Stanford Law Review

Volume 68 February 2016

NOTE

Beyond *Pollard*: Applying the Sixth Amendment's Speedy Trial Right to Sentencing

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Abstract. The Sixth Amendment right to a speedy trial represents one of the most fundamental safeguards for criminal defendants secured by our Constitution. Notwithstanding its significance, the full scope of the right's application remains uncertain, as lower courts have split on whether the right applies to sentencing proceedings. After the Supreme Court assumed without deciding that the right did apply in *Pollard v. United States*, federal and state courts have taken various approaches to answering this basic question. Despite these conflicts, almost no scholarship has touched on the application of the Sixth Amendment's speedy trial right to sentencing. This Note aims to fill that gap with a comprehensive analysis of the circuit split, as well as a reasoned and novel argument for application of the speedy trial right to sentencing. Part I provides a backdrop of the right's historical development and its treatment in recent decades by the Supreme Court. Part II analyzes the circuit split in depth, presenting a detailed overview of each side's reasoning and conclusions. Part III assesses historical, textual, doctrinal, and policy-based justifications for a speedy sentencing right to conclude that the right should apply through sentencing. However, the remedy for speedy trial right violations—automatic dismissal of charges—should be adapted logically for the sentencing context, resulting in dismissal of all but the minimum sentence to which the defendant is exposed.

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Introduction

> "*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .*"
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> —Sixth Amendment to the U.S. Constitution

With roots predating the Magna Carta, the Sixth Amendment's speedy trial right enshrines an essential safeguard at the heart of the American criminal justice system.[1] The Supreme Court has lauded the speedy trial right as "one of the most basic rights preserved by our Constitution,"[2] a right "as fundamental as any of the rights secured by the Sixth Amendment."[3] As important as the right is, however, the Court has also recognized it as "vague," "relative," "amorphous," and "slippery."[4] The speedy trial right does not prohibit all delays, nor does it provide a bright-line rule for how long a delay must be to violate its mandate.[5] Whether the speedy trial right has been compromised, the Supreme Court has said, depends upon a fact-specific, case-by-case approach that weighs a variety of factors, including the conduct of both the defendant and prosecution.[6]

In contrast to this flexible analysis for determining violations of the right, once a violation has been found, the remedy for a trial delay is clear: dismissal of the charges.[7] The Court has acknowledged dismissal as an "unsatisfactorily severe remedy" that means, in practice, that "a defendant who may be guilty of a serious crime will go free."[8] But the nature and importance of the speedy trial right permit no other solution.[9] In this respect, the speedy trial right is distinct from the other foundational guarantees secured by the Sixth Amendment: while courts remedy violations of the right to a public trial, the right to an impartial jury, and the right to notice of the charges (to name just a few) with new trials,[10] speedy trial violations demand more. Unlike these other rights, a speedy trial violation is not simply a defect in the trial itself that can be

1. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
2. *Id.* at 226.
3. *Id.* at 223.
4. Barker v. Wingo, 407 U.S. 514, 521-22 (1972) (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)).
5. *See, e.g.*, *id.* at 521-23.
6. *See, e.g.*, Vermont v. Brillon, 556 U.S. 81, 90-91 (2009).
7. *See* Strunk v. United States, 412 U.S. 434, 440 (1973) ("In light of the policies which underlie the right to a speedy trial, dismissal must remain . . . 'the only possible remedy.'" (quoting *Barker*, 407 U.S. at 522)).
8. *Id.* at 439 (quoting *Barker*, 407 U.S. at 522).
9. *See id.* at 439-40, 439 n.2.
10. *Id.* at 439.

corrected with a do-over; awarding the accused another trial after an unjust delay does not at all address the harm done.

Despite the speedy trial right's fundamental importance, the full scope of the right's application remains uncertain, as lower courts have split on whether the right applies to sentencing proceedings. In *Pollard v. United States*, the Supreme Court assumed—without deciding—that the right to a speedy trial applies to sentencing proceedings.[11] Since *Pollard*, federal and state courts have answered this critical question in several different ways. While the Second Circuit and a number of state courts have squarely held that the speedy trial right does not continue through sentencing,[12] the Third, Fifth, Sixth, Tenth, and Eleventh Circuits have come to the opposite conclusion.[13] The remainder of circuit courts have taken the *Pollard* Court's shortsighted approach, assuming in each case that the right does apply before denying the speedy sentencing claim on the merits.[14] This circuit conflict has resulted in decades-long confusion and inconsistencies among jurisdictions on whether prolonged delays in sentencing violate a defendant's constitutional speedy trial right.[15]

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11. 352 U.S. 354, 362 (1957).

12. *See, e.g.*, United States v. Ray, 578 F.3d 184, 198-99 (2d Cir. 2009) ("[W]e hold that the Speedy Trial Clause of the Sixth Amendment . . . does not apply to sentencing proceedings."); Lee v. State, 487 So. 2d 1202, 1203 (Fla. Dist. Ct. App. 1986) ("[T]he Sixth Amendment right to speedy trial does not apply to the sentencing procedure . . . ."); State v. Drake, 259 N.W.2d 862, 866 (Iowa 1977) ("We hold the sixth amendment right to speedy trial does not apply to the sentencing procedure . . . ."), *overruled on other grounds by* State v. Kaster, 469 N.W.2d 671 (Iowa 1991); State v. Pressley, 223 P.3d 299, 300 (Kan. 2010) ("We hold speedy trial requirements do not include sentencing . . . ."); State v. Johnson, 363 So. 2d 458, 461 (La. 1978) ("[W]e hold that the defendant's constitutional right to a speedy trial does not encompass sentencing or appeal."); State v. Betterman, 342 P.3d 971, 978 (Mont. 2015) ("[T]he constitutional speedy trial right does not include sentencing . . . ."); Ball v. Whyte, 294 S.E.2d 270, 271-72 (W. Va. 1982) ("Some courts have . . . concluded that the speedy trial guarantee attaches to the sentencing process. We do not, however, find this view persuasive." (citations omitted)).

13. *See* Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987) ("We now make explicit . . . that the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution . . . ." (citation omitted)); United States v. Campbell, 531 F.2d 1333, 1335 (5th Cir. 1976) ("[U]nreasonable delay in sentencing may constitute a violation of a defendant's Sixth Amendment right to a speedy trial."); United States v. Thomas, 167 F.3d 299, 303 (6th Cir. 1999) (recognizing that the court has "held that a defendant is entitled to a speedy sentencing"); United States v. Yehling, 456 F.3d 1236, 1243 (10th Cir. 2006) ("[W]e have applied this right from arrest through sentencing."); United States v. Bordon, 421 F.3d 1202, 1208 (11th Cir. 2005) (holding that an eighteen-month delay before sentencing did not violated the Sixth Amendment right to a speedy trial).

14. *See infra* notes 90-95.

15. *See Ray*, 578 F.3d at 191-92 ("Whether sentencing proceedings are within the ambit of the Speedy Trial Clause is a question that has not been resolved by the Supreme Court, our Court, or most of our sister Circuits.").

Compared to other constitutional criminal procedure rights, the right to a speedy trial has received relatively little attention from scholars,[16] and the application of the speedy trial right to sentencing has received almost none.[17] This Note fills that gap with a comprehensive analysis of the circuit split, the arguments offered by both sides, and a reasoned solution to the issue. Part I provides a brief overview of the historical origins of the speedy trial right and the Supreme Court's development of the right in recent decades. Part II examines the circuit split and describes the reasoning underlying each side's conclusions. Finally, Part III argues for the application of the speedy trial right to sentencing based on the right's historical context and core purposes, as well as the Supreme Court's pattern of preserving only certain Sixth Amendment rights at sentencing. Because trial and sentencing were, in effect, a unitary proceeding in early America and at common law; because the interests motivating the speedy trial right apply with force to prolonged delays in sentencing; and because the Supreme Court has consistently preserved rights at sentencing that promote accuracy and truth, the speedy trial right should apply to sentencing. However, the remedy of dismissal should be adapted logically for the sentencing context, resulting in dismissal of all but the minimum sentence to which the defendant is exposed—the functional equivalent of dismissal of the charges for a trial delay.

I. The Historical Development of the Speedy Trial Right

The speedy trial right enjoys a rich historical heritage in Anglo-American society, dating back to at least early twelfth-century England.[18] In 1166, King Henry II promulgated the Assize of Clarendon, a landmark set of procedural rules that began to transition England's law from the traditional trial-by-ordeal system to an evidentiary model based on investigation and sworn testimony.[19]

16. *See* SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 243 (2006) (noting the "paucity of scholarship on speedy trial" compared with the "prolific output on [other] criminal procedure rights").

17. Besides a two-page Bloomberg Law news report on the Montana Supreme Court's recent decision and a few pages within a larger article that surveys many rights at sentencing, essentially no scholarship has analyzed this issue and the attendant circuit split. *See* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1827-31 (2003); Lance J. Rogers, *'Speedy Sentencing' Claim Is Grounded in Due Process Clause, Not Sixth Amendment*, 83 U.S. L. WEEK 1180 (2015). John Douglass has written on the application of various parts of the Sixth Amendment to capital sentencing proceedings but includes only one paragraph on the speedy trial right. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1990 (2005).

18. *See* Brian P. Brooks, Comment, *A New Speedy Trial Standard for* Barker v. Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 587 (1994); *see also* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

19. *See* 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 316-17 (1922); *see also Klopfer*, 386 U.S. at 223 & n.9. The Assize still allowed trial by ordeal for some crimes,
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In addition to establishing a rudimentary right to a jury, the Assize required that each county's traveling judges be promptly notified of the location of accused individuals to ensure the courts could "make their law" without delay.[20] Fifty years later, the drafters of the Magna Carta included an even plainer statement of the right: "[T]o no one will we refuse or delay, right or justice."[21]

In his *Institutes*, the well-known Elizabethan jurist Edward Coke described this provision of the Magna Carta as establishing a fundamental tenet of the "law and custome of England,"[22] enshrining a guarantee that judges "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, . . . without detaining him long in prison."[23] Coke's *Institutes* were extremely influential among the Framers of the Constitution: John Rutledge, the second Chief Justice of the U.S. Supreme Court, described them as "almost the foundation of our law,"[24] and for Thomas Jefferson, the first part of *Institutes* constituted the "universal elementary book of law students."[25] Unsurprisingly, the speedy trial right was incorporated into many of the constitutions of the newly formed states,[26] and James Madison proposed the right without controversy as part of the set of fundamental safeguards against tyranny that culminated in the Bill of Rights.[27]

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but the practice was officially outlawed by 1219. *See* Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 272-73 (2003).

20. Assize of Clarendon para. 4 (1166) ("[W]hen [an accused] . . . be arrested through the aforesaid oath, if the justices are not about to come speedily enough into the county where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices. And . . . there before the justice let them stand trial."), *reprinted in* 2 ENGLISH HISTORICAL DOCUMENTS 1042-1189, at 440, 441 (David C. Douglas & George W. Greenaway eds., 2d ed. 1981).

21. Magna Carta, ch. 40 (1215), *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d rev. ed. 1914); *see also Klopfer*, 386 U.S. at 223 (relying on alternate translation of the Magna Carta).

22. *Klopfer*, 386 U.S. at 225 n.14 (quoting EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (London, E. & R. Brooke 1797) (1642)).

23. *Id.* at 224 (alteration in original) (quoting COKE, *supra* note 22, at 43).

24. *Id.* at 225 (quoting CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552-1634), at 514 (1957)).

25. *Id.* (quoting CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 174 (1911)).

26. *See, e.g.*, PA. CONST. of 1776, art. I, § 9 ("[I]n all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial . . . ."), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3081, 3083 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; VT. CONST. of 1777, ch. I, art. X (same), *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3737, 3741.

27. *See* Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 103-04 (2004).

Despite heralding the speedy trial right as central to our criminal justice system, the Supreme Court has heard relatively few cases on the right.[28] When the Court held that the right to a speedy trial applied to the states in 1967,[29] it still had not established a formal test to determine violations of the right and had provided "very little guidance" overall for lower courts deciding speedy trial right claims.[30] Justice Brennan remarked in 1970 that the Court had given "scant attention" to "questions essential to the definition of the speedy-trial guarantee": "[A]lthough we said in *Klopfer* that the right to a speedy trial is 'one of the most basic rights preserved by our Constitution,' . . . we have yet even to trace its contours."[31]

Clarification of the right's contours came in 1972 with the Court's seminal decision in *Barker v. Wingo*.[32] In *Barker*, five years had elapsed between the defendant's arrest for murder and his trial, due in large part to the sixteen continuances the state requested while it attempted to convict the defendant's alleged accomplice.[33] The state had strategized that, once the accomplice was convicted, he would be more willing to testify against Barker without fear of self-incrimination.[34] The state viewed this potential testimony as crucial in its case against Barker, but due to hung juries and procedural mishaps, it had to try the accomplice six times before securing a conviction.[35]

Barker's case was a "close" one, with equities on both sides.[36] The Court created a functional balancing test to address speedy trial right claims on a case-by-case basis, identifying four basic (but nonexclusive) factors for courts to consider: "[l]ength of delay, the reason for the delay, the defendant's assertion of

28. *See* Barker v. Wingo, 407 U.S. 514, 515 (1972) ("Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, this Court has dealt with that right on infrequent occasions." (footnote omitted)); Allen, *supra* note 27, at 104 ("In the proceeding years after the American Revolution, the Speedy Trial Clause generated few waves in constitutional litigation."). To date, the Court has heard fewer than twenty cases on the right. *See* Vermont v. Brillon, 556 U.S. 81 (2009); Reed v. Farley, 512 U.S. 339 (1994); Doggett v. United States, 505 U.S. 647 (1992); United States v. Loud Hawk, 474 U.S. 302 (1986); United States v. MacDonald, 456 U.S. 1 (1982); United States v. MacDonald, 435 U.S. 850 (1978); United States v. Lovasco, 431 U.S. 783 (1977); Dillingham v. United States, 423 U.S. 64 (1975) (per curiam); Moore v. Arizona, 414 U.S. 25 (1973) (per curiam); Strunk v. United States, 412 U.S. 434 (1973); *Barker*, 407 U.S. 514; United States v. Marion, 404 U.S. 307 (1971); Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969); *Klopfer*, 386 U.S. 213; Pollard v. United States, 352 U.S. 354 (1957); Beavers v. Haubert, 198 U.S. 77 (1905).

29. *Klopfer*, 386 U.S. at 222-23.

30. Allen, *supra* note 27, at 104.

31. *Dickey*, 398 U.S. at 40-41 (Brennan, J., concurring).

32. 407 U.S. 514.

33. *Id.* at 516-18.

34. *Id.* at 516.

35. *Id.* at 516-17.

36. *Id.* at 533-34.

his right, and prejudice to the defendant."[37] The length of delay represents a "triggering mechanism": until the defendant experiences some "presumptively prejudicial" delay, courts need not inquire into the other factors.[38] In Barker's case, the five-year delay was "extraordinary," with much of the delay caused by the state's own failure to prosecute the accomplice within the bounds of due process.[39] But two other factors outweighed these considerations. Because Barker suffered only minimal prejudice[40] and did not assert his objection to the delay until four years after the initial continuance, the Court concluded that he "did not want a speedy trial" and was instead taking advantage of the delay to obtain a dismissal.[41]

Since *Barker*, the Court has further clarified the contours of the speedy trial right, including when it attaches (at the time of arrest or formal indictment),[42] what the remedy must be (dismissal of the charges),[43] whether delays caused by appointed counsel count against the state (no),[44] and whether a defendant can appeal a denial of a speedy trial motion before trial begins (no).[45] It has not, however, clarified when the speedy trial right stops.

In *Pollard v. United States*, the defendant asserted that his speedy trial right had been violated through a sentencing error that resulted in extended probation and resentencing two years later.[46] The Court assumed without deciding that the right applied to sentencing but denied Pollard's claim on the merits,[47] noting that the delay was not "purposeful or oppressive," but rather "accidental and . . . promptly remedied when discovered."[48] Although four dissenting Justices noted that "[i]t has never been held that the sentence is not

37. *Id.* at 530-32.

38. *Id.* at 530.

39. *Id.* at 533-34.

40. *Id.* at 534 ("Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, . . . he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay.").

41. *Id.* at 534-36.

42. *See* United States v. Loud Hawk, 474 U.S. 302, 312-13 (1986) (holding that Speedy Trial Clause does not apply to time during which defendants were neither under indictment nor subjected to any official restraint); Dillingham v. United States, 423 U.S. 64, 64-65 (1975) (per curiam).

43. *See* Strunk v. United States, 412 U.S. 434, 439-40 (1973) (holding that dismissal, not a reduction in sentence length, is the only possible remedy for deprivation of constitutional speedy trial right).

44. *See* Vermont v. Brillon, 556 U.S. 81, 92 (2009).

45. *See* United States v. MacDonald, 435 U.S. 850, 863 (1978).

46. *See* 352 U.S. 354, 361 (1957).

47. *Id.* ("We will assume *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment.").

48. *Id.*

part of the 'trial,'"[49] the majority opinion gave no direction to lower courts on how to handle speedy sentencing violations in future cases. Part II of this Note discusses how, without further guidance from the Court on the issue, federal and state courts have resolved the question in various ways, creating confusion and inconsistencies among jurisdictions.

II. Lower Court Conflict on Applying the Speedy Trial Right to Sentencing

Lower courts have divided into several camps on the issue of whether the speedy trial right applies to sentencing. Some courts have refused to recognize a speedy sentencing right,[50] while others have expressly extended the speedy trial right through sentencing.[51] Still others have chosen to adopt the *Pollard* Court's noncommittal approach, assuming without deciding that the right extends through sentencing.[52]

A. Courts Rejecting a Speedy Sentencing Right

The Second Circuit[53] and several state supreme courts[54] have squarely rejected the idea that the Sixth Amendment's speedy trial right applies to sentencing proceedings. In *United States v. Ray*, the defendant was sentenced to a year in prison for mail fraud and released on bail while she appealed the district court's judgment.[55] After the Second Circuit issued an interceding decision that made it clear Ray should have been given a more lenient sentence, the parties stipulated to remanding the case for resentencing.[56] Then, "[f]or unknown reasons, no further action was taken on Ray's case for fifteen years."[57] Apparently believing her case had concluded, Ray continued to live in the Eastern District of New York, where she maintained lawful employment, raised three children, remarried, bought a home and a car, enrolled in an associate's degree program, and as the government later conceded, otherwise "reformed [her] lifestyle" and achieved "successful self-rehabilitation."[58] The government conceded that Ray's speedy trial right applied to her sentencing

49. *Id.* at 368 (Warren, C.J., dissenting).

50. *See infra* Part II.A.

51. *See infra* Part II.B.

52. *See infra* Part II.C.

53. *See* United States v. Ray, 578 F.3d 184, 198-99 (2d Cir. 2009).

54. *See infra* note 67.

55. 578 F.3d at 187.

56. *Id.*

57. *Id.*

58. *Id.* (alteration in original) (quoting Brief for the United States at 6 n.3, *Ray*, 578 F.3d 184 (No. 08-2795-cr), 2008 WL 7118394).

proceedings, but the district court denied Ray's motion to dismiss the indictment on speedy sentencing grounds.[59]

On appeal, the Second Circuit surveyed the holdings of other circuits on the issue, lamenting that no other federal court of appeals had yet "undertaken a rigorous examination of whether the Speedy Trial Clause of the Sixth Amendment extends to a delay in sentencing."[60] It then analyzed the history, policy, and doctrine surrounding the speedy trial right.[61] Referencing the writings of Blackstone and early American legal decisions, the court attempted to discern the original meaning of the word "trial" and found a historical distinction between trials and sentencing.[62] The court reasoned that the Framers' understanding of this divide has persisted in our modern criminal justice system: they looked to the Federal Rules of Criminal Procedure and the Speedy Trial Act, both of which treat sentencing as a postconviction proceeding completely separate from trial.[63] Next, the court briefly touched on whether the interests protected by the speedy trial right are "directly relevant to sentencing proceedings."[64] The court found that prolonged delays during sentencing do not implicate the constitutional interests underlying the Sixth Amendment. Such delays present "no concern over 'oppressive incarceration' before trial, 'anxiety' over public accusation before trial, or any 'impairment' of the petitioner's ability to defend himself."[65] The court therefore concluded that the Sixth Amendment right to a speedy trial did not apply to sentencing.[66]

A handful of state supreme courts, including West Virginia, Louisiana, Montana, Iowa, and Kansas, have come down the same way.[67] For example, in

59. At the rescheduled sentencing hearing a decade and a half after Ray's conviction, the prosecutor raised his concerns to the district court that Ray's speedy trial right may have been violated. In a letter produced by the government after that hearing, the government stated that Ray "ha[d] a right to a speedy re-sentencing" under both the Due Process Clause of the Fifth Amendment and the Speedy Trial Clause of the Sixth Amendment. *Id.* at 188-89 (quoting Letter from Charles P. Kelly, Assistant U.S. Attorney, to Thomas C. Platt, Judge, U.S. Dist. Ct. for the E. Dist. of N.Y. 1 (Mar. 18, 2008), United States v. Ray, No. 9:91-cr-01032 (E.D.N.Y. June 3, 2008), *aff'd in part, vacated in part*, *Ray*, 578 F.3d 184).

60. *Id.* at 193.

61. *Id.* at 193-98.

62. *Id.* at 195.

63. *Id.* at 196-97 (citing FED. R. CRIM. P. 23-32; and Speedy Trial Act of 1974, Pub. L. No. 93-619, tit. I, 88 Stat. 2076, 2076-86 (1975) (codified as amended at 18 U.S.C. §§ 3161-74 (2014))).

64. *Id.* at 197.

65. *Id.* (quoting Brooks v. United States, 423 F.2d 1149, 1153 (8th Cir. 1970)).

66. *Id.* at 198-99.

67. *See, e.g.*, State v. Drake, 259 N.W.2d 862, 866 (Iowa 1977) ("We hold the sixth amendment right to speedy trial does not apply to the sentencing procedure, or to this delayed resentencing."), *overruled on other grounds by* State v. Kaster, 469 N.W.2d 671 (Iowa 1991); State v. Pressley, 223 P.3d 299, 301 (Kan. 2010) ("A delay of sentencing from

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State v. Johnson, one of the more extensively reasoned decisions on this side of the split, the Supreme Court of Louisiana decided that the Speedy Trial Clause applies only to the adversarial proceeding that determines guilt or innocence.[68] The *Johnson* court analyzed various historical and contemporary indications that sentencing proceedings are not included in the "traditional notion of trial," including the American Bar Association's Standards Relating to Speedy Trial.[69] Like the Second Circuit, the court reasoned that delays between sentencing and conviction do not implicate the interests identified by the Supreme Court as underlying the speedy trial right—preventing oppressive pretrial incarceration, minimizing anxiety associated with public accusation, and averting impairment of the accused's defense.[70]

B. Courts Applying the Speedy Trial Right to Sentencing

On the other side of the split, the Third, Fifth, Sixth, Tenth, and Eleventh Circuits have explicitly held (albeit with sparse reasoning) that the Sixth Amendment's speedy trial right does apply to sentencing. In *Burkett v. Cunningham*, the Third Circuit referenced past decisions assuming the existence of the right and, without further reasoning, announced that it "now make[s] explicit what we have assumed in our previous cases, that the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution."[71]

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a defendant's plea or from a finding of guilty after a trial does not deprive a defendant of the right to a speedy trial." (quoting State v. Freeman, 689 P.2d 885, 891 (Kan. 1984))); State v. Johnson, 363 So. 2d 458, 460 (La. 1978) ("We hold that the right to a speedy trial is inapplicable to the appellate and sentencing stages of a criminal prosecution."); State v. Betterman, 342 P.3d 971, 978 (Mont. 2015) ("[W]e conclude that, just as the right to speedy trial does not attach until a criminal proceeding has been initiated, or after charges have been dismissed, so too does it cease to apply when the conviction becomes definitive." (citations omitted)); Ball v. Whyte, 294 S.E.2d 270, 271 (W. Va. 1982) ("Some courts have . . . concluded that the speedy trial guarantee attaches to the sentencing process. We do not, however, find this view persuasive." (citations omitted)); *see also* Lee v. State, 487 So. 2d 1202, 1203 (Fla. Dist. Ct. App. 1986) ("We do not agree with the posited academic implications that may be derived from *Pollard* and instead agree . . . . that the Sixth Amendment right to speedy trial does not apply to the sentencing procedure and that delay in the imposition of sentence is to be tested by due process standards.").

68. 363 So. 2d at 460.

69. *Id.* at 461 (citing STANDARDS RELATING TO SPEEDY TRIAL (AM. BAR ASS'N Approved Draft 1968)).

70. *Id.* at 460-61 (citing Barker v. Wingo, 407 U.S. 514 (1972)); *see also Barker*, 407 U.S. at 532.

71. 826 F.2d 1208, 1220 (3d Cir. 1987) (citation omitted).

The Fifth Circuit came to the same conclusion based on an apparent misunderstanding of the Supreme Court's holding in *Pollard*.[72] In *United States v. Campbell*, the Fifth Circuit stated flatly that the *Pollard* Court had held that "unreasonable delay in sentencing may constitute a violation of a defendant's Sixth Amendment right to a speedy trial."[73] However, the *Pollard* Court did not so hold—it explicitly assumed only for the purposes of that case that the Sixth Amendment applied to sentencing.[74] The Fifth Circuit has consistently maintained its position.[75] The Eleventh Circuit has expressly followed the Fifth Circuit to hold the same.[76] The Sixth Circuit has also held that the Sixth Amendment speedy trial right applies through sentencing,[77] and the Tenth Circuit has held that the right applies "from arrest through sentencing."[78]

Many state courts, including Wisconsin,[79] Alaska,[80] Kentucky,[81] Arkansas,[82] North Carolina,[83] Colorado,[84] and Vermont,[85] among others,[86]

72. *See* United States v. Campbell, 531 F.2d 1333, 1335 (5th Cir. 1976) (citing Pollard v. United States, 352 U.S. 354 (1957)); Juarez-Casares v. United States, 496 F.2d 190, 192 (5th Cir. 1974) ("[T]he imposition of sentence is part of the trial for the purposes of the Sixth Amendment speedy trial guarantee . . . ." (citing *Pollard*, 352 U.S. 354)); *see also* United States v. Ray, 578 F.3d 184, 193 (2d Cir. 2009) ("The Fifth Circuit's position, traced back to its origins, appears to be based on a misreading of *Pollard*.").

73. 531 F.2d at 1335.

74. 352 U.S. at 361.

75. *See, e.g.*, United States v. Abou-Kassem, 78 F.3d 161, 167 (5th Cir. 1996).

76. *See* United States v. Danner, 429 F. App'x 915, 917 (11th Cir. 2011) ("This Court and binding precedent from the Fifth Circuit have held that the protection of the Sixth Amendment right to a speedy trial extends to sentencing."); *see also* United States v. Bordon, 421 F.3d 1202, 1208 (11th Cir. 2005).

77. *See, e.g.*, United States v. Thomas, 167 F.3d 299, 303 (6th Cir. 1999); United States v. Reese, 568 F.2d 1246, 1253 (6th Cir. 1977).

78. United States v. Yehling, 456 F.3d 1236, 1243 (10th Cir. 2006) ("[W]e have applied this right from arrest through sentencing." (citing Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986))).

79. State v. Allen, 505 N.W.2d 801, 802 (Wis. Ct. App. 1993) ("We . . . conclude that the speedy trial clause of the sixth amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution." (citation omitted)). The Supreme Court of Wisconsin subsequently cited *Allen* with approval for this proposition in *State ex rel. Hager v. Marten*, 594 N.W.2d 791, 798 n.8 (Wis. 1999).

80. Gonzales v. State, 582 P.2d 630, 632 (Alaska 1978) ("[S]entencing delays are governed by . . . the federal . . . constitutional guarantee[] of a speedy trial . . . .").

81. Perdue v. Commonwealth, 82 S.W.3d 909, 911-12 (Ky. 2002) ("[A] defendant has a right to a speedy trial and to a speedy sentencing under the Sixth Amendment to the U.S. Constitution.").

82. Jolly v. State, 189 S.W.3d 40, 45 (Ark. 2004) ("As have so many of our sister states that have been confronted with this same constitutional issue, we conclude that the right to a speedy sentence is encompassed within the Sixth Amendment right to a speedy trial.").

have also held that the speedy trial right applies to sentencing. In *Gonzales v. State*, the Supreme Court of Alaska added to the interests identified by the *Barker* Court, citing seven interests underlying the right.[87] The *Gonzales* court concluded that many of these considerations apply to sentencing "by analogy": sentencing delays can cause "undue and oppressive incarceration," during which defendants cannot apply for pardons, commutations, or sentencing reductions; can "chill the legitimate exercise of First Amendment freedoms by unpopular defendants"; can hamper a defendant's sentencing case, as defense witnesses may no longer be available; and can harm the public's "interest in prompt and certain punishment for criminal offenses."[88] This nonexhaustive list, the court concluded, "points up the need to extend the constitutional guarantee of a speedy trial through imposition of sentence."[89]

C. Other Judicial Approaches to Sentencing Delays

The balance of federal courts of appeals and state supreme courts have adopted the *Pollard* Court's evasive approach, assuming without deciding that the speedy trial right applies to sentencing before denying claims on the merits. The First,[90] Fourth,[91] Seventh,[92] Eighth,[93] Ninth,[94] and D.C. Circuits,[95] as well

83. State v. Avery, 383 S.E.2d 224, 225 (N.C. Ct. App. 1989) ("Though not required by *Pollard*, we believe that the Sixth Amendment guarantees of a speedy trial extend to the sentencing phase of a criminal prosecution.").

84. Moody v. Corsentino, 843 P.2d 1355, 1363 (Colo. 1993) (en banc) (considering for review the defendant's constitutional challenge to a delay in sentencing while noting that "it is generally accepted in the lower federal courts that a criminal defendant's right to speedy trial under the federal constitution extends through the sentencing phase of a prosecution").

85. State v. Dean, 536 A.2d 909, 912 (Vt. 1987) ("We concur with those decisions that find that the speedy trial guarantee applies to sentencing.").

86. *Jolly*, 189 S.W.3d at 44 ("[T]here are at least seventeen state courts that have recognized that a defendant's speedy-trial rights encompass the right to a speedy sentence."); *see also, e.g.*, Hurst v. State, 516 So. 2d 904, 905 (Ala. Crim. App. 1987) (stating that the court had "ascertained that the constitutional guarantee to a speedy trial includes sentencing"); State v. Banks, 720 P.2d 1380, 1385 (Utah 1986) ("[W]e conclude that the right to a speedy trial may encompass . . . . not only a seasonal trial of the facts, but also a seasonal decision and sentencing following trial.").

87. 582 P.2d 630, 632-33 (Alaska 1978).

88. *Id.* at 633.

89. *Id.*

90. United States v. Nelson-Rodriguez, 319 F.3d 12, 60 (1st Cir. 2003) ("Several other circuits, including this one, have assumed without deciding that the right [to a speedy trial] extends to sentencing.").

91. Brady v. Superintendent, Anne Arundel Cty. Det. Ctr., 443 F.2d 1307, 1310 (4th Cir. 1971) ("Although there are thus strong indications that the Sixth Amendment right to a speedy trial is applicable to the interval between conviction and sentencing, we need not decide that question.").

as several state courts,[96] have all thus avoided undertaking a considered analysis of the issue.

Some, but not all, of the courts prohibiting application of the speedy trial right to sentencing have instead located a right to prompt sentencing under the Due Process Clauses of the Fifth and Fourteenth Amendments.[97] In *United States v. Marion* and *United States v. Lovasco*, where defendants had suffered lengthy preindictment delay, the Supreme Court noted that, although the Sixth Amendment does not attach until either the accused is arrested or a formal indictment is filed, "the Due Process Clause has a limited role to play in protecting against oppressive delay."[98] Accordingly, some lower courts holding that the Sixth Amendment ceases to attach after conviction have reasoned that due process still protects defendants against unreasonable delays in sentencing.[99]

Although the analysis for determining a due process violation looks much like the *Barker* test,[100] balancing the "reasons for the delay," notions of "fair

92. United States v. Rothrock, 20 F.3d 709, 711 (7th Cir. 1994) ("Assuming, without deciding, that the speedy trial right applies to sentencing proceedings, we hold that Rothrock's rights were not violated in this case." (citation omitted)).

93. Brooks v. United States, 423 F.2d 1149, 1151 (8th Cir. 1970) ("It is unnecessary for us to make a decision at this time as to whether an unreasonable delay in sentencing constitutes an infringement of a jurisdictional or constitutional right.").

94. United States v. Martinez, 837 F.2d 861, 866 (9th Cir. 1988) ("This court has treated the imposition of sentence as within the speedy trial guarantee, but has refrained from explicitly recognizing it as such." (citation omitted)); *see also* United States v. Ibarra, 396 F. App'x 354, 355-56 (9th Cir. 2010) ("[A]ssuming *arguendo* that sentencing is part of trial for Sixth Amendment purposes, the delay in Cazarez Ibarra's sentencing did not violate his Sixth Amendment right to a speedy trial.").

95. United States v. Gibson, 353 F.3d 21, 27 (D.C. Cir. 2003) ("Assuming therefore without deciding that the guarantee of a 'speedy and public trial' also provides a defendant a right to be promptly sentenced, we hold that Gibson has failed to make the showing under *Barker* necessary to obtain relief." (citations omitted) (quoting U.S. CONST. amend. VI)).

96. *See, e.g.*, Moore v. State, 436 S.E.2d 201, 202 (Ga. 1993); Prince v. State, 55 P.3d 947, 951 (Nev. 2002); State v. Todisco, 6 P.3d 1032, 1039 (N.M. Ct. App. 2000), *cert. quashed*, 51 P.3d 527 (N.M. 2002); Commonwealth v. Glover, 458 A.2d 935, 937 (Pa. 1983).

97. *See, e.g.*, Erbe v. State, 336 A.2d 129, 136 (Md. Ct. Spec. App. 1975) ("Any real prejudice suffered by an individual as a result of an unreasonable delay in sentencing may be remedied under due process principles."), *aff'd*, 350 A.2d 640 (Md. 1976).

98. United States v. Lovasco, 431 U.S. 783, 789 (1977); *see also, e.g.*, Doggett v. United States, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting) ("[T]he Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings."); United States v. Marion, 404 U.S. 307, 324-25 (1971).

99. *See, e.g.*, United States v. Ray, 578 F.3d 184, 202 (2d Cir. 2009); *Erbe*, 336 A.2d at 137; State v. Betterman, 342 P.3d 971, 978 (Mont. 2015).

100. United States v. Danner, 429 F. App'x 915, 917 (11th Cir. 2011) ("We combine the analysis of . . . the denial of rights under the Sixth Amendment Speedy Trial Clause and Fifth Amendment Due Process Clause, because the factors considered are essentially the same."). *See generally* Barker v. Wingo, 407 U.S. 514, 530 (1972) (establishing test

footnote continued on next page

play and decency," and prejudice to the defendant,[101] the remedy is very different: a speedy trial right violation requires automatic reversal and discharge, but the remedy for a due process violation is flexible. After a due process violation has occurred, courts simply "endeavor to fashion relief that counteracts the prejudice caused by the violation."[102] As the Third Circuit commented, "[t]he normal remedy for a due process violation is not discharge; rather, a court faced with a violation should attempt to counteract any resulting prejudice demonstrated by a petitioner."[103] Possible remedies include crediting the time already served against the defendant's sentence,[104] reducing the defendant's sentence, or even just issuing a "judicial apology" for the delay.[105] For example, in *Burkett v. Fulcomer*, the Third Circuit found that a thirty-eight-month delay due to the state trial court's negligence in rescheduling hearings violated due process.[106] The court accordingly reduced the defendant's sentence by the amount of time he had spent incarcerated after conviction and before sentencing.[107]

Thus, as a result of this circuit split, defendants suffering delays in sentencing are afforded drastically different remedies depending on which state or federal circuit presides over their case.

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assessing the length of delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant).

101. *Lovasco*, 431 U.S. at 790 (quoting Rochin v. California, 342 U.S. 165, 173 (1952)); United States v. L'Allier, 838 F.2d 234, 238 (7th Cir. 1988) ("A court must . . . weigh the actual prejudice to the defendant against the reasons for the delay to determine whether a particular indictment must be dismissed pursuant to the due process clause. Thus, even if [the defendant] can show actual and substantial prejudice to his defense as a result of the sixteen month pre-indictment delay, the indictment will not be dismissed if there was a legitimate reason for the delay." (citation omitted)). Even some of the courts that apply the Sixth Amendment to sentencing have conflated the two standards. *See, e.g.*, Burkett v. Cunningham, 826 F.2d 1208, 1222 (3d Cir. 1987) ("Because both the Due Process and Speedy Trial clauses constrain post-verdict delay, the Fifth Circuit and the Tenth Circuit have looked to the four *Barker* factors as a means of determining whether due process has been violated. . . . We agree that, as a general matter, the *Barker* factors should also inform our due process determination, for 'the right to avoid unreasonable delay in the appellate process is similar to the right to a speedy trial.'" (quoting DeLancy v. Caldwell, 741 F.2d 1246, 1248 (10th Cir. 1984) (per curiam))).

102. *Ray*, 578 F.3d at 202.

103. *Burkett*, 826 F.2d at 1222.

104. *See, e.g.*, Burkett v. Fulcomer, 951 F.2d 1431, 1447 (3d Cir. 1991).

105. *See, e.g.*, United States v. Yelverton, 197 F.3d 531, 538 (D.C. Cir. 1999) (approving judicial apology as appropriate remedy for delay).

106. 951 F.2d at 1439-43, 1446.

107. *Id.* at 1447.

III. Application of the Speedy Trial Right at Sentencing

History, policy, and doctrine all support the application of the speedy trial right to sentencing. Part III.A locates the speedy trial right within a fragmentary Supreme Court jurisprudence that applies only certain constitutional trial rights to sentencing. It then assesses the main arguments relied on by lower courts—the historical relationship of trials and sentencing, the applicability of the interests underlying the speedy trial right to sentencing, and the Court's prohibition on discharge as a remedy for sentencing errors—to conclude that the speedy trial right should extend to sentencing. Part III.B tackles the issue of a remedy, arguing that the equivalent of dismissal for the sentencing context is imposition of the minimum sentence to which the defendant's conviction exposes him.

A. The Speedy Trial Right Should Apply at Sentencing

1. The Supreme Court's jurisprudence on Sixth Amendment rights at sentencing

The Supreme Court has made clear that some constitutional rights apply at sentencing while others do not. Although the principles underlying this divide have been described as "confus[ed],"[108] "inconsistent,"[109] and "ad hoc,"[110] it is clear that modern criminal procedure treats trials and sentencing as separate universes, governed by very different rules. For example, evidentiary rules are relaxed at sentencing: almost any information related to a defendant's background is admissible, regardless of whether it comes in the form of hearsay or evidence otherwise inadmissible at trial.[111] A plurality of the Court has declared that even capital sentencing, with its heightened procedural requirements, does not "implicate the entire panoply of criminal trial procedural rights."[112] The Court's opinions have set forth varying explanations for why certain rights do or do not apply at sentencing, including historical

108. Douglass, *supra* note 17, at 1970.

109. *Id.* at 1975.

110. Michaels, *supra* note 17, at 1862.

111. *See, e.g.*, 18 U.S.C. § 3661 (2014) ("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."); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(b) (West 2015) ("*Williams* also treats as relevant aspects of the defendant's life that go beyond antisocial conduct. The Court noted the need for the sentencing judge, in evaluating the 'lives and personalities of convicted offenders,' to draw on information concerning 'every aspect of a defendant's life.'" (quoting Williams v. New York, 337 U.S. 241, 249-50 (1949))); *see also Williams*, 337 U.S. at 250-52.

112. Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977) (plurality opinion).

practice,[113] the purposes of trial and sentencing proceedings,[114] and the text of the Constitution.[115]

Because the plain language of the Sixth Amendment does not distinguish between trial and sentencing, some commentators have argued for a unified doctrine that applies all of the Sixth Amendment's safeguards to both trial and sentencing.[116] The Court thus far has resisted this proposal, despite its emphasis on textual interpretation in other areas of Sixth Amendment doctrine.[117] Instead it has undertaken a somewhat ad hoc approach to deciding which Sixth Amendment rights continue through sentencing. While the Court has held that a defendant has no Sixth Amendment right to be sentenced by a jury[118] or to confront sentencing witnesses,[119] it has applied the Sixth Amendment rights to counsel and effective assistance of counsel at sentencing.[120] For the remaining Sixth Amendment rights, the Court has "said little,"[121] resulting in a fragmentary doctrine for which the Court has offered no unifying justification.[122]

In a recent systematic analysis of twenty-five constitutional trial rights, Alan Michaels persuasively posits one theory—not articulated by the Court, but consistent with its pattern of decisions—that explains the divide between trial and sentencing rights. Put simply, rights that are chiefly aimed at producing a correct result continue through sentencing, whereas rights meant primarily to protect a defendant's liberty or autonomy interests do not.[123] At

113. *See Williams*, 337 U.S. at 246.

114. *See Gardner*, 430 U.S. at 360 (plurality opinion).

115. *See* Mitchell v. United States, 526 U.S. 314, 327 (1999).

116. *See, e.g.*, Douglass, *supra* note 17, at 1972 (discussing this idea in the context of capital cases).

117. *See id.* at 1969 ("Despite its affinity for textual analysis in other realms of Sixth Amendment law, the Court has never answered the basic textual question whether the Sixth Amendment—which applies 'in all criminal prosecutions'—applies to capital sentencing at all." (footnote omitted) (quoting U.S. CONST. amend. VI)).

118. Alleyne v. United States, 133 S. Ct. 2151, 2163 (2013) (noting that, while a jury must find the facts that establish elements of the offense, the judge retains the discretion to choose a sentence within the prescribed range); *see also* United States v. Bishop, 412 U.S. 346, 361 (1973) ("[I]n the federal system it is not the function of the jury to set the penalty.").

119. *See* Williams v. New York, 337 U.S. 241, 245 (1949).

120. Mempa v. Rhay, 389 U.S. 128, 137 (1967) (applying right to counsel at sentencing); Glover v. United States, 531 U.S. 198, 201-04 (2001) (applying right to effective assistance of counsel at sentencing).

121. Douglass, *supra* note 17, at 1970.

122. *See* Michaels, *supra* note 17, at 1774 ("Confusion about the extent of trial rights at sentencing undoubtedly traces from the Court's utter failure to articulate a consistent explanation for whether and when constitutional adjudication rights apply to sentencing proceedings.").

123. *Id.* at 1863.

sentencing, courts predominantly focus on obtaining an accurate and appropriate sentence,[124] and the defendant has lost the presumption of innocence underlying certain heightened procedural safeguards at trial designed to protect his autonomy and liberty interests.[125] For example, the right to counsel applies at sentencing because it continues the adversarial process that ensures that the judge receives all relevant information needed to fashion an appropriate sentence.[126] In contrast, the right to trial by jury, "plainly a protection against excessive and abusive official power" rather than a judgment that "juries are the most accurate or efficient fact-finders," constitutes a "special-protection" right and does not apply at sentencing.[127]

The speedy trial right, however, has both accuracy and "special-protection" rationales. The Court has identified the right's main underlying interests as prevention of oppressive incarceration, minimization of anxiety for the defendant, and preservation of the defendant's case.[128] Part III.A.3 below provides a more detailed analysis of these interests and how they apply to sentencing proceedings, but for the purpose of fitting the speedy trial right into the Court's doctrinal pattern, we can look to which of these interests the Court has recognized as most weighty to assess whether the Court would characterize the right as predominately accuracy- or liberty-based.

Although there has been some debate among Justices about which of the rationales predominates, the current Court would most likely weigh the accuracy-motivated rationales more heavily than those motivated by defendant autonomy.[129] The *Barker* Court identified prejudice to the defendant's case caused by delay as the "most serious" speedy trial interest because "the inability of a defendant adequately to prepare his case skews the

124. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984) ("[A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."), *overruled on other grounds by* Hurst v. Florida, No. 14-7505 (U.S. Jan. 12, 2016).

125. Michaels, *supra* note 17, at 1778. The Court has acknowledged the significance of a guilty conviction in changing the nature of a defendant's rights. In *Martinez v. Court of Appeal*, the Court stated that "[t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict," and that "the autonomy interests that survive a felony conviction are less compelling" than those protected preconviction. 528 U.S. 152, 162-63 (2000).

126. *See* Gardner v. Florida, 430 U.S. 349, 360 (1977) (plurality opinion) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision . . . .").

127. Michaels, *supra* note 17, at 1815.

128. Barker v. Wingo, 407 U.S. 514, 532 (1972).

129. *See* Michaels, *supra* note 17, at 1830-31 (concluding that a majority of the Court would view the accuracy rationale as the most important rationale underlying the speedy trial right).

fairness of the entire system."[130] Similarly, Justice Brennan's concurrence in *Dickey v. Florida* declared prejudice to the defendant "an essential element of speedy-trial violations."[131] It is thus "not surprising that courts have focused on impairment of the defendant's ability to defend as the hallmark of denial of a speedy trial, and that his other speedy trial interests have been treated as 'generally unimportant.'"[132] In contrast, in *Doggett v. United States*, dissenting Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, questioned whether the Sixth Amendment is actually meant to prevent prejudice to an accused's defense, stating that the "'major evils' against which the Speedy Trial Clause is directed [are] 'undue and oppressive incarceration' and the 'anxiety and concern accompanying public accusation.'"[133] Justice Thomas consequently declared the Speedy Trial Clause's "core concern" the "impairment of *liberty*."[134] However, the *Doggett* majority (Justice Souter, joined by Justices White, Blackmun, Stevens, and Kennedy) came to the opposite conclusion, holding that prejudice to a defendant's case alone was sufficient to violate the speedy trial right.[135] Assuming that Justice Kennedy has not changed his stance, and that Justices Breyer, Ginsburg, Kagan, and Sotomayor are not more conservative in their view of this right than the Justices they replaced—unlikely on a criminal procedure issue—it is reasonable to speculate that a majority of the Court would still so hold. If so, applying the above theory, the Court would likely extend the speedy trial right through sentencing.

2. A historical view of sentencing proceedings

In its interpretation of the Sixth Amendment, the Supreme Court routinely looks to the history of rights and procedures at common law and in early America to ascertain the intended meaning of the Framers.[136] Because the Sixth Amendment's text simply guarantees "the right to a speedy and public

130. 407 U.S. at 532.

131. 398 U.S. 30, 53 (1970) (Brennan, J., concurring).

132. Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 539 (1975) (quoting Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 481 (1968)).

133. 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).

134. *Id.* at 660 (quoting United States v. Loud Hawk, 474 U.S. 302, 312 (1986)).

135. *Id.* at 654 (majority opinion) ("Doggett claims this kind of prejudice, and there is probably no other kind that he can claim, since he was subjected neither to pretrial detention nor, he has successfully contended, to awareness of unresolved charges against him.").

136. *See, e.g.*, *In re* Oliver, 333 U.S. 257, 266 (1948) (describing history of public trial right to ascertain modern application).

trial,"[137] the "time-tested methodology of '[examining] the words of the Constitution . . . in their historical setting'"[138] can shed light on whether the term "trial" was originally meant to encompass sentencing.

Although modern judicial proceedings involve a strict divide between the guilt-innocence phase and sentencing proceedings,[139] commentators have debated whether trials and sentencing were considered so starkly separate in the Framers' world. In *United States v. Ray*, the Second Circuit relied on the Court's historical analysis in *Apprendi v. New Jersey*,[140] as well as the fact that Blackstone's *Commentaries* covers sentencing and trial proceedings in two separate chapters, to conclude that the original meaning of "trial" did not include sentencing.[141]

However, the weight of historical evidence does not support the Second Circuit's conclusion. After its review of the relevant historical practices, the *Apprendi* Court itself acknowledged the "historic link between verdict and judgment," despite the differing roles of judge and jury at each.[142] At common law and at the time of the Founding, criminal law was "sanction-specific"—that is, each offense carried with it a particular sentence that the judge imposed as a matter of course after the conviction.[143] As Blackstone described, sentencing came immediately after trial and only required that "the court must pronounce that judgment, which the law hath annexed to the crime."[144] The verdict and the sentence were thus determined by the same proceeding. As the *Apprendi* Court elaborated, "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."[145]

Indeed, to the extent that sentences could sometimes be manipulated, such determinations were often made by juries *during* trial.[146] For example, when a defendant had no credible defense ("perhaps most [cases]"), the jury could exercise considerable sentencing discretion as part of the trial verdict.[147] As

137. U.S. CONST. amend. VI.

138. United States v. Ray, 578 F.3d 184, 194 (2d Cir. 2009) (alterations in original) (quoting United States v. Classic, 313 U.S. 299, 317 (1941)).

139. *But see* Bradley v. United States, 410 U.S. 605, 609 (1973) ("In the legal sense, a prosecution terminates only when sentence is imposed.").

140. *Ray*, 578 F.3d at 194 (discussing the historical approach used in Apprendi v. New Jersey, 530 U.S. 466, 477 (2000)).

141. *Id.* at 194-96.

142. 530 U.S. at 482.

143. *Id.* at 479.

144. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *369.

145. 530 U.S. at 478 (footnote omitted).

146. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 59 (2005).

147. *Id.*

John Langbein describes, if "trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction."[148]

Thus, "bifurcation"—the separation of guilt determination from the selection of the specific sanction to be imposed—did not evolve until well after the Founding.[149] In noncapital cases, bifurcation did not emerge until the early twentieth century, and it did not reach capital cases until the mid-1970s.[150] The separation of rights at trial and sentencing represents a strictly "post-constitutional idea": "[t]here was no distinction between trial rights and sentencing rights [at the Founding] because, in both purpose and effect, the trial was the sentencing."[151] In conceptualizing the speedy trial right, the Framers would thus have had little reason to separate delays in trial from delays in sentencing, or to intend that the Sixth Amendment's speedy trial right would only apply to part of a defendant's tightly bundled, and sometimes overlapping, proceedings. The idea that the Framers would have subtly implied such an unusual separation in a foundational document like the Bill of Rights strains credulity.

3. The speedy trial right's underlying rationales

Many courts have looked to whether the purposes the Supreme Court identified as motivating the speedy trial right also apply to sentencing proceedings.[152] In the context of a defendant's pretrial delay, the *Barker* Court described three interests protected by speedy trials: (i) prevention of oppressive pretrial incarceration; (ii) minimization of anxiety and concern of the accused; and (iii) protection of the defendant's case against impairment caused by the passage of time.[153] Applying the *Barker* Court's pretrial gloss on these concerns to sentencing proceedings will, for obvious reasons, not produce persuasive results. Using this inflexible analysis, the Second Circuit concluded that prolonged sentencing delays implicate none of these pretrial interests: they create "no concern over 'oppressive incarceration' *before trial*, 'anxiety' over public accusation *before trial*, or any 'impairment' over the petitioner's ability to defend himself" at trial.[154]

148. *Id.*

149. Douglass, *supra* note 17, at 1972.

150. *Id.* at 1972-73, 2018-21.

151. *Id.* at 1973.

152. *Compare* United States v. Ray, 578 F.3d 184, 197 (2d Cir. 2009) (holding that the oppression and anxiety concerns underlying the speedy trial right do not apply to sentencing), *with* Gonzales v. State, 582 P.2d 630, 632-33 (Alaska 1978) (holding that "many of the policy considerations" behind the speedy trial right apply equally to sentencing).

153. Barker v. Wingo, 407 U.S. 514, 532 (1972).

154. *Ray*, 578 F.3d at 197 (emphasis added) (quoting Brooks v. United States, 423 F.2d 1149, 1153 (8th Cir. 1970)).

Of course, it would be impossible for posttrial sentencing delays to cause pretrial issues. However, as several lower courts have reasoned,[155] the interests underlying speedy trials have obvious analogies in the sentencing context, distinct but not necessarily lessened because of the defendant's guilt. Inordinate delay in sentencing could certainly cause real anxiety to the defendant unsure of what his sentence will be, especially if the statute under which he is convicted allows for a large range of punishment—or if his conviction renders him eligible for the death penalty. As the court in *State v. Allen* recognized, "[s]entencing delays . . . . potentially can create extreme anxiety for a convicted person waiting to learn how long he or she will be imprisoned."[156] Indeed, in the speedy trial context, the Supreme Court has expressly acknowledged that defendants already serving time for another crime may still suffer "emotional distress" resulting from "uncertainties in the prospect of . . . receiving a sentence longer than, or consecutive to, the one he is presently serving."[157] Depending on the offense, convicted defendants can be exposed to incredible ranges of potential punishment.[158] For example, Montana's criminal code allows deliberate homicide to be punished by death, life imprisonment, or a prison sentence of ten years.[159] And in many states and the federal system, defendants cannot apply for pardons, reductions in sentences, or commutations until the sentence has been imposed.[160] Prolonged delay prior to sentencing could also potentially exceed the actual incarceration time imposed by the sentence. Although monetary damages can be awarded to defendants in

155. *See supra* notes 79-89 and accompanying text.

156. 505 N.W.2d 801, 803 (Wis. Ct. App. 1993); *see also* Burkett v. Fulcomer, 951 F.2d 1431, 1443-44 (3d Cir. 1991) ("Burkett detailed his inability to eat and sleep and how, on occasion, he was reduced to tears by frustration caused by the delay in disposition of his post-trial motions and sentencing. He mentioned the loss of his fiancee who, he claimed, ended their relationship because of the uncertainty of the length of his incarceration. . . . [I]t is uncontested that Burkett suffered lack of sleep, loss of appetite, loss of companionship and emotional stress associated with his inability to determine the length of his incarceration.").

157. Strunk v. United States, 412 U.S. 434, 439 (1973) ("We recognize, as the Court did in *Smith v. Hooey*, [393 U.S. 374 (1969),] that the stress from a delayed trial may be less on a prisoner already confined, whose family ties and employment have been interrupted, but other factors such as the prospect of rehabilitation may also be affected adversely." (footnote omitted)).

158. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 327 (1999) ("Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime.").

159. MONT. ANN. CODE § 45-5-102(2) (2015).

160. *See, e.g.*, Smith, 393 U.S. at 378 n.8 (citing Evans v. Mitchell, 436 P.2d 408 (Kan. 1968)); Gonzales v. State, 582 P.2d 630, 633 (Alaska 1978); *Commutation Instructions*, U.S. DEP'T JUST. (Jan. 13, 2015), http://www.justice.gov/pardon/commutation-instructions.

such situations, it is far from clear that money constitutes adequate compensation for excess time wrongfully spent in prison.[161]

Perhaps most importantly, postconviction delay may also impair a defendant's ability to present his case at sentencing. Depending on the crime, a defendant can offer a wide variety of mitigating evidence regarding his upbringing, mental state, character, and background to argue for a lesser sentence.[162] Delay in sentencing proceedings poses the exact same dangers to a defendant's sentencing case as pretrial delay poses to his case at trial: "Witnesses and physical evidence may be lost . . . . [The defendant's] own memory and the memories of his witnesses may fade. Some defenses, such as insanity, are likely to become more difficult to sustain; as one court has stated, '[p]assage of time makes proof of any fact more difficult. . . .'"[163] The Court has acknowledged that sentencing "is a critical stage of the criminal proceeding" in the right-to-counsel context.[164] Likewise, the Court has applied the Fifth Amendment's right to remain silent through sentencing because, "[w]ithout question, the stakes are high" during sentencing proceedings.[165] Impairment of the defendant's defense at sentencing thus cannot be written off as substantially less concerning than impairment of his case at trial.

Lastly, the speedy trial right also penalizes official abuse and encourages the fair and expeditious administration of justice.[166] In addition to defendant-focused interests, the right protects the public's interest in prompt and certain punishment for criminal acts.[167] Unjustifiable delays in concluding prosecutions, whether caused by governmental negligence or purposeful intent, implicate the same concerns of governmental mismanagement and abuse raised by extended pretrial delays.[168]

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161. *Cf. id.* ("[P]rolonged imprisonment pending sentencing may be compensable by credit against time served; however, this remedy does little good to the person whose conviction is flatly overturned on appeal.").

162. *See, e.g.*, Williams v. New York, 337 U.S. 241, 243, 245 (1949).

163. Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring) (third alteration in original) (quoting Williams v. United States, 250 F.2d 19, 23 (D.C. Cir. 1957)); *see also* State v. Allen, 505 N.W.2d 801, 803 (Wis. Ct. App. 1993).

164. Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion).

165. Mitchell v. United States, 526 U.S. 314, 329 (1999).

166. *Dickey*, 398 U.S. at 43 (Brennan, J., concurring).

167. *See* Strunk v. United States, 412 U.S. 434, 439 n.2 (1973) ("The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges."); Gonzales v. State, 582 P.2d 630, 633 (Alaska 1978) ("[T]he public retains an interest in prompt and certain punishment for criminal offenses, both to minimize the possibility of further criminal activity by the accused while released on bail pending sentence, and to aid the deterrent effect of penal sanctions.").

168. *See, e.g.*, United States v. Ray, 578 F.3d 184, 200 (2d Cir. 2009) ("Ray's [sentencing] case was allowed to languish due to ordinary negligence on the part of the government . . . ."); State v. Ellis, 884 P.2d 1360, 1362 (Wash. Ct. App. 1994) (applying speedy sentencing right to two-year delay in sentencing that it found to be without

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B. Courts Should Remedy Speedy Sentencing Violations by Imposing the Minimum Possible Sentence

Although history, policy, and doctrine all point to the application of the speedy trial right to sentencing, application of *Strunk*'s remedy of dismissal of charges for an already-convicted defendant does not sit well.[169] The many compelling criticisms leveled at the dismissal of an accused's charges due to trial errors[170] apply with even more force when the accused has already been found guilty in a fair trial. The social costs of letting an accused go free because the government failed to follow a procedural rule are high; windfalls for convicted defendants can only be more costly.[171] Even the less extreme remedies of suppression of evidence or retrial have faced immense criticism because they often benefit guilty defendants.[172] Although our justice system does tolerate costly remedies for constitutional violations,[173] in no other context do courts discharge a conviction based on a constitutional violation that occurs *after* that conviction.

This Note argues instead that *Strunk*'s equivalent remedy in the sentencing context is the automatic imposition of the minimum available sentence. When a trial is severely delayed, the risk that the delay impaired the defendant's ability to win his freedom mandates that the charges be dismissed. Neither a new trial nor any other remedy short of dismissal adequately accounts for this harm. *Strunk* thus requires that the defendant receive his best-case scenario: freedom. In contrast, at sentencing, a defendant's freedom is no longer on the table; his best-case scenario has instead become the minimum sentence available for his conviction. Put another way, a speedy trial violation effectively requires the government to forfeit its case to remedy the harm done to the defendant. At sentencing, forfeiture by the government results only in a lower sentence, not discharge of the conviction.

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good cause and "purposeful or oppressive" on the part of the government (quoting Pollard v. United States, 352 U.S. 354, 361 (1957))).

169. *See, e.g.*, Brook A. Brewer, Case Note, *Rapist Goes Free After "Doing Time" at Home:* Jolly v. State, 58 ARK. L. REV. 679, 698 (2005) ("The exclusive remedy of dismissal is too harsh when applied to sentencing delays."). *But see* Michaels, *supra* note 17, at 1829 ("Courts finding a [speedy sentencing] violation have also applied the pretrial rule that the appropriate remedy is discharge.").

170. *See, e.g.*, Amsterdam, *supra* note 132, at 536 (lamenting that because "[d]enials of the right to a speedy trial . . . are judicially controllable by other methods than dismissing the prosecution[,] . . . it seems intolerable that '[t]he criminal is to go free because [a judge, or the court system] . . . has blundered'" (fifth, sixth, and seventh alterations in original) (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.))).

171. *See, e.g.*, John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1032-39 (1974); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2019 (1998).

172. *See* Kaplan, *supra* note 171, at 1032.

173. The Fourth Amendment's exclusionary rule is a prime example. *See* Mapp v. Ohio, 367 U.S. 643, 657-58 (1961).

To be sure, this is a largely novel remedy without direct precedent. But it is a logical one that has doctrinal roots in the Court's treatment of sentencing as essentially producing a second verdict.[174] In some cases, the Court has treated sentencing proceedings as minitrials in themselves holding, for example, that a capital sentencing proceeding that results in a life sentence is the equivalent of an acquittal of the death penalty, with the attendant double jeopardy implications.[175] In line with the Court's analogy, we can treat the range of possible sentencing results as the equivalent of the range of verdict results at trial. Conceptualizing the dismissal of anything the prosecutor can gain at sentencing (anything above the statutory minimum) as the equivalent of the dismissal of anything the prosecutor can gain at trial (a conviction on the charges) produces a result that is logically and doctrinally sound.

This minimum-sentence remedy adequately compensates defendants for the harms suffered from speedy sentencing violations. Most importantly, it addresses the potential impairment of the defendant's case, discussed above, by presuming that his mitigation case would have been successful. Such a robust bright-line rule would sufficiently protect the speedy sentencing right in a way that the more ad hoc remedies for due process violations do not, as discussed below.[176]

The minimum-sentence remedy would also alleviate the concerns voiced by some courts about a potential conflict between *Strunk* and a decades-old case on double jeopardy and sentencing, *Bozza v. United States*.[177] In *Bozza*, a judge imposed the wrong mandatory sentence on a defendant and brought him back to court a few hours later to correct the mistake through resentencing.[178] The defendant argued that the second sentence violated the Double Jeopardy Clause and accordingly requested discharge of his sentence.[179] The Court concluded that the process of correcting the sentence "did not twice put petitioner in jeopardy for the same offense," but rather substituted a valid sentence for an invalid one.[180] In that context, the Court noted that it had already "rejected the 'doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence.'"[181] At least two courts have concluded that *Bozza* prevents application of *Strunk*'s dismissal remedy to sentencing.[182] As an initial matter,

174. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).

175. Bullington v. Missouri, 451 U.S. 430, 438 (1981).

176. *See infra* notes 194-96 and accompanying text.

177. 330 U.S. 160 (1947).

178. *Id.* at 165-66.

179. *Id.* at 166.

180. *Id.* at 167.

181. *Id.* at 166 (quoting *In re* Bonner, 151 U.S. 252, 260 (1894)).

182. *See* United States v. Ray, 578 F.3d 184, 194 (2d Cir. 2009) ("If the Speedy Trial Clause does extend to sentencing, however, then the remedy set forth in *Strunk*—dismissal of the

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it is debatable at best that *Bozza* implicates speedy sentencing violations.[183] But even assuming that speedy sentencing violations do constitute the kind of sentencing "error" referred to by the *Bozza* Court, the minimum-sentence remedy would relieve any tension between *Bozza* and the speedy trial right, as no convicted defendant would "escape punishment altogether."

In the rare case with a mandatory set sentence—that is, where the statute determines an exact sentence length upon conviction and affords the judge no discretion for upward or downward movement[184]—this remedy will not provide defendants with any relief. However, this result makes sense because the underlying rationales of the speedy trial right cease to apply when the sentence cannot be changed at sentencing.[185] If the conviction brings with it a mandatory sentence, then the defendant knows at the time of the verdict what his punishment will be.[186] The anxiety that comes with the uncertainty of

charges—comes into conflict with the teaching of *Bozza* . . . ."); State v. Betterman, 342 P.3d 971, 978 (Mont. 2015) ("If the constitutional speedy trial right extends through sentencing, then these two remedial doctrines [*Strunk* and *Bozza*] conflict.").

183. The errors to which *Bozza* applies are those that render the sentence itself erroneous. *See, e.g.*, Llerena v. United States, 508 F.2d 78, 79-80 (5th Cir. 1975) (applying *Bozza* to a sentence that failed to include a mandatory special parole term); Kennedy v. United States, 330 F.2d 26, 27-28 (9th Cir. 1964) (applying *Bozza* to a sentence that exceeded the statutory maximum); Patterson v. State, 314 P.3d 759, 764-65, 764 n.4 (Wyo. 2013) (applying *Bozza* to a sentence that was incorrect for "technical reasons," including the use of the wrong sentence range). Thus, *Bozza* stands only for the proposition that "[w]here the original sentence is invalid, vacation of that sentence and imposition of another sentence, even though more severe, does not constitute double jeopardy." United States v. Richardson, 498 F.2d 9, 10 (8th Cir. 1974); *see also* United States v. Bentley, 850 F.2d 327, 329 (7th Cir. 1988) (describing *Bozza*'s "lesson" as "the court may alter the sentence to correct an illegality even though the change produces an increase in the net sentencing package"). *Bozza* does not reach the circumstances implicated by speedy sentencing violations, where the defendant has not been given an invalid sentence nor been subjected to more than one sentencing process.

184. *See, e.g.*, United States v. Van Horn, 798 F.2d 1166, 1168 (8th Cir. 1986) ("The courts have the discretion to choose the appropriate punishment from within the range (if any) authorized by Congress. *But Congress need not provide a range of options for the court. It could, if it wished, establish a mandatory set sentence for a particular crime, and it would be constitutional* (unless, of course, the sentence violated the Eighth Amendment)." (emphasis added)); 24 C.J.S. *Criminal Law* § 2005 (West 2015) ("A statute providing a mandatory sentence, mandatory imprisonment, a mandatory minimum sentence, or mandatory consecutive sentences is generally constitutional, at least for noncapital sentences." (footnotes omitted)).

185. It is also possible that the length of time between trial and sentencing is significantly reduced when the sentence is mandatorily set by statute, as the sentencing proceedings become more of an administrative hurdle than anything else. However, there do not appear to be any empirical studies on differences in delay length depending on whether the sentence is completely mandatory or presents a range of possible punishments.

186. Some statutes of conviction allow for discretionary imposition of a sentence below the statutory minimum, including probation. *See, e.g.*, 18 U.S.C. § 3553(f) (2014) (providing for sentencing of certain drug offenses "without regard to any statutory minimum sentence"); MO. REV. STAT. § 559.012 (2015); LEGISLATIVE PROGRAM REVIEW & INVESTIGATIVE COMM., CONN. GEN. ASSEMBLY, MANDATORY MINIMUM

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prolonged sentencing delays will not occur. Moreover, a defendant's case at sentencing cannot be impaired by the passage of time if he can do nothing to mitigate his sentence. Thus, the accuracy motivations for applying certain Sixth Amendment rights at sentencing do not pertain to those rare sentences that do not allow adjustment after conviction. However, for all other sentences, the mandatory remedy of imposing the minimum available punishment both adequately protects the fundamental individual right at stake and provides courts with an administrable, bright-line rule.

Allowing a defendant to go free prematurely may seem like a severe remedy, but the Court has established that speedy trial violations require an "unsatisfactorily severe" solution.[187] The *Barker* Court recognized that complete dismissal of charges "means that a defendant who may be guilty of a serious crime will go free," and yet still represents the appropriate remedy for unconstitutional trial delays.[188] The minimum-sentence remedy—still requiring a guilty defendant to serve a sentence but letting her "go free" sooner—is thus manifestly a cost our justice system can bear for a violation of this right.

This remedy is also the only mechanism that adequately compensates the defendant for the potential deterioration of his case, making it superior to other possible remedies.[189] Credit for time served, for example, does not present a sufficient solution. The Court has already rejected credit for time served during the delay as an appropriate remedy for speedy trial violations;[190] it is no more appropriate for speedy sentencing violations because it still "does not deal"[191] with the concerns the right addresses (notably, the potential

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SENTENCES 7 (2005), https://www.cga.ct.gov/2005/pridata/Studies/pdf/Minimum_Mandatory_Sentences_Final_Report.PDF (describing types of crimes for which Connecticut courts can sentence below statutory minimum). The remedy proposed in this Note would not interfere with any such further sentence reduction a court would have imposed independent from the speedy sentencing violation. It would make little sense for a defendant successfully asserting a constitutional violation to receive a less favorable sentence than he otherwise would have received had he not asserted his right, or had the right not been violated.

187. Strunk v. United States, 412 U.S. 434, 440 (1973) (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)).

188. *Barker*, 407 U.S. at 522.

189. The minimum-sentence remedy also comports with the criteria that federal judges must consider by statute when sentencing defendants. Under 18 U.S.C. § 3553(a), sentencing judges must weigh whether the sentence "provide[s] just punishment for the offense," "promote[s] respect for the law," and "afford[s] adequate deterrence to criminal conduct." Sonja Starr has argued that sentence reductions can serve these purposes. *See* Sonja Starr, *Using Sentencing to Clean Up Criminal Procedure: Incorporating Remedial Sentence Reduction into Federal Sentencing Law*, 21 FED. SENT'G REP. 29, 31-32 (2008).

190. *Strunk*, 412 U.S. at 439.

191. *Id.*

impairment of the defendant's case caused by delay). Moreover, the vast majority of jurisdictions already automatically award defendants credit for time served awaiting trial or sentencing.[192] That all defendants are generally entitled to count time spent in prison related to the offense of conviction towards their sentence rests on basic conceptions of fairness and logic.[193] It does not present a remedy worthy of the exceptional circumstances underlying speedy sentencing violations, and would present defendants with nothing they would not have already received.

Likewise, the more flexible remedial approach applied in the due process context is inappropriate for speedy sentencing violations.[194] The ad hoc approaches of courts treating sentencing delays as due process violations would produce an inconsistent array of remedies (which could include credit for time served, judicial apology, or whatever else a particular court deems effective).[195] The *Strunk* Court made clear that a due-process-like analysis ("'flexible' standards based on practical considerations")—while appropriate for determining whether a speedy trial *violation* has occurred—has no place in its remedy.[196] Indeed, *Strunk* stands for the principle that bright-line rules must govern the remedy in speedy trial right cases. If the speedy trial right applies to sentencing, courts cannot apply an ad hoc due-process-oriented approach to determine defendants' relief.

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192. Most have done so by statute. *See, e.g.*, 18 U.S.C. § 3585(b) (providing credit for custody served prior to sentencing for the crime of conviction or other later crimes); CAL. PENAL CODE § 2900.5 (West 2015) (providing credit for prior custody); CONN. GEN. STAT. § 18-98d (2015) (same); 730 ILL. COMP. STAT. 5/5-4.5-100 (2015) (same); N.M. STAT. ANN. § 31-20-12 (2015) (same); N.Y. PENAL LAW § 70.30 (McKinney 2015) (same); N.C. GEN. STAT. § 15-196.1 (2015) (same); *see also* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 9:28 (West 2015) ("Only a handful of states leave determination of time-served credit to the discretion of sentencing judges."). Some courts have also found a constitutional right to such credit. *See, e.g.*, *In re* Benninghoven, 749 P.2d 1302, 1303 (Wash. 1988) (en banc) ("Failure to allow credit violates due process, equal protection, and the prohibition against multiple punishments." (quoting State v. Cook, 679 P.2d 413, 413 (Wash. Ct. App. 1974))); *see also* Johnson v. Prast, 548 F.2d 699, 702 (7th Cir. 1977); King v. Wyrick, 516 F.2d 321, 325 (8th Cir. 1975); United States v. Gaines, 449 F.2d 143, 144 (2d Cir. 1971) (per curiam); Godbold v. Wilson, 518 F. Supp. 1265, 1269 (D. Colo. 1981).

193. *See* Wade R. Habeeb, *Right to Credit for Time Spent in Custody Prior to Trial or Sentence*, 77 A.L.R.3D 182, § 1[a] (West 2016) ("If a person is taken into custody on a state criminal charge and he is subsequently convicted and sentenced therefor, it seems quite logical to claim credit for the time spent in custody prior to trial or sentence . . . ." (footnote omitted)); *see also* Reanier v. Smith, 517 P.2d 949, 951 (Wash. 1974) (en banc).

194. *Compare Strunk*, 412 U.S at 437 (rejecting court of appeals' attempt "to fashion what it appeared to consider as a 'practical' remedy"), *with* United States v. Ray, 578 F.3d 184, 202 (2d Cir. 2009) (explaining that, after a due process violation has occurred, courts "endeavor to fashion relief that counteracts the prejudice caused by the violation").

195. *See, e.g.*, Burkett v. Cunningham, 826 F.2d 1208, 1222 (3d Cir. 1987).

196. *Strunk*, 412 U.S. at 438.

Conclusion

The speedy trial right has always occupied an important space at the heart of the American justice system. However, without explicit guidance from the Supreme Court, lower federal and state courts have sharply split on whether this fundamental right applies to all or part of the criminal prosecution process—specifically, whether it ends at conviction or continues through sentencing. History, policy, and doctrine all support extension of the speedy trial right to sentencing. However, although *Strunk* mandates that all speedy trial violations be remedied with dismissal of the charges, the equivalent remedy for speedy sentencing violations amounts to dismissal of all but the minimum available sentence. This remedy results in adequate and uniform protection of the speedy trial right—in a way the vague and varied solutions for due process delays do not—while preventing the obviously unsatisfactory result of freeing convicted criminals for sentencing delays. As one of our most fundamental rights, the speedy trial guarantee deserves this rigorous and consistent treatment.