fixing the sentence within the statutory limits, to give consideration to the defendant's false testimony observed by the judge during the trial.

I

In August 1975, respondent Grayson was confined in a federal prison camp under a conviction for distributing a controlled substance. In October, he escaped but was apprehended two days later by FBI agents in New York City. He was indicted for prison escape in violation of 18 U.S.C. § 751(a) [1976 ed.]

During its case in chief, the United States proved the essential elements of the crime, including his lawful confinement and the unlawful escape. In addition, it presented the testimony of the arresting FBI agents that Grayson, upon being apprehended, denied his true identity.

Grayson testified in his own defense. He admitted leaving the camp but asserted that he did so out of fear: "I had just been threatened with a large stick with a nail protruding through it by an inmate that was serving time at Allenwood, and I was scared, and t just ran". He testified that the threat was made in the presence of many inmates by prisoner Barnes who sought to enforce collection of a gambling debt and followed other threats and physical assaults made for the same purpose. Grayson called one inmate, who testified, "I heard [Barnes] talk to Grayson in a loud voice

one day, but that's all. I never seen no harm, no hands or no shuffling whatsoever".

Grayson's version of the facts was contradicted by the Government's rebuttal evidence and by cross-examination on crucial aspects of his story. For example, Grayson stated that after crossing the prison fence he left his prison jacket by the side of the road. On recross, he stated that he also left his prison shirt but not his trousers. Government testimony showed that on the morning after the escape, a shirt marked with Grayson's number, a jacket, and a pair of prison trousers were found outside a hole in the prison fence. Grayson also testified on cross-examination: "I do believe that I phrased the rhetorical question to Captain Kurd, who was in charge of [the prison], and I think I said something if an inmate was being threatened by somebody, what would ... he do? First of all he said he would want to know who it was". On further cross-examination, however, Grayson modified his description of the conversation. Captain Kurd testified that Grayson had never mentioned in any fashion threats from other inmates. Finally, the alleged assailant, Barnes, by then no longer an inmate, testified that Grayson had never owed him any money and that he had never threatened or physically assaulted Grayson.

The jury returned a guilty verdict, whereupon the District Judge ordered the United States Probation Office to prepare a presentence report. At the sentencing hearing, the judge stated:

"I'm going to give my reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible; and although I could come into this Court Room and sentence this Defendant to a five-year prison term without any explanation at all, I think it is fair that I give the reasons so that if the Court of Appeals feels that one of the reasons which I am about to enunciate is an improper

consideration for a trial judge, then the Court will be in a position to reverse this court and send the case back for resentencing".

"In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly, *it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so*". (Emphasis added).

He then sentenced Grayson to a term of two years' imprisonment, consecutive to his unexpired sentence¹.

On appeal, a divided panel of the Court of Appeals for the Third Circuit directed that Grayson's sentence be vacated and that he be resentenced by the District Court without consideration of false testimony. 550 F.2d 103 (1976)...

We granted certiorari to resolve conflicts between holdings of the Courts of Appeals... We reverse.

II

In *Williams v. New York*, 337 U.S. 241, 247 (1949), Mr. Justice Black observed that the "prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime", and that, accordingly, sentences should be determined with an eye toward the "reformation and rehabilitation of offenders". *Id.*, at 248...

¹ The District Court in this case could have sentenced Grayson for any period up to five years. 18 U.S. § 751(a)[(1976 ed.)]

...Thus it is that today the extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially fixed term... To an unspecified degree, the sentencing judge is obligated to make his decision on the basis, among others, of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation.

Indeterminate sentencing under the rehabilitation model presented sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitrary sentences, which the newly conferred and broad discretion placed within the realm of possibility. An obvious, although only partial, solution was to provide the judge with as much information as reasonably practical concerning the defendant's "character and propensities[,] ... his present purposes and tendencies". *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937), and, indeed, "every aspect of [his] life". *Williams v. New York*, 337 U.S., at 250. Thus, most jurisdictions provided trained probation officers to conduct presentence investigations of the defendant's life and, on that basis, prepare a presentence report for the sentencing judge.

Of course, a sentencing judge is not limited to the often far-ranging material compiled in a presentence report. "[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come". *United States v.*

Tucker, 404 U.S. 443, 446 (1972). Congress recently reaffirmed this fundamental sentencing principle by enacting 18 U.S.C. § 3577:

"No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence".

Thus, we have acknowledged that a sentencing authority may legitimately consider the evidence heard during trial, as well as the demeanor of the accused... More to the point presented in this case, one serious study has concluded that the trial judge's "opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition". ABA Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 5.1, at 232 [App. Draft 1968]

A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing...

Only one Circuit has directly rejected the probative value of the defendant's false testimony in his own defense. In *Scott v. United States*, 135 U.S.App.D.C. 377, 382, 419 F.2d 264, 269 (1969), the court argued that "the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law".

... The *Scott* rationale rests not only on the realism of the psychological pressures on a defendant in the dock—which we can grant— but also on a deterministic view of human conduct that is inconsistent with the underlying precepts of our criminal justice system. A "universal and persistent" foundation stone in our system of law, and particularly in our approach to punishment, sentencing and incarceration, is the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil". *Morissette v. United States*, 342 U.S. 246, 250 (1952)... Given that long accepted view of the "ability and duty of the normal individual to choose", we must conclude that the defendant's readiness to lie under oath—especially when, as here, the trial court finds the lie to be flagrant—may be deemed probative of his prospects for rehabilitation.

Against this background we evaluate Grayson's constitutional argument that the District Court's sentence constitutes punishment for the crime of perjury for which he has not been indicted, tried or convicted by due process. A second argument is that permitting consideration of perjury will "chill" defendants from exercising their right to testify on their own behalf

A

In his due process argument, Grayson does not contend directly that the District Court had an impermissible purpose in considering his perjury and selecting the sentence. Rather, he argues that this Court, in order to preserve due process rights, not only must prohibit the impermissible

sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution but also must prohibit the otherwise *permissible* practice of considering a defendant's untruthfulness for the purpose of illuminating his need for rehabilitation and society's need for protection. He presents two interrelated reasons. The effect of both permissible and impermissible sentencing practices may be the same: additional time in prison. Further, it is virtually impossible, he contends, to identify and establish the impermissible practice. We find these reasons insufficient justification for prohibiting what the Court and the Congress have declared appropriate judicial conduct.

First, the evolutionary history of sentencing...demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision. The "parlous" effort to appraise "character", *United States v. Hendrix*, [505 F.2d 1233 (2d Cir.1974)], at 1236, degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life". *Williams v. New York*, *supra*, at 250. The Government's interest, as well as the offender's, in avoiding irrationality is of the highest order. That interest more than justifies the risk that Grayson asserts is present when a sentencing judge considers a defendant's untruthfulness under oath.

Second, in our view, *Williams* fully supports consideration of such conduct in sentencing. There the Court permitted the sentencing judge to consider the offender's history of prior antisocial conduct, including burglaries for which he had not been duly convicted. This it did despite the

risk that the judge might use his knowledge of the offender's prior crimes for an improper purpose.

Third, the efficacy of Grayson's suggested "exclusionary rule" is open to serious doubt. No rule of law, even one garbed in constitutional terms, can prevent improper use of firsthand observations of perjury. The integrity of the judges, and their fidelity to their oaths of office, necessarily provide the only, and in our view adequate, assurance against that.

Grayson's argument that judicial consideration of his conduct at trial impermissibly "chills" a defendant's statutory right, 28 T.J.S.C. § 3481, and perhaps a constitutional right to testify on his own behalf is without basis. The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath—unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony... Further support for this is found in an important limitation on a defendant's right to the assistance of counsel: Counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony... Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Grayson's further argument that the sentencing practice challenged here will inhibit exercise of the right to testify truthfully is entirely frivolous. That argument misapprehends the nature and scope of the practice we find permissible. Nothing we say today requires a sentencing

judge to enlance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment— whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.

Accordingly, we reverse the judgment of the Court of Appeals and remand for reinstatement of the sentence of the District Court.

Reversed and remanded.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court begins its consideration of this case ... with the assumption that the respondent gave false testimony at his trial. But there has been no determination that his testimony was false. This respondent was given a greater sentence than he would otherwise have received—how much greater we have no way of knowing—solely because a single judge *thought* that he had not testified truthfully. In essence, the Court holds today that *whenever* a defendant testifies in his own behalf and is found guilty, he opens himself to the possibility of an enhanced sentence. Such a sentence is nothing more nor less than a penalty imposed on the defendant's exercise of his constitutional and statutory rights to plead not guilty and to testify in his own behalf.

It does not change matters to say that the enhanced sentence merely reflects the defendant's "prospects for rehabilitation" rather than an additional punishment for testifying falsely. The fact remains that all defendants who choose to testify, and only those who do so, face the very real prospect of a greater sentence based upon the trial judge's unreviewable perception that the testimony was untruthful. The Court prescribes no limitations or safeguards to minimize a defendant's rational fear that his truthful testimony will be perceived as false. Indeed, encumbrance of the sentencing process with the collateral inquiries necessary to provide such assurance would be both pragmatically unworkable and theoretically inconsistent with the assumption that the trial judge is merely considering one more piece of information in his overall evaluation of the defendant's prospects for rehabilitation. But without such safeguards I fail to see how the Court can dismiss as "frivolous" the argument that this sentencing practice will "inhibit the right to testify truthfully", ante, at 55.

A defendant's decision to testify may be inhibited by a number of considerations, such as the possibility that damaging evidence not otherwise admissible will be admitted to impeach his credibility. These constraints arise solely from the fact that the defendant is quite properly treated like any other witness who testifies at trial. But the practice that the Court approves today actually places the defendant at a disadvantage, as compared with any other witness at trial, simply because he is the defendant. Other witnesses risk punishment for perjury only upon indictment and conviction in accord with the full protections of the Constitution. Only the defendant himself, whose testimony is likely to be of critical importance to his defense, faces the additional risk that the disbelief of a single listener will itself result in time in prison.

The minimal contribution that the defendant's possibly untruthful testimony might make to an overall assessment of his potential for rehabilitation...cannot justify imposing this additional burden on his right to testify in his own behalf. I do not believe that a sentencing judge's discretion to consider a wide range of information in arriving at an appropriate sentence,...allows him to mete out additional punishment to the defendant simply because of his personal belief that the defendant did not testify truthfully at the trial.

Accordingly, I would affirm the judgment of the Court of Appeals.

XIX. REED v. ROSS

468 U.S. 1, 104 S.O. 2901, 82 L.Ed2d 1 (1984).

JUSTICE BRENNAN delivered the opinion of the Court.

In March 1969, respondent Daniel Ross was convicted of first-degree murder in North Carolina and sentenced to life imprisonment. At trial, Ross had claimed lack of malice and self-defense. In accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross, the defendant, had the burden of proving each of these defenses. Six years later, this Court decided *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which struck down, as violative of due process, the requirement that the defendant bear the burden of proving the element of malice. *Id.*, at 704. Two years later, *Hankerson v. North Carolina*, 432 U.S. 233 (1977), held that *Mullaney* was to have retroactive application. The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise on appeal the unconstitutionality of the jury' instruction, on the burden of proof.

I

A

In 1970, this Court decided *In re Winship*, 397 U.S. 358, the first case in which we directly addressed the constitutional foundation of the requirement that criminal guilt be established beyond a reasonable doubt. That case held that "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard,... the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *Id.*, at 364.

Five years after *Winship*, the Court applied the principle to the related question of allocating burdens of proof in a criminal case. *Mullaney v. Wilbur*, *supra*,... *Mullaney* held that due process requires the prosecution to bear the burden of persuasion with respect to each element of a crime.

Finally, *Hankerson v. North Carolina*, *supra*, held that *Mullaney* was to have retroactive application .. In this case, we are called upon again, in effect, to revisit our decision in *Hankerson* with respect to a particular set of administrative costs—namely, the costs imposed on state courts by the federal courts' exercise of their habeas corpus jurisdiction under 28 U.S. § 2254.

Ross was tried for murder under the same North Carolina burden-of-proof law that gave rise to *Hankerson's* claim in *Hankerson v. North Carolina*. That law...[had been] followed in North Carolina for over 100 years...

In accordance with this well-settled state law, the jury at Ross trial was instructed... On the basis of these instructions, Ross was convicted of

first-degree murder. Although Ross appealed his conviction to the North Carolina Supreme Court on a number of grounds...he did not challenge the constitutionality of these instructions—we may confidently assume this was because they were sanctioned by a century of North Carolina law and because *Mullaney* was yet six years away.

Ross challenged the jury instructions for the first time in 1977, shortly after this Court decided *Hankerson*. He initially did so in a petition filed in state court for postconviction relief, where his challenge was summarily rejected at both the trial and appellate levels... After exhausting his state remedies, Ross brought the instant federal habeas proceeding in the United States District Court for the Eastern District of North Carolina under 28 U.S.C. § 2254. The District Court, however, held that habeas relief was barred because Ross had failed to raise the issue on appeal as required by North Carolina law...and the Court of Appeals for the Fourth Circuit dismissed Ross' appeal summarily... On Ross' first petition for certiorari, however, this Court vacated the judgment of the Court of Appeals and remanded the case for further consideration... On remand, the Court of Appeals reversed, holding that Ross' claim met the "cause and prejudice" requirements and that the District Court had therefore erred in denying his petition for a writ of habeas corpus. 704 F.2d 705 (1983). The Court of Appeals found the "cause" requirement satisfied because the *Mullaney* issue was so novel at the time of Ross' appeal that Ross' attorney could not reasonably be expected to have raised it... And the State had conceded the existence of "prejudice" in light of evidence that had been introduced to indicate that Ross might have acted reflexively in self-defense. The Court of Appeals went on to hold that the jury instruction concerning the burden of proof for both malice and self-defense violated *Mullaney*... We granted certiorari ... to determine whether the Court of Appeals erred in concluding

that Ross had "cause" for failing to raise the *Mullaney* question on appeal. We now affirm.

A

Our decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated... The more difficult question, and the one that lies at the heart of this case is: What standards should govern the exercise of the habeas court's equitable discretion in the use of this power?

A habeas court's decision whether to review the merits of a state prisoner's constitutional claim, when the prisoner has failed to follow applicable state procedural rules in raising the claim, implicates two sets of competing concerns. On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners. There can be no doubt that in enacting § 2254, Congress sought to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action". *Mitchum v. Foster*, 407 U.S. 225,242(1972).

On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in state court. The criminal justice system in each of the 50 States is structured both to determine the guilt or innocence of defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading up to the verdict.

Each State's complement of procedural rules facilitates this complex process, channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.

North Carolina's rule requiring a defendant initially to raise a legal issue on appeal, rather than on postconviction review, performs such a function. It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal... This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not properly raised before the state court, these legitimate state interests may be frustrated: evidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long after his trial; and it may be too late to retry the defendant effectively if he prevails in his collateral challenge. Thus, we have long recognized that "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power". *Francis v. Henderson*, [425 U.S. 536 (1976)] at 539...

Where, as in this case, a defendant has failed to abide by a State's procedural rule requiring the exercise of legal expertise and judgment, the competing concerns implicated by the exercise of the federal court's habeas corpus power have come to be embodied in the "cause and prejudice" requirement: When a procedural default bars litigation of a

constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of "cause and actual prejudice". *Engle v. Isaac*, 456 U.S. [107 (1982)], at 129 ... We therefore turn to the question whether the cause-and-prejudice test was met in this case.

As stated above, petitioners have conceded that Ross suffered "actual prejudice" as a result of the trial court's instruction imposing on him the burden of proving self-defense or lack of malice... Thus the only question for decision is whether there was "cause" for Ross' failure to raise the *Mullaney* issue on appeal.

The Court of Appeals held that there was cause for Ross' failure to raise the *Mullaney* issue on appeal because of the "novelty" of the issue at the time. As the Court of Appeals characterized the legal basis for raising the *Mullaney* issue at the time of Ross' appeal, there was merely "[a] hint here and there voiced in other contexts", which did not "offe[r] a reasonable basis for a challenge to frequently approved jury instructions which had been used in North Carolina, and many other states, for over a century". 704 F.2d, at 708.

Engle v. Isaac, supra, left open the question whether the novelty of a constitutional issue at the time of a state-court proceeding could, as a general matter, give rise to cause for defense counsel's failure to raise the issue in accordance with applicable state procedures... Today, we answer that question in the affirmative.

Because of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the tenn "cause" precise content... Nor do we attempt to do so here. Underlying the concept of cause, however, is at least the dual notion that,

absence exceptional circumstances, a" defendant is bound by the tactical decisions of competent counsel...and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct ... A defense attorney, therefore, may not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in federal court... Similarly, he may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court... In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would also undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, "inexcusable",,, and cannot qualify as "cause" for purposes of federal habeas corpus review.

On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met. If counsel has no reasonable basis upon which to formulate a constitutional question, setting aside for the moment exactly what is meant by "reasonable basis", see *infra*, at 16-18, it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.

Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance, as the *Mullaney* issue currently does, when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose. Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand. Raising such a claim in state court, therefore, would not promote either the fairness or the efficiency of the state criminal justice system. It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense

counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition.

Accordingly, we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. We therefore turn to the question whether the *Mullaney* issue, which respondent Ross has raised in this action, was sufficiently novel at the time of the appeal from his conviction to excuse his attorney's failure to raise it at that time.

As stated above, the Court of Appeals found that the state of the law at the time of Ross' appeal did not offer a "reasonable basis" upon which to challenge the jury instructions on the burden of proof. 704 F.2d, at 708. We agree and therefore conclude that Ross had cause for failing to raise the issue at that time. Although the question whether an attorney has a "reasonable basis" upon which to develop a legal theory may arise in a variety of contexts, we confine our attention to the specific situation presented here: one in which this Court has articulated a constitutional principle that had not been previously recognized but which is held to have retroactive application. In *United States v. Johnson*, 457 U.S. 537 (1982), we identified three situations in which a "new" constitutional rule, representing "a clear break with the past", might emerge from this Court. *Id.*, at 549 (quoting *Desist v. United States*, 394 U.S. 244, 258-259 (1969)). First, a decision of this Court may explicitly overrule one of our precedents. *United States v. Johnson*, 457 U.S., at 551. Second a decision may "overtur[n] a longstanding and wide-spread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved". *Ibid.* And, finally, a decision may

"disapprove] a practice this Court arguably has sanctioned in prior cases". Ibid. By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement. Cases falling into the third category, however, present a more difficult question. Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.

This case is covered by the third category. At the time of Ross' appeal, *Leiland v. Oregon*, 343 U.S. 790 (1952), was the primary authority addressing the due process constraints upon the imposition of the burden of proof on a defendant in a criminal trial. In that case, the Court held that a State may require a defendant on trial for first-degree murder to bear the burden of proving insanity beyond a reasonable doubt, despite the fact that the presence of insanity might tend to imply the absence of the mental state required to support a conviction... *Leland* thus confirmed "the long-accepted rule...that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant", *Patterson v. New York*, 432 U.S. 197, 211 (1977), and arguably sanctioned the practice by which a State crafts an affirmative defense to shift to the defendant the burden of disproving an essential element of a crime. As stated above, North Carolina had consistently engaged in this

practice with respect to the defenses of lack of malice and self-defense for over a century...Indeed, it was not until five years after Ross' appeal that the issue first surfaced in the North Carolina courts, and even then it was rejected out of hand...

Moreover, prior to Ross' appeal, only one Federal Court of Appeals had held that it was unconstitutional to require a defendant to disprove an essential element of a crime for which he is charged. *Stump v. Bennett*, 398 F.2d 111 (C.A.8 1968). Even that case, however, involved the burden of proving an alibi, which the Court of Appeals described as the "den[ial] of] the possibility of [the defendant's] having committed the crime by reason of being elsewhere". *Id.*, at 116. The court thus contrasted the alibi defense with "an affirmative defense [which] generally applies to justification for his admitted participation in the act itself", *ibid.*, and distinguished *Leland* on that basis, 398 F.2d, at 119. In addition, at the time of Ross' appeal, the Superior Court of Connecticut had struck down, as violative of due process, a statute making it unlawful for an individual to possess burglary tools "without lawful excuse, the proof of which excuse shall be upon him". *State v. Nales*, 28 Conn.Sup. 28, 29, 248 A.2d 242 (1968). Because these cases provided only indirect support for Ross' claim, and because they were the only cases that would have supported Ross' claim at all, we cannot conclude that they provided a reasonable basis upon which Ross could have realistically appealed his conviction.

In *Engle v. Isaac*, 456 U.S. 107 (1982), this Court reached the opposite conclusion with respect to the failure of a group of defendants to raise the *Mullaney* issue in 1975. That case differs from this one, however, in two crucial respects. First, the procedural defaults at issue there occurred five years after we decided *Winship*, which held that "the Due Process Clause protects the accused against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *Winship*, 397 U.S., at 364. As the Court in *Engle v. Isaac* stated, *Winship* "laid the basis for [the habeas petitioners'] constitutional claim". 456 U.S., at 131. Second, during those five years, "numerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses" (footnotes omitted). See *id.*, at 132, n. 40 (citing cases). Moreover, as evidence of the reasonableness of the legal basis for raising the *Mullaney* issue in 1975, *Engle v. Isaac* emphasized that "dozens of defendants relied upon [*Winship*] to challenge the constitutionality of rules requiring them to bear a burden of proof. 456 U.S., at 131-132. None of these bases of decision relied upon in *Engle v. Isaac* is present in this case.

We therefore conclude that Ross' claim was sufficiently novel in 1969 to excuse his attorney's failure to raise the *Mullaney* issue at that time.

Accordingly, we affirm the decision of the Court of Appeals with respect to the question of "cause".

It is so ordered^{1,2}.

¹ Justice Powell wrote a concurring opinion. Justice Rehnquist wrote a dissenting opinion, which Chief Justice Burger, Justice Blackmun, and Justice O'Connor joined.

² In *United States v. Frady*, 456 U.S. 152 (1982) (6-1), the Court considered the meaning of "prejudice" as part of the standard for allowing collateral relief under *Wainwright v. Sykes*, 433 U.S. 72 (1977), above. It said:

"... [T]he degree of prejudice we have required a prisoner to show before obtaining collateral relief for errors in the jury charge [has been characterized] as 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', not merely whether 'the instruction is undesirable, erroneous, or even universally condemned'. [*Henderson v. Kibbe*], 431 U.S. 1145 (1977)], at 154 ... We reaffirm this formulation, which requires that the degree of prejudice resulting from instruction error be evaluated the total context of the events at trial ... [Frady] must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions" 456 US at 169-170. Frady had been convicted of murder. The allegedly erroneous instruction to the jury concerned the element of malice. The Court said: "We conclude that the strong un contra-dicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified. We perceive no risk of a fundamental miscarriage of justice in this case". 466 U.S. at 172.

1. Alan G. Tarr. Judicial Process and Judicial Policymaking. St. Poul.:West Publishing Co, 1994.
2. Ashworth A. Punishment and Compensation: Victims, Offenders and State// Oxford Journal of Legal Studies. 1986. 6.
3. Ashworth A. The Criminal Process : An Evaluative Study. Oxford, 1994.
4. Bell J. Policy Arguments in Judicial Decisions. 1983.
5. Black's Law Dictionary.-St.Poul: West Publishing Co,1990.
6. Braithwaite J., Mugford S. Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders// British Journal of Criminology. 1994. 34.
7. Braithwaite J. Crime, Shame and Re-integration. Cambrige, 1989.
8. Burnham W. Introduction to the Law and Legal System of the United States. West Publishing, 1994.
9. Brody D. The American Legal System : Concepts and Principles. Lexington, 1978.
10. Case v. Nebraska 381 US 336 (1965).
11. Cardozo W. The Grows of Law. New- Hawen, 1944.
12. Constitution of USA. (with Amendments).
13. Criminal Justice. An introduction to the Criminal Justice System in England and Wales. London, 1995.
14. Constitution of USA (with Amendmens).
15. Crossman J. Wellss R. Constitution Law and Judicial Policy making. New York, 1980.
16. Dworkin R. Natural Law Revisited// University of Florida Law Review. 1982. 34.

17. Dignan J., Cavadino M. Towards a Framework for Conceptualizing and Evaluating Victim-Oriented Models of Criminal Justice. Centre for Criminological and Legal Research. University of Sheffield. Sheffield, 1995.
18. Davis G., Watson D., Boucherat J., Reparation in the Service of Diversion: the subordination of a good idea// Howard Journal of Criminal Justice. 1988. 27.
19. Erez E. Victim Participation in Sentencing : An the Debate does on...// International Review of Victimology. 1994. 3.
20. Ehrenzweig A. A. The Physico-analitic jurisprudence. Crime and procedure. New York. 1971.
21. Federal Rules of Appellate Procedure. Official documents. Dictriect of Columbia.
22. Federal Rules of Criminal Procedure. Official documents. Dictriect of Columbia.
23. Gefferson. Process and procedure of modem America. 1995.
24. Goldsmith M. Eavesdropping Reform: The Legality of Roving Surveillance. University of Illinois// Law Review. 1987.N 3.
25. Griffith J. The ideology in Criminal procedure. Or the third model of criminal process .The Valf law Journal. 1970. V. 79. N 3.
26. Harris J. Legal Philosophies. New York, 1980.
27. Huber B. Development of the Criminal Law: Review// European Journal of Crime, Criminal Law and Criminal Justice 1993.
28. Israel J. La Fave W. Criminal procedure in a nutshell. St. Paul.:West Publishing Co, 1979.
29. Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts. Ed. by Goldman and Lamb, 1968.

30. Jousten M. Victim in Proceedings and Sentencing in Europe// International Review of Victimology. 1994. 3.
31. Jousten M. The Criminal Justice System of Finland. A General Introduction. Helsinki, 1995.
32. Kamisar. A. Dissent from Mirand Dissent: some Comments the "New" Fifth Amendment and the Old Voluntaries Nest, 65 MICH. L. REV. 59, 59 (1966).
33. King M. The Framework of Criminal Justice.London,1981.
34. Landsman S. Reading in Advesarial Justice : The American Approach to Adjudication (American Bar Association Section on Litigation). West Publishing, 1988.
35. Leading Constitutional Cases on Criminal Justice. Ed. Lloyd L. Weinreb. New York, 1998.
36. Maguire M., Corbett C. Effects of Crime and the Work of Victim Support Schemes. Aldershot, 1987.
37. Marshall ., Merry S. Crime and Accountability: Victim/ Obbender Mediation in Practice. London, 1990.
38. Mauro Cappolletti. The judicial process in comparative perspective- Oxford: Clarenton Press, 1989.
39. Mauro. T. Police. Win Right to remain Silent in Miranda in 5 States// USA today. 1999. 10 Febr.
40. Mawbe R., Gill M. Crime Victims : Needs, Service and the Voluntary Sector. London and New York, 1987.
41. Mayers L. The American Legal System. New York, 1964.
42. Miers D. Compensation for Criminal Inquiries. London, 1990.
43. Moris A., Maxwell G., Robertson J., Giving Victims a Voice: A New-Zealand Experiment// The Howard Journal of Criminal Justice. 1993. 32.

44. oxon D., Corcey J., Hedderman Developments in Use of Compensation Orders in Magistrates Courts since October 1988. London, 1992.
45. Nolfinger R., Shapiro M, Greenstien F. Dynamics of American Politics. Englewood Cliffs, 1980.
46. Nutter R. H. The Quality of Justice in Misdemeanor Arraignment Court// The Journal of Criminal Law, Criminology and Police Science. 1962. Vol. 153. 2.
47. Newbura ., Merry S. Keeping in touch: Police - victim Communication in Two Areas. London, 1990.
48. O'Sullivan J. The Independent Counsel Statute: Bad law, Bad Policy// American Criminal Law Review. 1996. Vol. 33. P. 463.
49. Packer H. Two models of the criminal process. 1966, Stanford University Press.
50. Perspectives on Crime Victims/ Eds. B. Galaway, J. Hudson. St. Louis - Toronto - London, 1981.
51. Peter Arnelia. The professor University of California Law. The Warren and Burger, Georgetown Journal, 185 (1983).
52. Penal Theory and Penal Practice: Tradition and innovation in Criminal Justice/ Eds. A. Duff, S. Marshall et al Manchester, 1994.
53. Pound R. The Criminal Justice un America. New York, 1975.
54. Ponzi v. Fessenden. 258. US 254 (1922).
55. Paker H. The Limits of the Criminal Sanction, 1968.
56. Raymond Moley. Politics and Criminal prosecution. Minton.; Balch, 1922.
57. Reid T. Crime and Criminology, West Publishing Co., 1976.
58. Relation Justice: Repairing the Bragch/ Eds. J. Burnside, N. Baker. Winchester, 1994.

59. Report to the nation on crime and justice (Washington. US Department of justice. Bureau of justice statistics. 1988.
60. Shapiro M. Courts. New York, 1981.
61. Sapland J., Willmore J. and Durr P. Victims in the Criminal Justice System. Aldershot, 1985.
62. Scolnick J. Justice without Trail. New York, 1966.
63. S. Slory & Robert L. Byman. "Direct Examination", Masterson practice, 1978.
64. Setsuo Miyazawa. Law and Society review. 1963. N 21. P.217.
65. Smith E. Christopher. Courts. Politics, and the Judicial Process. - Chicago: Nelson-Hall Publishers, 1993.
66. Toomer v. Witsell, 334 US 385, 395 (1948).
67. US Code Title 18, Chapter 2, "Crimes and criminal procedure": Title 28 "Court System".
68. Walklate S., Mawbe R. A Victim Oriented Criminal Justice System/ Paper presented to British Criminology Conference in Cardiff, July, 1993.
69. Waddington L. Criminal Justice. New York, 1982.
70. Watson D., Boucherst J., Davis D. Reparation for retributivists // Mediation and Criminal Justice: Victims, Offenders and Community. London, 1989.
71. Weinreb L.L. The Law of Criminal investigation. A book of Law Enforcement Personnel- Cambridge. Bullingel Publ.Co. 1982. XV.
72. Zehr H. Changing Lenses: A New Focus for Criminal Justice. Scottsdale, 1990.
73. . M., 1999.
74. : . , . .
// . 1997.N 1.
75. . , 1995.

76.
., 1997.
77. . .
// - , , . 1994.
7. .
78. . //
. 1995. 3.
79. . .
// . 1999. 10.
80. . . // : , ,
. 1999. 1.
81., 1981.
82. . . // : ,
, . 1999. 7.
83., 1979.
84. . . . , 1969.
85. , - .
. ., 1997.
86. . . - . :
, 1991.
87. . : //
. 1995. 12.
88. 0 . . . , 1985.
89. . . //
. 1999. 7.
90., 1972.
91. . . :
. ., 1978.

92. . . . :
- . . . , 1986.
93. . . . // . 1985. N 8.
94. . . . , 1994.
95. (. . . 12 . 1993).
96. . . . , 1999.
97. . . . , 1985.
- 98 , 1985.
99. , 1977.
100. // . 1998. 7.
101. . . . ,
// . 1999. 12.
102.
« . . . » . :
»//
. 1989. 437.
103. . . . -
. . . . , 1961.
104. . . . «
»// . 1970. N 1.
105. . . .
// . 1947. N 3.
106. . . . :
// . 1995. 9.

107. . . // :
- , , . 1999. 6.
108. . . -
- // - , , . 1994. N 1.
109. . . - // -
- , ; . 1990. N 8.
110. . .
- // - , , . 1996. N 2,3.
111. . . // -
- , , . 1997. N 1.
112. . . - //
- , , . 1997. N 8,9.
113. . . // -
- , , . 1995. N2;3;4;6.
114. . . . , 1981.
115. . . « »:
- // : , , . 1998. 10.
116. . .
- // . 1998. 2.
117. . .
- // 1998. 1.
118. . . - // . 1998. 12.
119. . .
- // . 1997. 2.
120. . .
- // . 1998 6.

121. . . ,
//
. 1998 . N 1.
122. . . , . .
//
. 2000. 1.
123. . . , . .
// . 2000. 1.
124. . . , . .
// . 1999. 6.
125.
. . 133.
. . : , 1977.
126. , 1985.
127. . .
//
. 1991. N 5.
128. . , « » :
//
. 1998. 4.
129. . .
//
. 1998. 1.
130. .
. , 1993.
131. . .
//
. , 1998.
132. , 1971.
133. : / . . . (.
.), . . , . . . , 1997.

134. . . . : // . 1996. 1.
135. , , . . , 1996.
136. , , . . , 1998.
137. . . . , 1992.
138. . // . 1995. 8.
139. . . , 1994.

020372 29 . 1997 .

10.11.2000. 60x84/16.

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12.9. 13.7. 200 .
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