The Initiation of the Legal Process, Bail, and the Right to Counsel

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Prosecutors possess complete discretion to charge and prosecute individuals so long as the prosecutor has probable cause to believe that the individual has committed a crime even when the prosecutor is motivated by a discriminatory intent.

2. Some jurisdictions use the designation of a “probable cause hearing” and other jurisdictions use the designation “first appearance” to refer to a proceeding in which a suspect typically is formally charged with a crime, bail is set, and a plea is entered.

3. The sole purpose of bail is to confine individuals who pose a threat to the community prior to trial.

4. Excessive bail is prohibited and is defined as bail that a suspect cannot afford to pay.

5. Gideon v. Wainwright established the Sixth Amendment right of individuals charged with both misdemeanors and felonies to be represented by a lawyer at trial.

6. A defendant, to establish ineffective legal representation, must establish a deficient performance by his or her lawyer, although they need not prove that there is a reasonable probability that the result of the trial would have been different.

Did Clarence Gideon have the right to a lawyer at his trial?

[Clarence Gideon] was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him. . . . [The judge replied,] “Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.” . . . Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State’s witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument “emphasizing his innocence to the charge contained in the Information filed in this case.” The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison.

INTRODUCTION

In earlier chapters, we discussed the investigation and detection of crime by the police through searches and seizures and through the interrogation and identification of suspects. Once the police have completed their investigation, they must decide whether to formally arrest a suspect and to turn the case over to the prosecutor. They may decide to drop the case or to continue the investigation because of a belief that a suspect is not guilty, because they lack evidence, or because they consider the crime to be a fairly minor violation of the law. The police also may decide to continue the investigation and to focus on other suspects. In some instances, the police may conclude that a warning will deter an individual from violating the law in the future or that a defendant already has spent enough time in jail to provide adequate punishment.

In the next three chapters, we will examine the pretrial, trial, and appeal stages of the criminal justice process. This chapter covers the early steps in the pretrial process. We first discuss prosecutorial discretion and the filing of criminal charges. Then we turn our attention to the initial stages of the pretrial process: the determination of probable cause to detain a suspect and the defendant’s first appearance before a magistrate or judge. The remainder of the chapter discusses two central aspects of the first appearance:

- Pretrial release and bail and the conditions of pretrial confinement
- The right of an indigent defendant to be represented by a court-appointed lawyer

As you read the chapter, pay particular attention to the protections accorded to individuals in the pretrial process and to how the Supreme Court balances these safeguards against the social interest in the criminal prosecution of offenders.
THE PROSECUTORIAL DISCRETION TO CHARGE

Following a suspect’s arrest, responsibility for the case shifts to the prosecutor, who is the government official responsible for enforcing the criminal law through the prosecution of criminal offenses. U.S. Supreme Court Justice Robert Jackson famously observed that the prosecutor is perhaps the most powerful person in the criminal justice system. Courts have recognized the authority of prosecutors to decide who is to be charged with a crime, what crime to charge, and whether to plea-bargain a case. The prosecutor also has discretion over whether to refer a defendant to a diversion program for substance abuse or psychological counseling or for some other purpose rather than to prosecute the individual.

In Wayte v. United States, the U.S. Supreme Court observed that prosecutors retain "broad discretion" as to whether to prosecute. "So long as the prosecution has probable cause to believe that the accused has committed an offense defined by statutes, the decision whether or not to prosecute, and what charge . . . generally rests entirely in his discretion" (Wayte v. United States, 470 U.S. 598, 607 [1985]). There is a presumption of regularity: Courts presume that in the absence of clear evidence to the contrary, prosecutors honestly, fairly, and responsibly exercise their authority.

An example of the prosecutor’s exercise of discretion is United States v. Batchelder. Two identical federal statutes applied in this case; each punished a felon who takes possession of a firearm transported across state lines. The prosecutor charged and convicted Batchelder under the statute that carried a penalty of five years rather than under the statute that carried a penalty of two years. The U.S. Supreme Court upheld the prosecutor's exercise of discretion, explaining that "there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements." Consider that the result of the decision in Batchelder was that the prosecutor was able to determine the amount of time that Batchelder potentially would spend in prison without having to explain or defend his decision (United States v. Batchelder, 442 U.S. 114, 125 [1979]).

Why have courts recognized the discretion of prosecutors to prosecute or not to prosecute a case and to decide what criminal charges to bring against a defendant rather than to subject these decisions to review by a judge? There are several reasons listed below why courts have adopted the view that prosecutors’ charging decisions are “ill-suited for judicial review” (Wayte v. United States, 470 U.S. 598, 607 [1985]).

Separation of Powers. The prosecutor is a member of the executive branch and is charged with responsibility for ensuring that the “laws are faithfully executed.” Judges are members of the judicial branch and are reluctant to interfere with the daily decisions of the executive unless the prosecutor violates the state constitution or U.S. Constitution.

Discretionary Judgment. A prosecutor considers a range of factors and information in deciding whether to prosecute a case. Courts lack the expertise to evaluate the prosecutor's weighing and balancing of factors such as the strength of evidence, the impact of the prosecution in deterring other crimes, the government's priorities for enforcement, the circumstances of the case, and the defendant's personal character and background.

Resources. A review of the prosecutor’s decisions would delay prosecutions and consume considerable time and energy.

The U.S. Supreme Court has observed that although “prosecutorial discretion is broad,” it is not “unlimited.” Courts will step in and review a prosecutor's decisions where there is an allegation that the prosecutor engaged in either selective prosecution in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments or vindictive prosecutions in violation of the Due Process Clause of the Fifth and Fourteenth Amendments.

TEST YOUR KNOWLEDGE: TRUE/FALSE

7. Defendants have the absolute right to defend themselves at trial.

Check your answers on page 510.
Selective Prosecution. The Equal Protection Clause of the Fifth and Fourteenth Amendments prohibits a prosecutor from prosecuting an individual because of the individual's race, gender, religion, or exercise of his or her fundamental rights. (You may recall this was discussed in Chapter 2.) A leading example of this protection comes from Wayte v. United States. Wayte protested the Vietnam War and wrote government officials stating that he had no intention of registering for the military draft. Wayte's name, along with the names of 133 other individuals who wrote the government refusing to register for the military draft, was sent to the U.S. Department of Justice for prosecution. In each case, these individuals were warned by the FBI that they were required to register or would be subject to prosecution. Wayte nevertheless continued to resist the draft and was prosecuted for draft evasion. He argued that this so-called passive enforcement system violated the First Amendment to the U.S. Constitution by targeting vocal opponents of the war for prosecution while the government took no action against the other 674,000 nonregistrants who had not written the government.

The U.S. Supreme Court held that in order for Wayte to succeed in his claim of selective prosecution, he was required to demonstrate that the prosecutor's decision had a “discriminatory effect” and that “it was motivated by a discriminatory purpose.” What precisely is required under this two-pronged test? The first question is whether individuals are singled out for prosecution who are members of a particular race, gender, or religion or who have engaged in the exercise of a fundamental freedom while other “similarly situated” individuals who do not fall within the group are not prosecuted. The second question is whether the prosecutorial policy is based on an intent to discriminate against the members of the group. Wayte failed to satisfy this burden. He was unable to demonstrate that the government prosecution policy was based on an intent to punish individuals who protested the draft. Individuals were not prosecuted who initially expressed an intent to refuse to register for the draft but who later registered after meeting with the FBI. The Supreme Court found that the purpose in relying on the passive enforcement system was to enable the government efficiently and easily to identify individuals who were subject to prosecution for draft resistance rather than to spend the time and resources required to locate all nonregistrants (Wayte v. United States, 470 U.S. 598, 606 [1985]).

Defendants have a heavy burden in overcoming the presumption of regularity and establishing a discriminatory intent. In United States v. Turner, the African American defendants were indicted on one count of distributing cocaine and contended that they had been selected for prosecution because of their race. They submitted a memorandum documenting that between 1991 and 1993, the Office of the Federal Public Defender for the Central District of California had defended crack cocaine cases involving forty-seven African American and five Hispanic defendants and that no Caucasians had been indicted for an offense involving crack cocaine. This pattern of selective prosecution was corroborated by newspaper articles and an academic study. The U.S. Court of Appeals for the Ninth Circuit rejected the claim of racial discrimination and held that the defendants had failed to produce evidence that individuals arrested for the same offense belonging to “other races had been left unprosecuted.” The appellate court, instead, concluded that the statistics reflected the fact that the distribution of crack cocaine is dominated by violent African American street gangs. The data failed to establish that the government had failed to pursue similarly situated Caucasian or Hispanic individuals. What other data could the defendants have submitted to strengthen their claim (United States v. Turner, 104 F.3d 1180, 1185 [9th Cir. 1997])?

Vindictive Prosecutions. In a vindictive prosecution, a prosecutor retaliates against a defendant who asserts his or her rights by bringing a more serious charge against the defendant. Courts have held that this vindictive prosecution is “patently unconstitutional,” violates an individual’s right to due process of law, and risks deterring other individuals from asserting their rights.

In Blackledge v. Perry, Perry was convicted of the misdemeanor of assault with a deadly weapon. Perry then filed a notice of appeal to a superior court in which, under North Carolina law, he was entitled to a new trial before a jury. In other words, in this second stage, the slate is wiped clean, and the prior conviction no longer is recognized. The prosecutor responded by filing a new indictment entitled to a new trial before a jury. In other words, in this second stage, the slate is wiped clean, and Perry then filed a notice of appeal to a superior court in which, under North Carolina law, he was entitled to a new trial before a jury. The prosecution then moved to dismiss the indictment, and the defendant moved to require an order of nolle prosequi. The motion to dismiss the indictment was sustained, and the order of nolle prosequi was entered.

The Court held that under these circumstances, there is a “realistic likelihood of vindictiveness” on the part of the prosecutor and that the prosecutor had improperly filed a felony charge against Perry (Blackledge v. Perry, 417 U.S. 21 [1974]).
The U.S. Supreme Court has not presumed vindictiveness on the part of a prosecutor who brings more serious charges against a defendant who, prior to trial, refuses to plead guilty and announces that he or she plans to proceed to trial. In United States v. Goodwin, Goodwin was arrested and arraigned before a U.S. magistrate for various misdemeanors. He opened plea negotiations with the government but later informed the prosecutor that he did not plan to plead guilty and wanted a jury trial. Another prosecutor then obtained a four-count indictment charging Goodwin with a felony along with several misdemeanors. Goodwin was convicted and moved to set aside the verdict on the grounds of prosecutorial vindictiveness.

The Supreme Court rejected Goodwin’s claim, explaining that it is natural for a prosecutor to continue to assess the strength of his or her case prior to trial and that a prosecutor may conclude in good faith that a more severe charge is justified. A change in a prosecutor’s charging decision made after the initial trial is completed is “much more likely to be improperly motivated than is a pretrial decision.” A prosecutor should

remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. . . . The initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. (United States v. Goodwin, 457 U.S. 368, 381–382 [1982])

We now turn our attention to the initial steps in the criminal justice process that follow a decision by the police to arrest an individual for a criminal offense.

**Probable Cause to Detain a Suspect**

The first step for a prosecutor following the arrest of an individual without an arrest warrant or formal indictment by a grand jury is a judicial determination of whether there is probable cause to detain the suspect for an extended period. In Gerstein v. Pugh (discussed in Chapter 5), the U.S. Supreme Court held that a Florida law that permitted a suspect to be held for a month or more before being taken before a judge to determine whether there is probable cause constituted an unreasonable restraint on liberty in violation of the Fourth Amendment. The U.S. Supreme Court stated that the Constitution requires a judicial determination of probable cause as a condition for an “extended restraint of liberty.” This “nonadversarial” **probable cause hearing** must be held “promptly” following an arrest. In County of Riverside v. McLaughlin, the U.S. Supreme Court defined promptly and held that a forty-eight-hour period of delay is a presumptively reasonable period of time within which to conduct the hearing. The forty-eight-hour requirement balances the interest in protecting society by detaining a suspect against the risk that an overly lengthy detention will unduly interfere with a suspect’s job, income, and personal life and freedom. The probable cause standard to detain a suspect is the same as the probable cause standard to arrest a suspect.

The time between the arrest and the probable cause hearing allows the police to undertake “administrative steps incident to arrest.” This includes “completing paperwork, searching the suspect, inventorying property, fingerprinting, photographing, checking for a prior record, laboratory testing, and conducting line-ups” (Sanders v. City of Houston, 543 F. Supp. 694, 701 [S.D. Tex. 1982]). The Gerstein hearing often is combined with the **first appearance** (discussed below).

In County of Riverside v. McLaughlin, the next case in the text, the U.S. Supreme Court discusses the requirement that a suspect is to be brought “promptly” before a magistrate following his or her arrest for a determination of whether there is probable cause. Pay attention to how the U.S. Supreme Court balances various interests and determines that a forty-eight-hour period between arrest and the Gerstein hearing is reasonable under the Fourth Amendment. Is this too lengthy a period to detain an individual without a determination that there is probable cause to detain the suspect?

**First Appearance**

The next step following an arrest is the **first appearance** or the **initial appearance**. The first appearance is triggered by the filing of a **complaint**, which is a sworn statement by the prosecutor charging the defendant with a specific offense. The federal rules of criminal procedure and most states specify that a defendant is to be brought before a magistrate or judge “without unnecessary delay.” States differ on the permissible time between the arrest and the first appearance. The Supreme Court has set the outside limit at forty-eight hours (County of Riverside v. McLaughlin, 500 U.S. 44 [1991]). The Court has held that a confession obtained after failing to promptly present a defendant to a magistrate is inadmissible in evidence (McNabb v. United States, 318 U.S. 332 [1943]; Mallory v. United States, 354 U.S. 449 [1957]). The initial appearance has four primary purposes.
How long may the police detain a suspect before obtaining a probable cause determination before a magistrate?

**COUNTY OF RIVERSIDE V. MCLAUGHLIN,**
500 U.S. 44 (1991), O'CONNOR, J.

**Issue**

This is a class action brought under 42 U.S.C. § 1983 challenging the manner in which the County of Riverside, California, provides probable cause determinations to persons arrested without a warrant. . . . Under county policy . . . arraignments must be conducted without unnecessary delay and, in any event, within two days of arrest. This two-day requirement excludes from computation weekends and holidays. Thus, an individual arrested without a warrant late in the week may in some cases be held for as long as five days before receiving a probable cause determination. Over the Thanksgiving holiday, a seven-day delay is possible.

**Facts**

In August 1987, Donald Lee McLaughlin filed a complaint in the U.S. District Court for the Central District of California, seeking injunctive and declaratory relief on behalf of himself and “all others similarly situated.” The complaint alleged that McLaughlin was then currently incarcerated in the Riverside County Jail and had not received a probable cause determination. He requested “an order and judgment requiring that the defendants and the County of Riverside provide in-custody arrestees, arrested without warrants, prompt probable cause, bail and arraignment hearings.” . . . The second amended complaint named three additional plaintiffs—Johnny E. James, Diana Ray Simon, and Michael Scott Hyde. . . . The . . . complaint alleged that each of the named plaintiffs had been arrested without a warrant, had received neither a prompt probable cause nor a bail hearing, and was still in custody. . . .

In March 1989, plaintiffs asked the district court to issue a preliminary injunction requiring the county to provide all persons arrested without a warrant a judicial determination of probable cause within thirty-six hours of arrest. The district court issued the injunction, holding that the county’s existing practice violated this Court’s decision in *Gerstein*. Without discussion, the district court adopted a rule that the county provide probable cause determinations within thirty-six hours of arrest, except in exigent circumstances.

**Reasoning**

In *Gerstein*, this Court held as unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for thirty days or more without a judicial determination of probable cause. In reaching this conclusion, we attempted to reconcile important competing interests. On the one hand, states have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause. On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly “imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships.” We sought to balance these competing concerns by holding that states “must provide a fair and reliable determination of probable cause.

- **Criminal charges.** The defendant is informed of the precise charges against him or her.
- **Constitutional rights.** The defendant is informed of his or her rights. This includes the Miranda warnings, the entitlement to a lawyer and the right to consult with a lawyer, the availability of pretrial release and bail, the right to a preliminary hearing and speedy trial, the right against self-incrimination, and the right to exclude unlawfully obtained evidence.
- **Pretrial release.** A determination is made whether to release the defendant from custody prior to trial. The judge will fix the amount of bail or establish the conditions of the defendant's pretrial release.
- **Attorney.** A lawyer is appointed for indigent defendants.
as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.” . . .

Inherent in Gerstein’s invitation to the states to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest. Plainly, if a probable cause hearing is constitutionally compelled the moment a suspect is finished being booked, there is no room whatsoever for “flexibility and experimentation by the states.” Incorporating probable cause determinations “into the procedure for setting bail or fixing other conditions of pretrial release”—which Gerstein explicitly contemplated—would be impossible. Waiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination would amount to a constitutional violation. Clearly, Gerstein is not that inflexible. . . .

But flexibility has its limits; Gerstein is not a blank check. A state has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. The Court recognized in Gerstein that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination of probable cause must be made promptly. Unfortunately, as lower court decisions applying Gerstein have demonstrated, it is not enough to say that probable cause determinations must be “prompt.” This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systematic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations.

Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that states and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within forty-eight hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within forty-eight hours. Such a hearing may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay’s sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Where an arrested individual does not receive a probable cause determination within forty-eight hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the Government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than forty-eight hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to combine probable cause determinations with arraignments must do so as soon as is reasonably feasible, but in no event later than forty-eight hours after arrest.

**Holding**

For the reasons we have articulated, we conclude that Riverside County is entitled to combine probable cause determinations with arraignments. The record indicates, however, that the county’s current policy and practice do not comport fully with the principles we have outlined. The county’s current policy is to offer combined proceedings within two days, exclusive of Saturdays, Sundays, and holidays. As a result, persons arrested on Thursdays may have to wait until the following Monday before they receive a probable cause determination. The delay is even longer if there is an intervening holiday. Thus, the county’s regular practice exceeds the forty-eight-hour period we deem constitutionally permissible, meaning that the county is not immune from systemic challenges, such as this class action.

As to arrests that occur early in the week, the county’s practice is that “arraignment[s] usually take place on the last possible day. There may well be legitimate reasons for this practice; alternatively, this may constitute delay for delay’s sake. We leave it to the court of appeals and the district court, on remand, to make this determination. The judgment of the court of appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

**Dissenting, Scalia, J.**

We said that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty . . . either before or promptly after arrest.” Though how “promptly” we did not say, it was...
plain enough that the requirement left no room for intentional delay unrelated to the completion of “the administrative steps incident to arrest.” Plain enough, at least, that all but one federal court considering the question understood Gerstein that way. Today, however, the Court discerns something quite different in Gerstein. It finds that the plain statements set forth above (not to mention the common law tradition of liberty upon which they were based) were trumped by the implication of a later dictum in the case which, according to the Court, manifests a “recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest.”

Determining the outer boundary of reasonableness is a more objective and more manageable task. We were asked to undertake it in Gerstein, but declined—wisely, I think, since we had before us little data to support any figure we might choose. As the Court notes, however, Gerstein has engendered a number of cases addressing not only the scope of the procedures “incident to arrest,” but also their duration. The conclusions reached by the judges in those cases, and by others who have addressed the question, are surprisingly similar. I frankly would prefer even more information, and for that purpose would have supported reargument on the single question of an outer time limit. The data available are enough to convince me, however, that certainly no more than twenty-four hours is needed.

A few weeks before issuance of today’s opinion, there appeared in The Washington Post the story of protracted litigation arising from the arrest of a student who entered a restaurant in Charlottesville, Virginia, one evening, to look for some friends. Failing to find them, he tried to leave—but refused to pay a $5 fee (required by the restaurant’s posted rules) for failing to return a red tab he had been issued to keep track of his orders. According to the story, he “was taken by police to the Charlottesville jail” at the restaurant’s request. “There, a magistrate refused to issue an arrest warrant,” and he was released. That is how it used to be, but not, according to today’s decision, how it must be in the future. If the Fourth Amendment meant then what the Court says it does now, the student could lawfully have been held for as long as it would have taken to arrange for his arraignment, up to a maximum of forty-eight hours.

Justice Story wrote that the Fourth Amendment “is little more than the affirmation of a great constitutional doctrine of the common law.” It should not become less than that. One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty, that it benefits the career criminal (through the exclusionary rule) often and directly but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today’s opinion reinforces that view. The common law rule of prompt hearing had as its primary beneficiaries the innocent—not those whose fully justified convictions must be overturned to scold the police; nor those who avoid conviction because the evidence, while convincing, does not establish guilt beyond a reasonable doubt; but those so blameless that there was not even good reason to arrest them. While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.

---

Questions for Discussion

1. Explain the holding in McLaughlin. How does this modify the rule established in Gerstein?
2. Discuss the interests that the Supreme Court balances in reaching its decision.
3. Summarize the Court’s discussion regarding “unreasonable delay.”
4. How should Riverside County modify its procedures to meet the constitutional standard established in McLaughlin?
5. Outline the argument in Justice Scalia’s dissent. As a Supreme Court justice, would you support the majority or dissenting opinion?

---

PRETRIAL RELEASE

In England, the practice at the time of the drafting of the U.S. Constitution was that individuals who had been arrested and who were awaiting trial could be released from detention by depositing money or title to property with the court. A failure to appear for trial resulted in the forfeiture of the money or property. The thinking was that an individual should not be detained without a finding of guilt.
This philosophy has led to the modern court practice known as *posting bail*. The U.S. Constitution provides for *bail* in the Eighth Amendment, which states that “excessive bail shall not be required.” This bail provision has not been incorporated into the Due Process Clause of the Fourteenth Amendment. Most state constitutions, however, create a right to bail in all but capital cases. The fundamental nature of bail was recognized by the U.S. Supreme Court in *Schilb v. Kuebel*, in which the Court observed that “bail, of course, is basic to our system of law, and the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment” (*Schilb v. Kuebel*, 404 U.S. 357, 365 [1971]).

The U.S. Supreme Court declared in *Stack v. Boyle* that the primary purpose of bail is to ensure that the defendant appears for trial. An amount of bail beyond that required to guarantee the defendant’s appearance for trial is “excessive” under the Eighth Amendment. The Court noted that

> the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as . . . 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. (*Stack v. Boyle*, 342 U.S. 1, 4–5 [1951])

Despite the fundamental nature of individual access to bail, the *Bail Clause* has

never been thought to accord a right to bail in all cases, but merely to provide that bail should not be excessive in those cases where it is proper to grant bail . . . The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. (*Carlson v. Landon*, 342 U.S. 524, 545 [1952])

Forty state constitutions deny bail to individuals charged with capital offenses. The U.S. Department of Justice Bureau of Justice Statistics reports that between 1990 and 2004 62 percent of individuals arrested for felonies in the seventy-five largest counties in the United States were released on personal recognizance or on bail prior to trial. The number of individuals released varied by the offenses. Nineteen percent of murder defendants were released as compared with 44 percent of individuals charged with robbery, 49 percent of individuals charged with motor vehicle theft, 49 percent of individuals charged with burglary, and 53 percent of individuals charged with rape. Defendants with an “active criminal justice status,” such as those on parole or probation at the time of their arrest, are released on bail less than half of the time. The higher the bail, the less probability that a defendant will post the required funds to be released before trial.

There are several reasons why bail is viewed as important to a defendant.

- **Detention.** An individual may spend several months in jail waiting for his or her trial.
- **Personal hardship.** A failure to make bail strains family life and likely will result in a loss of employment and income.
- **Preparation for trial.** A defendant who is released is able to help his or her lawyer prepare for trial. There is some evidence that individuals who do not make bail are more likely to be convicted and are more likely to be sentenced to jail.

Balanced against the importance of bail to the individual is the fact that society has an interest in detaining individuals who may engage in criminal conduct.

The cash bond historically has been the principal form of bail in the United States. This *money bail* system requires that defendants deposit an amount of money with the court as a condition of release. The money is returned when the individual appears for trial. In most instances, individuals are unable to deposit the full amount of bail. They turn to a bail bondsman for a *surety bond*. The defendant is required to deposit 10 percent of the bond with the bondsman, and the bondsman deposits the money with the court. The bondsman retains the 10 percent amount as a fee for posting the bail and forfeits the entire amount of the money bail if the defendant fails to appear for trial. Bondsmen have been known to hire “bounty hunters” to track down individuals who fail to appear for trial.

Justice William Douglas observed that the system of money bail may result in the release of wealthy individuals who have sufficient money to pledge for their freedom, while indigents find themselves lacking the resources to post a deposit and are detained (*Bandy v. United States*, 364 U.S. 477 [1960]).
In 1967, the President’s Commission on Law Enforcement and Administration of Justice published a report titled *The Challenge of Crime in a Free Society* that concludes that the money bail system discriminates against the poor who are unable to meet bail. The taxpayers also are placed in the position of paying the costs of detaining those individuals who are unable to make bail and are incarcerated. The commission found that the amount of bail typically is fixed by a schedule based on the nature of the defendant’s criminal offense and has little relationship to whether a defendant is likely to appear for trial. The report recommends the pretrial release without financial conditions of all but a small percentage of defendants and would deny release to defendants who present a high risk of flight or dangerous acts prior to trial (131–132).

One of the first reform efforts was sponsored by the Vera Institute, a research organization that sponsored the Manhattan Bail Project in New York City. The program evaluated the background of indigent defendants and determined whether an individual would appear for trial if provided *release on recognizance*. The factors evaluated included prior convictions, the nature of the offense, whether the accused was employed, and whether the accused had roots in the community. The result was that only 1.6 percent of the individuals recommended for release failed to appear for trial.

Despite the criticism of the commercial bail bond system, most states primarily rely on this mechanism. Illinois, Kentucky, Oregon, and Wisconsin have abolished private bail bondsmen and have substituted a system based on release on personal recognizance or on the requirement of a money deposit with the court, most of which is returned when the defendant appears for trial. Colorado limited the use of monetary bail, and cash bail has been largely eliminated in Arizona, Delaware, Maryland, New Mexico, and the District of Columbia. New Jersey abolished money bail and imposes various types of restraints on a defendant based on the risk that he or she poses to public safety. California is the latest state to abolish monetary bail. It has substituted a system in which judges will employ “risk assessment tools” to determine whether individuals are to be subjected to pretrial detention. Judges, in making this decision, may detain an individual “if there is a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person in court.”

The model for bail reform efforts is the federal *Bail Reform Act of 1984* (18 U.S.C. §§ 3141–3150), which has largely abandoned the system of money bail. A judicial official is to order the pretrial release of an individual on personal recognizance or upon execution of an unsecured appearance bond (a promise to pay in the event of nonappearance) “unless the judicial officer determines that such release will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community.” In the event that the judicial officer determines that these forms of pretrial release will not “reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community,” the judicial officer shall order the individual’s release subject to various conditions listed in the statute, including the posting of money bail or property.

The Bail Reform Act also makes provision for the *preventive detention* of individuals who pose a risk of flight or a risk to the community. Preventive detention permits the government to obtain a court order providing for the pretrial confinement of an individual who is awaiting trial. Roughly seventeen state constitutions also provide for preventive detention of offenders.

The federal *Bail Reform Act* provides that a pretrial detention hearing is to be held on the motion of a prosecutor in those instances in which a defendant is charged with a crime of violence, an offense with a maximum penalty of death or life imprisonment, designated drug offenses, or any felony in the event that the individual has two or more convictions for one of the listed offenses. A hearing also may be held on the motion of a prosecutor or judge on the grounds that there is a serious risk that the defendant will flee, obstruct justice, or interfere with a witness or juror. Detention is ordered in the event that a judicial official finds by clear and convincing evidence that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.”

In 2015, in *Varden v. Clanton*, a federal district court held that Alabama’s use of a prefixed bail schedule in which a set amount of bail was established for a particular offense constituted an unconstitutional form of preventive detention. The court noted that the Alabama bail system did not consider the likelihood that a defendant would appear for trial or the danger the defendant posed to the public (*Varden v. Clanton*, No. 2:2015cv00034 - Document 76 [M.D. Ala. 2015]).

The New Mexico Supreme Court held that the amount of bail should be based on the defendant’s risk of flight and threat to the community and other factors and may not be based exclusively on the offense with which a defendant is charged. The court also indicated that monetary bail may not be used to confine a defendant who poses no threat to the community in those instances in which other methods would ensure the defendant’s appearance for trial (*State v. Brown*, 2014-NMSC-038).

In 1987, in *United States v. Salerno*, the next case in the text, the U.S. Supreme Court affirmed the constitutionality of preventive detention. Defendants Salerno and Cafaro were alleged to be high-ranking
organized crime figures and were charged with thirty-five acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. The U.S. government successfully petitioned the federal district court to order the defendants' detention under the federal Bail Reform Act of 1984. Salerno and Cafaro argued that they were being detained without having been convicted of a crime in violation of the Due Process Clause and that they were being denied access to bail guaranteed under the Eighth Amendment. As you read Salerno, you will want to pay attention to the somewhat technical reasoning of the U.S. Supreme Court. The decision rests on several legal conclusions that are outlined below.

**Substantive Due Process.** The act does not constitute impermissible punishment before trial. The U.S. Congress did not intend preventive detention to serve as punishment. It instead is an administrative procedure to protect the community. This interest strongly outweighs the individual's interest in liberty. Detention is limited to the "most serious crimes," detention hearings are promptly conducted, and there are limits on the length of detentions. The judge is required to issue a written order explaining the reasons for the detention.

**Procedural Due Process.** The defendant is permitted representation by an attorney, the right to present evidence, and the right to cross-examine witnesses. The government must satisfy the standards set forth in the act by clear and convincing evidence, and the defendant has the right to an immediate appeal.

**Eighth Amendment.** The Bail Clause does not provide a right to bail in every instance and does not prohibit the detention of an individual prior to trial. The only limitation is that the government may not employ excessive means to achieve its goal. The government is not employing excessive means when it detains an individual awaiting trial to prevent him or her from committing additional crimes.

As you read United States v. Salerno, consider whether preventive detention strikes an appropriate balance between the protection of society and the rights of the defendant. Does preventive detention constitute the punishment of an individual who has yet to be convicted of a crime?

---

**May defendants be detained without bail to prevent them from engaging in additional criminal activity?**

**UNITED STATES V. SALERNO,**

481 U.S. 739 (1987), REHNQUIST, C.J.

**Issue**
The Bail Reform Act of 1984 (the act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure ... the safety of any other person and the community." The U.S. Court of Appeals for the Second Circuit struck down this provision of the act as facially unconstitutional. . . . We granted certiorari because of a conflict among the courts of appeals regarding the validity of the act. We [now examine whether] the act fully comports with constitutional requirements.

**Facts**
Responding to “the alarming problem of crimes committed by persons on release,” Congress formulated the Bail Reform Act of 1984 as the solution to a bail crisis in the federal courts. The act represents the national legislature’s considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to “give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.”

To this end, Section 3141(a) of the act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that if, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of (Continued)
any other person and the community, he shall order the
detention of the person prior to trial.

Section 3142(f) provides the arrestee with a num-
ber of procedural safeguards. He may request the pres-
ence of counsel at the detention hearing, he may testify
and present witnesses in his behalf as well as proffer
evidence, and he may cross-examine other witnesses
appearing at the hearing. If the judicial officer finds that
no conditions of pretrial release can reasonably assure
the safety of other persons and the community, he must
state his findings of fact in writing (3142(i)) and sup-
port his conclusion with “clear and convincing evidence”
(3142(f)).

The judicial officer is not given unbridled discretion
in making the detention determination. Congress has speci-
fied the considerations relevant to that decision. These
factors include the nature and seriousness of the charges,
the substantiality of the Government’s evidence against
the arrestee, the arrestee’s background and characteris-
tics, and the nature and seriousness of the danger posed by
the suspect’s release. Should a judicial officer order detention,
the detainee is entitled to expedited appellate review of
the detention order.

Respondents Anthony Salerno and Vincent Cafaro
were arrested on March 21, 1986, after being charged in
a 29-count indictment alleging various violations of the
Racketeer Influenced and Corrupt Organizations (RICO)
Act, mail and wire fraud offenses, extortion, and various
criminal gambling violations. The RICO counts alleged
thirty-five acts of racketeering activity, including fraud,
extortion, gambling, and conspiracy to commit murder.

At respondents’ arraignment, the Government moved
to have Salerno and Cafaro detained on the ground that
no condition of release would assure the safety of the
community or any person. The district court held a hear-
ing at which the Government made a detailed proffer of
evidence. The Government’s case showed that Salerno
was the “boss” of the Genovese crime family of La Cosa
Nostra and that Cafaro was a “captain” in the Genovese
family. According to the Government’s proffer, based
in large part on conversations intercepted by a court-
ordered wiretap, the two respondents had participated in
wide-ranging conspiracies to aid their illegitimate
enterprises through violent means. The Government also
offered the testimony of two of its trial witnesses, who
were prepared to assert at trial that Salerno personally
participated in two murder conspiracies. Salerno opposed
the motion for detention, challenging the credibility of
the Government’s witnesses. He offered the testimony
of several character witnesses as well as a letter from
his doctor stating that he was suffering from a serious
medical condition. Cafaro presented no evidence at the
hearing but instead characterized the wiretap conversa-
tions as merely “tough talk.”

The district court granted the Government’s deten-
tion motion, concluding that the Government had estab-
lished by clear and convincing evidence that no condition
or combination of conditions of release would ensure the
safety of the community or any person:

The activities of a criminal organization such as
the Genovese Family do not cease with the arrest
of its principals and their release on even the most
stringent of bail conditions. The illegal businesses,
in place for many years, require constant attention
and protection, or they will fail . . . . When business
as usual involves threats, beatings, and murder, the
present danger such people pose in the community
is self-evident.

Reasoning
A facial challenge to a legislative act is, of course, the
most difficult challenge to mount successfully, since the
challenger must establish that no set of circumstances
exists under which the act would be valid . . . . We think
respondents have failed to shoulder their heavy burden
to demonstrate that the act is “facially” unconstitutional.
Respondents present two grounds for invalidating the Bail
Reform Act’s provisions permitting pretrial detention on
the basis of future dangerousness. First, they rely upon
the conclusion of the court of appeals that the act exceeds
the limitations placed upon the federal government by the
Due Process Clause of the Fifth Amendment. Second, they
contend that the act contravenes the Eighth Amendment’s
proscription against excessive bail. We treat these conten-
tions in turn.

The Due Process Clause of the Fifth Amendment pro-
vides that “No person shall . . . be deprived of life, liberty, or
property, without due process of law . . . .” This Court has held
that the Due Process Clause protects individuals against
two types of government action. So-called substantive due
process prevents the government from engaging in conduct that “shocks the conscience,” or interferes with rights “implicit in the concept of ordered liberty.” When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as procedural due process.

Respondents first argue that the act violates substantive due process, because the pretrial detention it authorizes constitutes impermissible punishment before trial. The Government, however, has never argued that pretrial detention could be upheld if it were “punishment.” The court of appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is. As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.

To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].” We conclude that the detention imposed by the act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal.

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U.S.C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing after arrest and hold him until a neutral magistrate determines whether probable cause exists. Finally, respondents concede and the court of appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight or a danger to witnesses. . . . We think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel. . . .

The court of appeals nevertheless concluded that “the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention.” Respondents characterize the Due Process Clause as erecting an impenetrable “wall” in this area that “no governmental interest—rational, important, compelling or otherwise—may surmount.”

We do not think the clause lays down any such categorical imperative. We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest. . . . We have also held that the government may detain mentally unstable individuals who present a danger to the public and dangerous defendants who become incompetent to stand trial. We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. Finally, respondents concede and the court of appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight or a danger to witnesses. . . . We think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel. . . .

The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in Schall v. Martin (467 U.S. 253, 1984). The statute we upheld in Schall permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses (18 U.S.C. § 3142(f)). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can

(Continued)
reasonably assure the safety of the community or any person (18 U.S.C. § 3142(f)). While the Government’s general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society’s interest in crime prevention is at its greatest.

On the other side of the scale, of course, is the individual’s strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government’s interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress’s careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

Finally, we may dispose briefly of respondents’ facial challenge to the procedures of the Bail Reform Act. To sustain them against such a challenge, we need only find them “adequate to authorize the pretrial detention of at least some [persons] charged with crimes,” whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in Schall, “There is nothing inherently unattainable about a prediction of future criminal conduct.”

Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing (18 U.S.C. § 3142(f)). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. . . . The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community (§ 3142(g)). The Government must prove its case by clear and convincing evidence (§ 3142(f)). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain (§ 3142(i)). The act’s review provisions, § 3145(c), provide for immediate appellate review of the detention decision.

We think these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context . . . and they far exceed what we found necessary to effect limited postarrest detention in Gerstein v. Pugh. Given the legitimate and compelling regulatory purpose of the act and the procedural protections it offers, we conclude that the act is not facially invalid under the Due Process Clause of the Fifth Amendment.

Respondents also contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The court of appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the Eighth Amendment. The Eighth Amendment addresses pretrial release by providing merely that “[e]xcessive bail shall not be required.” This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on Stack v. Boyle, in which the Court stated that “[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.” In respondents’ view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the court of appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail—to ensure the integrity of the judicial process.

While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above quoted dictum in Stack v. Boyle is far too slender a reed on which to rest this argument. The Court in Stack had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees’ presence at trial.

We need not decide today whether the Excessive Bail Clause speaks at all to Congress’s power to define the
classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the national legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Excessive Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

**Holding**

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

**Dissenting, Marshall, J., joined by Brennan, J.**

The essence of this case may be found, ironically enough, in a provision of the act to which the majority does not refer. Title 18 U.S.C. § 3142(j)(II) provides that "nothing in this section shall be construed as modifying or limiting the presumption of innocence." But the very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence. The majority's untenable conclusion that the present act is constitutional arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.

The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the Government to imprison someone for uncommitted crimes based upon "proof" not beyond a reasonable doubt. The result must therefore be that once the indictment has failed, detention cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, and that left to his own devices he will soon be guilty of something else. "If it suffices to accuse, what will become of the innocent?"

To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed and that the defendant committed it. Upon probable cause, a warrant for the defendant's arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. Once a defendant has been committed for trial, he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial. . . . As Chief Justice Vinson wrote for the Court in *Stack v. Boyle*, "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials that may never come or that may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision that will go forth without authority and come back without respect.

(Continued)
Questions for Discussion

1. Why were Salerno and Cafaro subjected to preventive detention? What are the procedures that the government is required to follow to detain an individual under the Bail Reform Act?

2. Summarize the Supreme Court’s discussion of procedural and substantive due process.

3. How did the Supreme Court respond to the claim that preventive detention violates the Bail Clause of the Eighth Amendment?

4. Do you agree with the majority or with the dissent?

5. Are you confident in the ability of courts to predict whether an individual will prove to be a threat to the community if released prior to trial?

YOU DECIDE 12.1

Rahmat Abd Hir was charged with two counts of conspiring to provide and providing material support to terrorists, thirteen counts of contributing goods and services to a “designated global terrorist,” and one count of making a false statement.

Rahmat Abd Hir, forty-three, emigrated from Malaysia to the United States twenty years ago and has lived in San Francisco for the past ten years. He is a United States citizen with four young children and has no criminal record or history of substance abuse.

The charges against Rahmat Abd Hir (“Rahmat”) stem from his contacts with his brother, Zulkifli Abd Hir (“Zulkifli”). Zulkifli is a member of the Moro Islamic Liberation Front (MILF), a rebel force operating in the southern Philippines. Zulkifli also is an alleged high-ranking member of Jemaah Islamiyah, an al-Qaeda-affiliated foreign terrorist organization operating in Indonesia, the Philippines, and Malaysia that is suspected of carrying out lethal attacks in Southeast Asia.

It is alleged that Rahmat, despite knowledge of his brother’s activities, sent Zulkifli money and supplies. He wired Zulkifli more than $10,000 using bank accounts in the Philippines. Rahmat also sent packages, using false names and addresses, that contained food and clothing, accessories for guns, backpacks, knives, handheld two-way radios, and publications about firearms. The prosecution charged that some of the two-way radios were used to make improvised explosive devices (IEDs) that were detonated in a bombing in the Philippines that killed five and injured twenty-nine. Rahmat faces as much as 298 years in prison.

Rahmat appealed the federal district court judge’s pretrial detention order denying him bail based on the threat he poses to the community. First, Rahmat argued that the district court mistakenly interpreted the Bail Reform Act to permit pretrial detention of an individual who poses a danger to a community outside as well as inside the United States. Second, Rahmat contended that the district court was in error in determining that he poses such a danger because he was not directly involved in the commission of violent acts. Third, Rahmat disputed the determination that no condition or combination of conditions would reasonably assure the safety of the community because his communications abroad can be monitored and controlled. Do you agree with the federal district court that Hir posed a danger and should be denied bail? See United States v. Hir, 517 F.3d 1081 (9th Cir. 2008).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmancp4e.

YOU DECIDE 12.2

Nelson Mantecon-Zayas was indicted on federal drug charges in Florida. He was released subject to various conditions including the posting of a $200,000 bond. He posted bond and obtained his release pending trial. The next year, Mantecon-Zayas was indicted on federal drug charges in Puerto Rico. The prosecutor appealed the magistrate’s order setting bail at $50,000, which later was raised to $200,000. Mantecon-Zayas asked the district court in Puerto Rico to reconsider the amount of bail based on the fact that he did not have “any more
properties or assets to satisfy this . . . bond increase to [a total of] $400,000.” He asked that the amount of the bond on the second set of charges be reduced to $50,000.

Does a defendant have a right to a bail amount that is within his or her financial capabilities? Should Mantec-Zayas’s bail be reduced? How would you rule in this case? See United States v. Mantec-Zayas, 959 F.2d 548 (1st Cir. 1991).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmanCP4e.

YOU DECIDE 12.3

The state charged Joe Paul Martinez with multiple sexual offenses, including sexual conduct with a minor under age fifteen, a class 2 felony, and a dangerous crime against children and confronted him with a sentence of between fifteen and thirty years in prison. Martinez filed a petition to be released on bail. The trial court conducted an evidentiary hearing and concluded that the proof was evident or presumption was great that Martinez committed sexual conduct with a minor under age fifteen, thus rendering him ineligible for bail . . .

Section 13-1405(A) states, “A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.” The crime can be committed by a person of any age and may be consensual.

An Arizona court of appeals noted that “the offense sweeps in situations where teenagers engage in consensual sex.”

Arizona voters passed Proposition 103 in 2002, which was incorporated into state statutory law by the state legislature. The law provides that:

All persons charged with crime shall be bailable by sufficient sureties, except:

1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great.

Absent this provision, because Martinez is charged with a felony, he could be denied bail under Arizona law if: (1) the person charged poses a substantial danger to another person or the community; (2) no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community; or (3) the proof is evident or the presumption great that the person committed the offense.


Also consider the following Arizona law. Arizona law prohibits granting undocumented immigrants arrested for a wide range of felony offenses any form of bail or pretrial release, even if the particular arrestee is not a flight risk or dangerous. The Arizona legislature passed the legislation and referred it to the voters in May 2005. The voters approved Proposition 100 in November 2006. The Proposition 100 bail determination under Arizona law is to occur within 24 hours of arrest. The judge is required to deny bail, regardless of whether the arrestee poses a flight risk or a danger to the community, “if the court finds (1) that the proof is evident or the presumption great that the person committed a serious offense, and (2) probable cause that the person entered or remained in the United States illegally . . . .” An arrestee, within seven days, may move for reexamination of the denial for bail. “The arrestee can dispute whether there is probable cause that he or she entered or remained in the United States unlawfully, but may not refute Proposition 100’s irrebuttable presumption that he or she poses an unmanageable flight risk.” Once a court determines that there is proof that an arrestee has entered or remained in the United States unlawfully, the court has no discretion to release the arrestee even if the court finds that the arrestee does not pose a flight risk or danger to the community. Lopez-Valezuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmanCP4e.
may not be subjected to "arbitrary or purposeless" conditions that constitute punishment. In *Wolfish*, the U.S. Supreme Court reviewed various practices in the Metropolitan Correctional Center in New York City in an effort to clarify the dividing line between reasonable detention policies and punishment. In reading the Supreme Court's opinion, ask yourself whether the Court has struck the proper balance between the interests of detainees and the interests in institutional security.

### Issue

This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge. The parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence, and it is the scope of their rights during this period of confinement prior to trial that is the primary focus of this case.

### Facts

The MCC [Metropolitan Correctional Center] was constructed in 1975 to replace the converted waterfront garage on West Street that had served as New York City’s federal jail since 1928. It is located adjacent to the Foley Square federal courthouse and has as its primary objective the housing of persons who are being detained in custody prior to trial for federal criminal offenses in the U.S. District Courts for the Southern and Eastern Districts of New York and for the District of New Jersey. Under the Bail Reform Act, 18 U.S.C. § 3146, a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial. In addition to pretrial detainees, the MCC also houses some convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving generally short sentences in a service capacity at the MCC, convicted prisoners who have been lodged at the facility under writs of habeas corpus issued to ensure their presence at upcoming trials, witnesses in protective custody, and persons incarcerated for contempt.

The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities. As the court of appeals stated, it “represented the architectural embodiment of the best and most progressive penological planning.” The key design element of the 12-story structure is the “modular” or “unit” concept, whereby each floor designed to house inmates has one or two largely self-contained residential units that replace the traditional cellblock jail construction. Each unit in turn has several clusters or corridors of private rooms or dormitories radiating from a central two-story multi-purpose or common room, to which each inmate has free access approximately sixteen hours a day. Because our analysis does not turn on the particulars of the MCC concept or design, we need not discuss them further.

When the MCC opened in August 1975, the planned capacity was 449 inmates, an increase of fifty percent over that of the former West Street facility. Despite some dormitory accommodations, the MCC was designed primarily to house these inmates in 389 rooms, which originally were intended for single occupancy. While the MCC was under construction, however, the number of persons committed to pretrial detention began to rise at an “unprecedented” rate. The Bureau of Prisons took several steps to accommodate this unexpected flow of persons assigned to the facility, but despite these efforts, the inmate population at the MCC rose above its planned capacity within a short time after its opening. To provide sleeping space for this increased population, the MCC replaced the single bunks in many of the individual rooms and dormitories with double bunks. Also, each week some newly arrived inmates had to sleep on cots in the common areas until they could be transferred to residential rooms as space became available.

On November 28, 1975, less than four months after the MCC had opened, the named respondents initiated this action . . . in the district court . . . . The petition served up a veritable potpourri of complaints that implicated virtually every facet of the institution's conditions and practices. Respondents charged, in part, that they had been deprived of their statutory and constitutional rights because of overcrowded conditions; undue length of confinement; improper searches; inadequate recreational, educational, and employment opportunities; insufficient staff; and objectionable restrictions on the purchase and receipt of personal items and books. The federal district court
enjoined these practices, and the U.S. Court of Appeals for the Second Circuit affirmed the district court's rulings. We granted certiorari to consider the important constitutional questions raised by these decisions and to resolve an apparent conflict among the circuits. We now reverse.

Reasoning

We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision implies. . . . In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment or otherwise violate the Constitution.

Not every disability imposed during pretrial detention amounts to “punishment” in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility, which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. The fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little constraint as possible during confinement does not convert the conditions or restrictions of detention into “punishment.”

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].” Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

One further point requires discussion. The petitioners assert, and respondents concede, that the “essential objective of pretrial confinement is to ensure the detainees’ presence at trial.” While this interest undoubtedly justifies the original decision to confine an individual in some manner, we do not accept respondents’ argument that the Government’s interest in ensuring a detainee’s presence at trial is the only objective that may justify restraints and conditions once the decision is lawfully made to confine a person. “If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention.” The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution’s interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.

Judged by this analysis, respondents’ claim that double-bunking violated their due process rights fails. . . . On this record, we are convinced as a matter of law that double-bunking as practiced at the MCC did not amount to punishment and did not, therefore, violate respondents’ rights under the Due Process Clause of the Fifth Amendment. Each of the rooms at the MCC that house pretrial detainees has a total floor space of approximately seventy-five square feet. Each of them designated for double-bunking contains a double bunk bed, certain other items of furniture, a wash basin, and an uncovered toilet. Inmates generally are locked into their rooms from 11 P.M. to 6:30 A.M. and for brief periods during the afternoon and evening head counts. During the rest of the day, they may move about freely between their rooms and the common areas.

We disagree with both the district court and the court of appeals that there is some sort of “one man, one cell” principle lurking in the Due Process Clause of the Fifth Amendment. While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.

(Continued)
Detainees are required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably are sleeping. The rooms provide more than adequate space for sleeping. During the remainder of the time, the detainees are free to move between their rooms and the common area. While-double-bunking may have taxed some of the equipment or particular facilities in certain of the common areas, this does not mean that the conditions at the MCC failed to meet the standards required by the Constitution. Our conclusion in this regard is further buttressed by the detainees’ length of stay at the MCC. Nearly all of the detainees are released within sixty days. We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of sixty days violates the Constitution.

Respondents also challenged certain MCC restrictions and practices that were designed to promote security and order at the facility on the ground that these restrictions violated the Due Process Clause of the Fifth Amendment and certain other constitutional guarantees, such as those within the First and Fourth Amendments. . . . In our view, the court of appeals failed to heed its own admonition not to second-guess prison administrators. . . . Our cases have established several general principles that inform our evaluation of the constitutionality of the restrictions at issue. First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. . . . “There is no iron curtain drawn between the Constitution and the prisons of this country.” So, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment; and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law. Pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.

Our cases also have insisted on a second proposition: Simply because prison inmates retain certain constitutional rights, does not mean that these rights are not subject to restrictions and limitations. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The fact of confinement as well as the legitimate goals and policies of the penal institution limit these retained constitutional rights. There must be a “mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.” This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.

Third, maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. . . . Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry.

Finally, as the court of appeals correctly acknowledged, the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . . Judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge but also because the operation of our correctional facilities is peculiarly the province of the legislative and executive branches of our government, not the judicial. With these teachings of our cases in mind, we turn to an examination of the MCC security practices that are alleged to violate the Constitution. . . .

We conclude that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores does not violate the First Amendment rights of MCC inmates. That limited restriction is a rational response by prison officials to an obvious security problem. It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. They also are difficult to search effectively. . . .

The restriction, as it is now before us, allows soft-bound books and magazines to be received from any source and hardback books to be received from publishers, bookstores, and book clubs. In addition, the MCC has a “relatively large” library for use by inmates. To the limited extent the rule might possibly increase the cost of obtaining published materials, this Court has held that where “other avenues” remain available for the receipt of materials by inmates, the loss of “cost advantages does not fundamentally implicate free speech values.” We are also influenced in our decision by the fact that the rule’s impact on pretrial detainees is limited to a maximum period of approximately sixty days.

Inmates at the MCC were not permitted to receive packages from outside the facility containing items of food or
personal property except for one package of food at Christmas. . . . Corrections officials concluded that permitting the introduction of packages of personal property and food would increase the risks of gambling, theft, and inmate fights over that which the institution already experienced by permitting certain items to be purchased from its commissary. “It is enough to say that they have not been conclusively shown to be wrong in this view.” It is also all too obvious that such packages are handy devices for the smuggling of contraband. . . . It does not therefore deprive the convicted inmates or pretrial detainees of the MCC of their property without due process of law in contravention of the Fifth Amendment.

The MCC staff conducts unannounced searches of inmate living areas at irregular intervals. These searches generally are formal unit shake-downs during which all inmates are cleared of the residential units, and a team of guards searches each room. Prior to the district court’s order, inmates were not permitted to watch the searches. Officials testified that permitting inmates to observe room inspections would lead to friction between the inmates and security guards and would allow the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team . . . .

It is difficult to see how the detainee’s interest in privacy is infringed by the room-search rule. . . . Permitting detainees to observe the searches does not lessen the invasion of their privacy; its only conceivable beneficial effect would be to prevent theft or misuse by those conducting the search. The room-search rule simply facilitates the safe and effective performance of the search which all concede may be conducted. The rule itself, then, does not render the searches “unreasonable” within the meaning of the Fourth Amendment.

Inmates at all Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. Corrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution. . . . Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable.

Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence, and inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record. That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises. We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the district court noted, that on occasion a security guard may conduct the search in an abusive fashion. Such abuse cannot be condoned. The searches must be conducted in a reasonable manner. But we deal here with the question of whether visual body cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

**Holding**

We do not think that the four MCC security restrictions and practices constitute “punishment” in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment. Respondents do not even make such a suggestion; they simply argue that the restrictions were greater than necessary to satisfy petitioners’ legitimate interest in maintaining security. Therefore, the determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose. Ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both. For the reasons previously set forth, we conclude that these particular restrictions and practices were reasonable responses by MCC officials to legitimate security concerns. Respondents simply have not met their heavy burden of showing that these officials have exaggerated their response to the genuine security considerations that actuated these restrictions and practices. And as might be expected of restrictions applicable to pretrial detainees, these restrictions were of only limited duration so far as the MCC pretrial detainees were concerned.

There was a time not too long ago when the federal judiciary took a completely hands-off approach to the problem of prison administration. In recent years, however, these courts largely have discarded this hands-off attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our nation’s prisons are too well known to require recounting.
here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. . . . The inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of “judgment calls” that meet constitutional and statutory requirements are confined to officials outside of the judicial branch of government.

Dissenting, Marshall, J.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupported, given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.

I believe the proper inquiry in this context is not whether a particular restraint can be labeled "punishment." Rather, as with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered.

To make detention officials' intent the critical factor in assessing the constitutionality of impositions on detainees is unrealistic. . . . It will often be the case that officials believe, erroneously but in good faith, that a specific restriction is necessary for institutional security. As the district court noted, "zeal for security is among the most common varieties of official excess," and the litigation in this area corroborates that conclusion. A standard that focuses on punitive intent cannot effectively eliminate this excess. Indeed, the Court does not even attempt to "detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention." Rather, it is content merely to recognize that "the effective management of the detention facility . . . is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment."

Almost any restriction on detainees, including, as the Court concedes, chains and shackles, can be found to have some rational relation to institutional security, or more broadly, to "the effective management of the detention facility." Yet this toothless standard applies irrespective of the excessiveness of the restraint or the nature of the rights infringed. Moreover, the Court has not in fact reviewed the rationality of detention officials' decisions. Instead, the majority affords "wide-ranging" deference to those officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Reasoning that security considerations in jails are little different than in prisons, the Court concludes that cases requiring substantial deference to prison administrators' determinations on security-related issues are equally applicable in the present context.

Yet as the Court implicitly acknowledges, the rights of detainees, who have not been adjudicated guilty of a crime, are necessarily more extensive than those of prisoners "who have been found to have violated one or more of the criminal laws established by society for its orderly governance." Judicial tolerance of substantial impositions on detainees must be concomitantly less. However, by blindly deferring to administrative judgments on the rational basis for particular restrictions, the Court effectively delegates to detention officials the decision whether pretrial detainees have been punished. This, in my view, is an abdication of an unquestionably judicial function.

When assessing the restrictions on detainees, we must consider the cumulative impact of restraints imposed during confinement. Incarceration of itself clearly represents a profound infringement of liberty, and each additional imposition increases the severity of that initial deprivation. Since any restraint thus has a serious effect on detainees, I believe the Government must bear a more rigorous burden of justification than the rational-basis standard mandates. At a minimum, I would require a showing that a restriction is substantially necessary to jail administration. Where the imposition is of particular gravity, that is, where it implicates interests of fundamental importance or inflicts significant harms, the Government should demonstrate that the restriction serves a compelling necessity of jail administration.

Simply stated, the approach I advocate here weighs the detainees' interests implicated by a particular restriction against the governmental interests the restriction serves. As the substantiality of the intrusion on detainees' rights increases, so must the significance of the countervailing governmental objectives. . . .

In my view, the body cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency. After every contact visit with someone from outside the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection, while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates.
Not surprisingly, the Government asserts a security justification for such inspections. These searches are necessary, it argues, to prevent inmates from smuggling contraband into the facility. In crediting this justification despite the contrary findings of the two courts below, the Court overlooks the critical facts. As respondents point out, inmates are required to wear one-piece jumpsuits with zippers in the front. To insert an object into the vaginal or anal cavity, an inmate would have to remove the jumpsuit, at least from the upper torso. . . . There was medical testimony, moreover, that inserting an object into the rectum is painful and “would require time and opportunity which is not available in the visiting areas,” and that visual inspection would probably not detect an object once inserted. Additionally, before entering the visiting room, visitors and their packages are searched thoroughly by a metal detector, fluoroscope, and by hand. Correction officers may require that visitors leave packages or handbags with guards until the visit is over. Only by blinding itself to the facts presented on this record can the Court accept the Government’s security rationale.

Without question, these searches are an imposition of sufficient gravity to invoke the compelling-necessity standard. It is equally indisputable that they cannot meet that standard. Indeed, the procedure is so unnecessarily degrading that it “shocks the conscience.” Here, the searches are employed absent any suspicion of wrongdoing. It was this aspect of the MCC practice that the court of appeals redressed, requiring that searches be conducted only when there is probable cause to believe that the inmate is concealing contraband.

That the Court can uphold these indiscriminate searches highlights the bankruptcy of its basic analysis. Under the test adopted today, the rights of detainees apparently extend only so far as detention officials decide that cost and security will permit. Such unthinking deference to administrative convenience cannot be justified where the interests at stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail. I dissent.

Dissenting, Stevens J., joined by Brennan, J.

Some of the individuals housed in the MCC are convicted criminals. As to them, detention may legitimately serve a punitive goal, and there is strong reason, even apart from the rules challenged here, to suggest that it does. But the same is not true of the detainees who are also housed there and whose rights we are called upon to address. . . .

The fact that an individual may be unable to pay for a bail bond, however, is an insufficient reason for subjecting him to indignities that would be appropriate punishment for convicted felons. Nor can he be subject on that basis to onerous restraints that might properly be considered regulatory with respect to particularly obstreperous or dangerous arrestees. An innocent man who has no propensity toward immediate violence, escape, or subversion may not be dumped into a pool of second-class citizens and subjected to restraints designed to regulate others who have. For him, such treatment amounts to punishment. And because the due process guarantee is individual and personal, it mandates that an innocent person be treated as an individual human being and be free of treatment that, as to him, is punishment.

Questions for Discussion

1. What is the purpose of confining pretrial detainees?
2. How does the Supreme Court define punishment? Note the importance of intent and effective correctional management in evaluating whether a policy constitutes punishment. Distinguish punishment from detention.
3. Discuss the court’s holdings in regard to the receipt of books and packages, the searches of cells and body cavities, and double-bunking.
4. Why do the dissenting judges emphasize that some of the detainees in the MCC have not been convicted of a crime?
5. Why is the dissent critical of the reliance on the intent of correctional officials to determine whether a policy constitutes punishment?
6. Compare and contrast the conclusions of the majority and dissent in regard to the correctional policies discussed in Bell v. Wolfish.
7. Should judges defer to the judgment of correctional officials?

INDIGENCY AND THE RIGHT TO COUNSEL

The remainder of the chapter focuses on a second important aspect of the first appearance: the provision of an appointed counsel for an indigent defendant.

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” In England under the common law, defendants charged with misdemeanors were entitled to the assistance of a lawyer at trial. Individuals charged with
felonies, on the other hand, were denied the assistance of a lawyer at trial. Lawyers were thought to impede the prosecution of these more serious offenses. The American colonists wanted to protect individuals against the power of prosecutors and judges. At the time of the adaptation of the Bill of Rights in 1791, the constitutions of twelve of the thirteen American colonies provided for the right to counsel, and this protection subsequently was included in the Sixth Amendment of the U.S. Constitution.

The first major U.S. Supreme Court judgment addressing the right to counsel was the famous case of Powell v. Alabama. As you may recall from reading about Powell in Chapter 2, the Supreme Court relied on the Due Process Clause of the Fourteenth Amendment in holding that the “Scottsboro Boys” had been denied their fundamental right to legal representation. The Supreme Court overturned the defendants’ convictions. During the pretrial phase, the trial judge in Powell appointed “all members of the bar” to represent the defendants. This was “little more than an expansive gesture, imposing no definite obligation upon any one.” On the day of the trial, the judge named two unqualified lawyers to represent the defendants and provided the lawyers with a limited time to prepare their defense. The Supreme Court concluded that the trial court judge denied the defendants their Sixth Amendment right to a lawyer. The Court stressed that legal representation is crucial to a fair hearing and that absent the appointment of effective counsel, innocent defendants are at risk of criminal conviction. The right to the appointment of effective legal representation is particularly vital in a capital case such as Powell:

Where the defendant is unable to employ counsel and is incapable of making his own defense because of ignorance, feeble mindedness, [or] illiteracy . . . it is the duty of the court . . . to assign counsel . . . for [the defendant] as a necessary requisite of due process of law. (Powell v. Alabama, 287 U.S. 45, 53, 71 [1932])

The decision in Powell established a limited right to appointed counsel for indigents who were “incapable” of representing themselves and who were facing the death penalty. The Supreme Court demonstrated little hesitancy six years later, in Johnson v. Zerbst, in holding that in federal criminal prosecutions, an accused may not be deprived of his “life or liberty unless he has or waives the assistance of counsel.” The Court stressed that even the intelligent and educated layman . . . left without the aid of counsel . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense . . . [and] requires the guiding hand of counsel at every step in the proceedings against him. (Johnson v. Zerbst, 304 U.S. 458, 463 [1938])

The Supreme Court was not ready to extend the Sixth Amendment protection to defendants in state criminal prosecutions. In Betts v. Brady, the Court refused to hold that the Due Process Clause incorporated the Sixth Amendment and required the appointment of a lawyer to represent the accused in every state criminal case. Justice Roberts held that the right to an attorney is not fundamental to the justice process and that Maryland had no constitutional obligation to appoint a lawyer to represent the indigent Betts, who was convicted of robbery and sentenced to eight years in prison. The Due Process Clause requires a state only to appoint a lawyer in special circumstances where the trial is offensive to the common and fundamental ideas of fairness and right. . . . We cannot say that the Amendment embodies . . . [a] command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel. (Betts v. Brady, 316 U.S. 455 [1942])

In this instance, Betts claimed that he had an alibi and therefore could not have committed the robbery with which he was charged. The Supreme Court concluded that he was not “helpless.” Betts was forty-three and intelligent and had experience as a defendant in the criminal justice system, and he was “fully able to examine witnesses to support the claim that he was at another location at the time of the robbery” (473). The Court did recognize that “special circumstances” might require that a state appoint a defense lawyer to represent young offenders with little education or mentally challenged defendants who confront a prosecution for complicated crimes involving technical defenses (Uveges v. Pennsylvania, 335 U.S. 437, 441 [1948]).

Justices Black, Douglas, and Murphy dissented in Betts and argued that the right to a lawyer in a criminal case is fundamental to liberty and that the Sixth Amendment is incorporated into the Due
Process Clause. The dissenters insisted that it is “shocking to the conscience” to subject innocent individuals to “increased dangers of conviction merely because of their poverty.” It is nearly impossible to determine whether a defendant such as Betts would be able to adequately represent himself or herself at trial in the absence of a defense attorney (476).

In 1963, in the famous case of *Gideon v. Wainwright*, the U.S. Supreme Court abandoned the “special circumstances” test established in *Betts v. Brady* and held that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel and that indigent individuals charged with felonies in state courts are entitled to an appointed counsel. This decision established that indigent defendants confronting state as well as federal prosecutions are entitled to legal representation.

Clarence Gideon was convicted and sentenced to five years in prison for breaking into and entering a poolroom. His request for an attorney had been denied, and despite the fact that he had conducted an adequate defense for a “layman,” the Supreme Court held that Gideon had been denied due process of law. Justice Black stressed that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.” The “noble ideal” that all individuals are equal before the law cannot be realized if the ability of an individual to present a defense is based on an individual’s personal wealth or income (344).

It is interesting as you read *Gideon v. Wainwright*, the next case in the text, to note how the Supreme Court justifies overturning the precedent in *Betts v. Brady*. Do you believe that indigent individuals have a fundamental right to have the government provide them with a lawyer in a felony prosecution?

---

**Was the trial judge constitutionally required to appoint a lawyer to represent Gideon?**

**GIDEON V. WAINWRIGHT,**

372 U.S. 335 (1963), BLACK, J.

**Facts**

Petitioner was charged in a Florida state court with having broken into and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel. Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the state’s witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument “emphasizing his innocence to the charge contained in the Information filed in this case.” The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court’s refusal to appoint counsel for him denied him rights “ guaranteed by the Constitution and the Bill of Rights by the United States Government.” Treating the petition for habeas corpus as properly before it, the State Supreme Court, “ upon consideration thereof” but without an opinion, denied all relief.

**Issue**

Since 1942, when *Betts v. Brady* was decided by a divided Court, the problem of a defendant’s federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. Since Gideon was proceeding in *forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: “Should this Court’s holding in *Betts v. Brady* be reconsidered?”

(Continued)
Reasoning

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State’s witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison.

Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court . . . held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so “offensive to the common and fundamental ideas of fairness” as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon’s claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to the Assistance of Counsel for his defense.” We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel, unless the right is competently and intelligently waived. Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response, the Court stated that while the Sixth Amendment laid down no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.

We think the Court in Betts was wrong . . . in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that “the right to the aid of counsel is of this fundamental character” in Powell v. Alabama. While the Court, at the close of its Powell opinion, did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. . . . In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant’s need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (287 U.S. 45, 69 [1932]).
Holding

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other states, has asked that *Betts v. Brady* be left intact. Twenty-two states, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree. The judgment is reversed, and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Questions for Discussion

1. What is the holding in *Gideon v. Wainwright*?
2. Explain in your own words why Gideon has a fundamental right to be represented by a lawyer at trial.
3. Why did the Supreme Court overturn *Betts*?

RIGHT TO COUNSEL AND CRITICAL STAGES OF PROSECUTION

The Sixth Amendment right to counsel and right of an indigent to appointed counsel is not limited to the criminal trial. The right to a lawyer would provide little protection if individuals were denied assistance when subjected to custodial interrogation, when negotiating a plea bargain, or when determining whether to enter a guilty plea or a not-guilty plea prior to trial. The U.S. Supreme Court has established a two-part test to determine when the Sixth Amendment right to counsel attaches.

The Sixth Amendment provides that in "all criminal prosecutions," the accused is entitled to the "Assistance of Counsel" for his or her defense. The Supreme Court has held that an individual is entitled to a lawyer when formal adversarial criminal proceedings are initiated. Formal adversarial criminal proceedings begin when a formal charge is issued by an indictment or by information filed by a prosecutor, or when a charge is brought against the accused at an arraignment or preliminary hearing. It is commonly observed that at this point, an individual confronts the full force of the prosecution and is transformed from a suspect into a defendant (*Kirby v. Illinois*, 406 U.S. 682, 689 [1972]).

Following the initiation of formal criminal proceedings, the right to counsel attaches at critical stages of the prosecution. A critical stage is considered any phase of the prosecution that may negatively impact the defendant's ability to present a defense at trial and at which the presence of an attorney would safeguard the defendant. In *Gerstein*, a critical stage is described as "those pretrial procedures that would impair a defense on the merits if the accused is required to proceed without counsel" (*Gerstein v. Pugh*, 420 U.S. 102, 122 [1973]), and in *United States v. Wade* (discussed in Chapter 9), the Supreme Court described a critical stage as "any stage of the prosecution . . . in court or out, where Counsel's absence might derogate from the right to a fair trial" (*United States v. Wade*, 388 U.S. 218, 226 [1967]). In *United States v. Gouveia*, the Court stressed that a critical stage is a "situation in which the results "might well settle the accused's fate and reduce the trial itself to a mere formality" (*United States v. Gouveia*, 467 U.S. 180, 189 [1984]).

Courts have not found a procedure to be critical when a lawyer is able later to reconstruct whether the procedure was carried out in a fair fashion. For example, a lawyer can determine the accuracy of a DNA test following the test. You should be aware that some states more broadly interpret the right to a lawyer and provide individuals with legal representation at "important points in the criminal process," such as when bail is being set, while other state statutes provide that the right to counsel attaches as "soon as feasible" after an individual is taken into custody. The Wisconsin state statutes, in section 967.06(1), provide that "[as] soon as practicable after a person has been detained or arrested in connection with any offense that is punishable by incarceration . . . the person shall be informed of his or her right to counsel."

You can find a list of some critical and noncritical stages of criminal prosecution in Table 12.1. In the next section, we discuss whether an indigent defendant is entitled to an appointed counsel during "all criminal prosecutions" or only during "some critical prosecutions."
The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, the U.S. Supreme Court interpreted this clause to provide Clarence Gideon with the right to an attorney in his felony trial. Gideon's conviction and five-year prison sentence accordingly were reversed by the Court. The Court expanded the right to counsel at trial in *Argersinger v. Hamlin*. In *Argersinger*, the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel." In other words, an individual who, if convicted, confronts imprisonment for even a single day is entitled to be represented by a lawyer (*Argersinger v. Hamlin*, 407 U.S. 25 [1972]).

Why did the Supreme Court draw the line at this point rather than distinguish between petty misdemeanors (punishable by less than six months) and felonies? The Court observed that a trial for an offense punishable by less than six months in jail is likely to be as complex as a case involving a crime punishable by one year or more in jail. A defendant confronting incarceration, however brief, is in need of legal assistance to understand the consequences of decisions such as whether to take the stand at trial. In the absence of legal representation, the temptation will be for prosecutors and judges to encourage defendants to plead guilty in order to dispose of misdemeanor prosecutions as quickly as possible.

In *Scott v. Illinois*, the U.S. Supreme Court was asked to expand the right to counsel to cover criminal prosecutions that do not result in imprisonment. Scott was convicted of the shoplifting of goods valued at $150. The Illinois statute provided for punishment by a $500 fine or by a year in prison or both, and Scott was punished by a $50 fine. Scott appealed on the grounds that the Sixth and Fourteenth Amendments required Illinois to provide him with an appointed lawyer. The U.S. Supreme Court affirmed Scott's conviction and fine and held that the Constitution provides that "no indigent criminal defendant [is to] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense" (*Scott v. Illinois*, 440 U.S. 367 [1979]). There is no right to a counsel in the event that a fine is imposed.

The decision in *Scott* means that unless a defendant is provided with a lawyer, a judge may not sentence him or her to imprisonment. In *Alabama v. Shelton*, Shelton was accused of the misdemeanor of third-degree assault, a charge that carried penalties of one year in prison and a $2,000 fine. Shelton was not provided with a lawyer at trial; he was convicted, received a thirty-day suspended sentence, and was placed on unsupervised probation for two years. The Supreme Court overturned Shelton's conviction and held that a suspended sentence that may result in imprisonment in the future may not be imposed where a defendant has not been provided with an attorney at trial. Do you agree that the Alabama court should be required to provide Shelton with a lawyer at trial based on the speculative possibility that he might be incarcerated in the future? See *Alabama v. Shelton*, 534 U.S. 654 (2002).

On the other hand, in *Nichols v. United States*, a prior state misdemeanor conviction for DUI, for which Nichols was fined $250 and was not incarcerated, was factored into his sentence under the U.S. Sentencing Commission Guidelines. This resulted in Nichols's sentence for drug possession being increased from Category I (168–210 months) to Category II (188–235 months). Nichols objected to the inclusion of his DUI misdemeanor conviction in his criminal history, because he was not represented by counsel at that proceeding. He maintained that consideration of his misdemeanor conviction in establishing his sentence for the drug crimes violated the Sixth Amendment.

The Supreme Court held that "an uncounseled misdemeanor conviction" for which no prison term is imposed may be used to enhance the punishment for a "subsequent conviction" (*Nichols v. United States*, 511 U.S. 738 [1994]).

In reading the next case in the text, *Scott v. Illinois*, consider whether the U.S. Supreme Court has struck the proper balance in determining when a defendant is entitled to an appointed attorney.
Did Scott have a right to a lawyer in his trial for shoplifting?

SCOTT V. ILLINOIS,
440 U.S. 367 (1979), REHNQUIST, J.

Issue
Petitioner Aubrey Scott was convicted of shoplifting merchandise valued at less than $150. The applicable Illinois statute set the maximum penalty for such an offense at a $500 fine or one year in jail, or both. The petitioner argues that a line of this Court’s cases culminating in Argersinger v. Hamlin requires state provision of counsel whenever imprisonment is an authorized penalty.

Facts
The Supreme Court of Illinois rejected Scott’s contention, quoting the following language from Argersinger:

We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. . . . Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

The Supreme Court of Illinois went on to state that it was “not inclined to extend Argersinger” to the case where a defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed upon the defendant.

Reasoning
We agree with the Supreme Court of Illinois that the federal Constitution does not require a state trial court to appoint counsel for a criminal defendant such as petitioner, and we therefore affirm its judgment. . . . The Supreme Court of Illinois, in quoting the above language from Argersinger, clearly viewed the latter as Argersinger’s holding. Additional support for this proposition may be derived from the concluding paragraph of the opinion in that case:

The run of misdemeanors will not be affected by today’s ruling. But in those that end up in the actual deprivation of a person’s liberty, the accused will receive the benefit of “the guiding hand of counsel” so necessary where one’s liberty is in jeopardy.

There is considerable doubt that the Sixth Amendment itself, as originally drafted by the founders of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense . . . . In Argersinger, the State of Florida urged that . . . any offense punishable by less than six months in jail should not require appointment of counsel for an indigent defendant. . . . The Court rejected arguments that social cost or a lack of available lawyers militated against its holding, in some part because it thought these arguments were factually incorrect. But they were rejected in much larger part because of the Court’s conclusion that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the states implicit in such a rule. The Court in its opinion repeatedly referred to trials “where an accused is deprived of his liberty,” and to “a case that actually leads to imprisonment even for a brief period.” The Chief Justice in his opinion concurring in the result also observed that “any deprivation of liberty is a serious matter.”

Holding
Although the intentions of the Argersinger Court are not unmistakably clear from its opinion, we conclude today that Argersinger did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. . . . We believe that the central premise of Argersinger—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. Argersinger has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on fifty quite diverse states.

We therefore hold that the Sixth and Fourteenth Amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. The judgment of the Supreme Court of Illinois is accordingly affirmed.

(Continued)
Dissenting, Brennan, J., joined by Marshall, J., and Stevens, J.

The Court today retreats to the indefensible position that the Argersinger “actual imprisonment” standard is the only test for determining the boundary of the Sixth Amendment right to appointed counsel in state misdemeanor cases, thus necessarily deciding that in many cases (such as this one) a defendant will have no right to appointed counsel even when he has a constitutional right to a jury trial. This is simply an intolerable result. Not only is the “actual imprisonment” standard unprecedented as the exclusive test, but also the problems inherent in its application demonstrate the superiority of an “authorized imprisonment” standard that would require the appointment of counsel for indigents accused of any offense for which imprisonment for any time is authorized.

First, the authorized imprisonment standard more faithfully implements the principles of the Sixth Amendment identified in Gideon. The procedural rules established by state statutes are geared to the nature of the potential penalty for an offense, not to the actual penalty imposed in particular cases. The authorized penalty is also a better predictor of the stigma and other collateral consequences that attach to conviction of an offense. With the exception of Argersinger, authorized penalties have been used consistently by this Court as the true measures of the seriousness of offenses. Imprisonment is a sanction particularly associated with criminal offenses; trials of offenses punishable by imprisonment accordingly possess the characteristics found by Gideon to require the appointment of counsel. By contrast, the actual imprisonment standard, as the Court’s opinion in this case demonstrates, denies the right to counsel in criminal prosecutions to accuseds who suffer the severe consequences of prosecution other than imprisonment.

Second, the authorized imprisonment test presents no problems of administration. It avoids the necessity for time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate predictions, unequal treatment, and apparent and actual bias.

Finally, the authorized imprisonment test ensures that courts will not arrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense. Under the actual imprisonment standard, [the] judge will . . . be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.

The authorized imprisonment standard, on the other hand, respects the allocation of functions between legislatures and courts in the administration of the criminal justice system.

The apparent reason for the Court’s adoption of the actual imprisonment standard for all misdemeanors is concern for the economic burden that an authorized imprisonment standard might place on the states. But, with all respect, that concern is both irrelevant and speculative.

This Court’s role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments. A unanimous Court made that clear in Mayer v. Chicago (404 U.S. 189 [1971]), in rejecting a proposed fiscal justification for providing free transcripts for appeals only when the appellant was subject to imprisonment.

The invidiousness of the discrimination that exists where criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State’s fiscal interest is, therefore, irrelevant.

In any event, the extent of the alleged burden on the states is, as the Court admits, speculative. Although more persons are charged with misdemeanors punishable by incarceration than are charged with felonies, a smaller percentage of persons charged with misdemeanors qualify as indigent, and misdemeanor cases as a rule require far less attorney time.

Furthermore, public defender systems have proved economically feasible, and the establishment of such systems to replace appointment of private attorneys can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically. The public defender system alternative also answers the argument that an authorized imprisonment standard would clog the courts with inexperienced appointed counsel.

Perhaps the strongest refutation of respondent’s alarmist prophecies that an authorized imprisonment standard would wreak havoc on the states is that the standard has not produced that result in the substantial number of states that already provide counsel in all cases where imprisonment is authorized—states that include a large majority of the country’s population and a great diversity of urban and rural environments. Moreover, of those states that do not yet provide counsel in all cases where any imprisonment is authorized, many provide counsel when periods
of imprisonment longer than thirty days, three months, or six months are authorized. In fact, Scott would be entitled to appointed counsel under the current laws of at least 33 states.

It may well be that adoption by this Court of an authorized imprisonment standard would lead state and local governments to re-examine their criminal statutes. A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution. In my view this re-examination is long overdue. In any event, the Court’s actual imprisonment standard must inevitably lead the courts to make this re-examination, which plainly should more properly be a legislative responsibility.

Dissenting, Blackmun, J.

I would hold that the right to counsel secured by the Sixth and Fourteenth Amendments extends at least as far as the right to jury trial secured by those Amendments. Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months’ imprisonment, whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment. . . . On this approach, of course, the judgment of the Supreme Court of Illinois upholding petitioner Scott’s conviction should be reversed, since he was convicted of an offense for which he was constitutionally entitled to a jury trial. I, therefore, dissent.

Questions for Discussion

1. What is the holding of the Supreme Court in Scott v. Illinois?
2. Why did the Court hold that an appointed attorney was constitutionally required in Argersinger and not in Scott? Do you agree that the two situations are significantly different?
4. What is Justice Blackmun’s view?
5. Do you believe that the Supreme Court considered the economic costs of providing an appointed attorney for indigents in all criminal trials?

Cases and Comments

Civil Child Support Proceedings. What of civil proceedings that may result in incarceration? In Turner v. Rogers, the U.S. Supreme Court held that South Carolina was not required to provide legal assistance to an indigent defendant in a civil contempt proceeding to enforce a child support order that might lead to incarceration. In South Carolina, a judge in a child support proceeding may order the imprisonment of a defendant who has failed to make child support payments and who is determined to possess the financial resources to make the payments. Turner contended that a lawyer might have assisted him in convincing the judge that he lacked the resources to pay child support.

The Court noted that the Sixth Amendment applies only to criminal proceedings and determined that indigent defendants could be adequately protected by “procedural safeguards” to determine the defendant’s ability to pay child support. In particular, the Due Process Clause “does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel” (Turner v. Rogers, 564 U.S. 431 [2011]).

You can find Turner v. Rogers on the Student Study Site, edge.sagepub.com/lippmancp4e.

DETERMINING INDIGENCY

The U.S. Supreme Court has not defined the standard for determining whether an individual is an indigent who is entitled to be represented by an appointed counsel in a criminal prosecution. Georgia defines an indigent as an individual “who is arrested or charged with a crime punishable by imprisonment who lacks sufficient income or other resources to employ a qualified lawyer to defend him.
or her without hardship on the individual or his or her dependents.” States have different standards for indigency, and in many cases, the standard is set forth in a state legislative statute. The standard followed in Washington State, which is outlined below, is typical of the types of considerations that are employed for determining indigency (Wash. Rev. Code § 10.101.010 (1)).

- **Public assistance.** Receiving one of various types of public assistance, for example, Temporary Assistance for Needy Families, poverty-related veteran’s benefits, food stamps, refugee resettlement benefits, Medicaid, or supplemental security income; or
- **Income.** Receiving an annual income, after taxes, of 125 percent or less of the current federally established poverty level; or
- **Available funds.** Inability to pay the anticipated cost of a lawyer for the case before the court as a result of insufficient available funds.

Individuals who do not meet these standards may apply to the court to be recognized as an indigent on the grounds that they have significant health costs, child support, or other extraordinary financial circumstances.

The next section discusses whether an indigent defendant has the right to select a lawyer or whether he or she must accept the defense attorney assigned to the case.

### THE RIGHT TO SELECT AN APPOINTED COUNSEL

A defendant has no right to be represented by a specific appointed counsel, although a court may take the defendant’s preference into consideration. In *Morris v. Slappy*, the public defender assigned to represent Morris was hospitalized. The U.S. Supreme Court upheld the trial court’s refusal to grant Morris a continuance and decision to assign a new lawyer to represent Morris. The Court reasoned that there is no right to a “meaningful attorney–client relationship” and explained that a court cannot guarantee that an attorney and his or her client share a close working relationship or that the defendant has trust and confidence in his or her assigned attorney (*Morris v. Slappy*, 461 U.S. 1, 13–14 [1983]).

A nonindigent defendant possesses the Sixth Amendment right to be represented by the lawyer of his or her choice. A defendant, however, does not have the right to be represented by an individual who is not a member of the bar, by a lawyer who has a conflict of interest, or by a lawyer whom he or she cannot afford to hire. The U.S. Supreme Court has held that a trial judge’s wrongful rejection of a defendant’s “first choice” of an attorney results in an automatic reversal of a defendant’s conviction (*United States v. Gonzalez-Lopez*, 548 U.S. 140 [2006]).

In *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617 (1989), a law firm sued the United States government to recover legal fees that were owed to the firm from Charles Reckmeier, who pled guilty to running an illegal drug operation. The money had been seized under a federal statute providing that a person convicted of certain drug violations forfeits all property “consisting or derived from” the proceeds of the offense. The Supreme Court held that there is a “strong governmental interest in obtaining full recovery” of forfeitable assets, an “interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay their defense.” The government interest in seizing the proceeds of criminal offenses allows the return of property in full to those individuals wrongfully deprived or defrauded and also was intended to weaken the power of members of organized crime to use illicitly obtained funds to mount a criminal defense (*Caplin & Drysdale Chartered v. United States*, 491 U.S. 617 [1989]).

In 2017, in *Luis v. United States*, Luis was indicted by a federal grand jury and charged with paying kickbacks, conspiring to commit fraud, and engaging in other crimes related to health care. The government claimed that Sila Luis had fraudulently obtained nearly $4 million, almost all of which she had already spent. The prosecution sought to preserve the $2 million remaining in Luis’s possession for payment of restitution and for other criminal penalties. The government obtained a pretrial order prohibiting Luis from dissipating her untainted assets, which were not traceable to her alleged criminal activity. A federal statute provides that a court may freeze before trial certain assets belonging to a criminal defendant accused of violations of federal health care or banking laws. Assets that may be frozen include property obtained as a result of the crime, property “traceable” to the crime, and other property of equivalent value. The Supreme Court held that the pretrial restraint of legitimate untainted assets required by a defendant to retain counsel of his or her choice violates the Sixth Amendment. The Court explained that the government cannot deny Luis her fundamental Sixth Amendment right to be represented by a qualified attorney of her choice whom she can afford. The government
would undermine that right by taking from Luis the ability to use funds she needs to pay her attorney of choice. The Court stressed that the untainted money belongs to the defendant and differs from a “robber’s loot, a drug seller’s cocaine, a burglar’s tools” or other property associated with the planning, implementing, or committing of a crime (Luis v. United States, 578 U.S. ___, 36 S. Ct. 1083 [2016]).

In the next section, we will see that both indigent and nonindigent defendants have the right to effective legal representation.

Criminal Procedure in the News

In February 2013, Jonathan Lippman, the chief judge of New York State, criticized the system of money bail that “strips our justice system of its credibility and distorts its operation.” Despite his efforts, Judge Lippman was unsuccessful in his work to implement bail reform in New York State.

About 45,000 defendants a year are detained on bail in New York City’s ten jails. In 2013, half of the inmates in these jails were being detained because they were unable to meet a bail amount of $2,500 or less. Most of these individuals had been arrested for misdemeanors. Nationally, as many as 500,000 individuals, on any given day, are held in local jails because of their inability to pay bail, most of them awaiting trial.

At the time of Judge Lippman’s speech, Kalief Browder, age sixteen, was in custody awaiting trial on a grand larceny felony for, allegedly together with a friend, assaulting and robbing an individual of a backpack containing money and valuables. Because Browder was on probation and on “youthful offender” status for joyriding in a delivery truck that crashed into a parked car, the judge set bail at $3,000. Browder’s mother had been unable to provide the required amount to post bail, and Browder was detained at Rikers Island jail.

Browder insisted on his innocence to his court-appointed lawyer Brendan O’Meara. In June 2012, Browder refused the prosecutor’s offer to release him based on time served in jail and Browder was detained at Rikers Island jail.

Rikers Island, at the time of Browder’s incarceration, housed roughly 600 males between the ages of 16 and 18. A report by the U.S. Attorney for the Southern District of New York described the juvenile wing of the prison as a place with a “deep-seated culture of violence.” Roughly 27 percent of adolescent inmates were held for twenty-three hours per day in twelve-foot-by-seven-foot solitary confinement cells. Browder spent more than 1,000 days in jail at Rikers Island, 800 of which were spent in solitary confinement. The prison complex now is scheduled to be closed.

Surveillance videos show Browder being beaten by guards and terrorized by inmate gangs, and he attempted to commit suicide on at least two occasions.

The criminal court in the Bronx, New York, is chronically overcrowded. In 2010, Browder’s case was one of 5,694 felonies that the Bronx District Attorney’s Office had on its docket.

New York’s speedy trial law requires that all felonies must be ready for trial within six months of arraignment or the charges are to be dropped. The prosecutor in Browder’s case was able to remain within the requirements of the law by asking the trial court for various postponements, each of which pushed back the trial for a number of weeks.

In March 2013, Judge Patricia M. DiMango was transferred from Brooklyn to the Bronx to clear up the backlog of cases. At the time, there were 952 cases in the Bronx, including Browder’s, that were more than two years old. Some were as old as five years. DiMango managed to clear the docket of a thousand cases over the next year. On May 29, 2013, Browder appeared in court for the thirty-first time. Judge DiMango dismissed his case when the prosecutor announced that the victim had returned to Mexico and that the prosecutor was unable to proceed to trial.

The next day, Browder walked out of jail. He had missed two years of high school and had entered jail as a teenager and left after turning twenty years of age. His friends at this point in their lives had been admitted to college or had managed to obtain jobs and earn money.

Attorney Paul V. Prestia, on hearing Browder’s story, filed a civil rights suit on behalf of Browder against New York City, the Bronx District Attorney, and the Department of Correction. The legal action alleged that the prosecutor falsely represented to the court that they were ready for trial and sought lengthy delays in order to compel Browder into entering a guilty plea. Prestia alleged that the prosecutor had known for some time that the complaining witness was unavailable.

Browder initially found it difficult to adjust to life outside of the penitentiary. He virtually recreated the conditions of solitary confinement by isolating himself in his bedroom and left after turning twenty years of age. His friends at this point in their lives had been admitted to college or had managed to obtain jobs and earn money.

Browder came to symbolize what was perceived to be wrong with the criminal justice system. In December 2014, Mayor Bill de Blasio abolished solitary confinement for sixteen- to seventeen-year-olds.

(Continued)
Groups like Bronx Freedom Fund, the Chicago Community Bail Fund, and Mamma’s Bailout Day raise money to assist individuals who cannot afford bail. More than a dozen constitutional challenges have been brought around the country challenging monetary bail by the nonprofit group Civil Rights Corps (CRC). In *O’Donnell v. Harris County*, Civil ACT-No. 4-16-1414 (2017), Judge Lee Rosenthal, in a historic ruling largely upheld by the Fifth Circuit Court of Appeals, found that Harris County, Texas, judges, in setting bail for misdemeanants, followed a predetermined bail schedule with almost no evaluation of individuals’ ability to pay in violation of the equal protection of the law and due process. This “instrument of oppression” directly impacted indigent defendants unable to obtain bail, a high percentage of whom pled guilty rather than remain in jail awaiting trial. The named plaintiffs included Maranda O’Donnell, a twenty-two-year-old single mother who was living on a friend’s couch when she was arrested for driving with an invalid license and spent two days in jail because she could not make $2,500 in bail. The Fifth Circuit Court of Appeals compared two hypothetical misdemeanor defendants who are identical in every respect other than that one defendant is wealthy and the other defendant is indigent. “One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all these, simply because he has less money than his wealth counterpart” (*O’Donnell v. Harris County*, __F.3d__[5th Cir. 2018]).

Scott M. Stringer, New York City’s chief financial officer, in a January 2018 report found that the bail system resulted in $28 million in lost wages by individuals jailed as a result of a failure to post bail and between $16 million and $27 million in nonrefundable fees paid to bail bond companies. Should the cash bail system be reformed or abolished? Why do most jurisdictions continue to use cash bail?

### The Right to Effectual Legal Representation

The adversary process in a criminal trial involves a contest between zealous advocates: a prosecutor who represents the interests of the government and a defense attorney who represents the defendant. As noted by the U.S. Supreme Court, a defense attorney possesses the “overarching duty to advocate the defendant’s cause” as well as the duty to “bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” The assumption is that this process will result in a clear and comprehensive presentation of the facts and allow the jury to make an informed determination of the defendant’s guilt or innocence (*Strickland v. Washington*, 466 U.S. 668 [1984]).

The Supreme Court has recognized that the adversary process functions effectively when both the defense and the prosecution are represented by competent and skilled lawyers. The Court accordingly held in *Strickland v. Washington* that the Sixth Amendment guarantees an indigent as well as a nonindigent defendant representation by an “effective counsel.” The right to the effective assistance of a lawyer is crucial to a defendant receiving a fair trial; a lawyer who is “ineffective” deprives a defendant of the competent representation expected of a lawyer under the Sixth Amendment. The right to an “effective counsel” applies at the “guilt or innocence” phase of trial as well as at sentencing.
and at a defendant's first appeal of his or her conviction. The U.S. Supreme Court has held that there is a two-pronged test for an **ineffective assistance of counsel**.

**Deficient Performance.** The defendant is required to identify specific aspects of the lawyer's performance that fall below the range of reasonably effective competence expected of an attorney in a criminal case. In making this determination, judges look at the "totality of the circumstances" that confronted the lawyer at the time, and there is a presumption that the lawyer acted in an effective fashion. This means that an appellate court examines the entire situation that confronted an attorney and requires that the lawyer made a reasonable decision rather than the best or most intelligent decision.

**Prejudice.** Absent the lawyer's error, the question is whether there is a "reasonable probability that the result would have been different." A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

In *Strickland*, Washington pled guilty to three murders, torture, kidnapping, and theft. Washington's attorney concluded that it would be difficult to overcome his client's confession and to avoid the death penalty and decided that the best course was to argue that the defendant's sense of remorse and acceptance of responsibility justified sparing him from the death penalty. The judge in reviewing the record found several aggravating circumstances that outweighed these mitigating factors and imposed the death penalty. Washington contended that his attorney was ineffective in six different respects and, in particular, that he did not seek out character witnesses or request a psychiatric examination to demonstrate that the defendant was a nonviolent individual who was devoted to his family. The U.S. Supreme Court held that the lawyer's decision was "well within the range of professionally reasonable judgments," and given the overwhelming aggravating factors that there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed (699–700).

Several of the Supreme Court's important ineffective counsel decisions are outlined below.

**Lack of Knowledge of the Law.** A lawyer is considered ineffective whose ignorance of the law affected the outcome of the trial. For example, the defense attorney in a rape prosecution was unaware that he was required to file a motion for pretrial discovery to determine the evidence that the prosecution planned to introduce at trial, and as a result, he failed to file a pretrial motion to suppress bedsheets, hairs, and fibers that had been seized by the government. The evidence was admitted at trial, and the defendant was convicted. The lawyer incorrectly believed that the government was obligated to inform him that the sheets had been seized; he claimed that he had been told that the victim was reluctant to testify and that the case would not go forward. The U.S. Supreme Court held that the lawyer displayed a "shocking ignorance of the law" that fell below professional norms (Kimmelman v. Morrison, 477 U.S. 365 [1986]). In *Glover v. United States*, the Supreme Court held that a defense attorney's failure to object to the judge's error in calculating the defendant's sentence that resulted in an increase in the length of the sentence of at least six months constituted ineffective assistance of counsel (*Glover v. United States*, 531 U.S. 198 [2001]).

In *Hinton v. Alabama*, Anthony Ray Hinton was convicted and sentenced to death for two murders. The prosecutor, in part, relied on two expert witnesses who linked the six bullets uncovered at the crime scene to Hinton's revolver. Hinton's attorney was under the mistaken belief that the judge was correct that the statutory maximum allotted to the defense to hire an expert witness to rebut the prosecution's "firearms and toolmarks" experts was $1,000. In fact, a statute adopted by the Alabama legislature a year before Hinton's arrest provided for reimbursement of expenses "reasonably incurred" by the defense. The attorney in postconviction testimony stated that as a result of what he believed to be the limitation on available funding, he was unable to obtain the expert "he thought he needed and did not consider [the expert's] testimony to be effective." The U.S. Supreme Court held that an "attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance..." On April 2, 2015, Anthony Ray Hinton, after having spent thirty years on death row, was exonerated and released from death row (*Hinton v. Alabama*, 571 U.S. ___, 134 S. Ct. 1081 [2014]).

**Duty to Investigate.** The U.S. Supreme Court requires lawyers in death penalty cases to conduct an investigation into possible mitigating circumstances. The lawyer is not required to continue to carry on an investigation where it does not appear that his or her investigation will lead to useful information. In *Wiggins v. Smith*, Wiggins was convicted of first-degree murder. The public defenders argued at
the capital punishment hearing that Wiggins was not a direct participant in the homicide and should not be sentenced to death. The Supreme Court noted that the defense lawyers had information that Wiggins's mother was an alcoholic who on at least one occasion had left her children without food and that he had spent time in foster care and had been severely abused. The Supreme Court found that the public defenders had failed to pursue this mitigating evidence and that a “reasonable attorney would have realized that pursuing the leads in these records was necessary in making an informed choice among possible defenses” (Wiggins v. Smith, 539 U.S. 510 [2003]).

In 2005, in Porter v. McCollum, the Supreme Court held that the public defenders’ conduct fell below the level of reasonable performance when they failed to examine a file that included mitigating evidence regarding Porter’s childhood and, instead, relied on interviews with Rompilla’s family and health professionals that indicated that there were no mitigating factors that could have been presented at the death penalty sentencing stage (Rompilla v. Beard, 545 U.S. 374 [2005]). In Burger v. Kemp, the Supreme Court held that an attorney acted reasonably in interviewing all the witnesses brought to his attention before deciding to terminate the pretrial investigation. The Court noted that the lawyer had discovered “little that was helpful and much that was harmful,” and his decision “not to mount an all-out investigation was supported by reasonable professional judgment” (Burger v. Kemp, 483 U.S. 776 [1987]).

In Porter v. McCollum, the Supreme Court held that a defense attorney had provided ineffective assistance of counsel at the death-penalty sentencing phase of the trial. The attorney had never handled a penalty-phase proceeding and, in preparing for the hearing, only met with George Porter on one occasion. The lawyer did not obtain any of Porter’s school, medical, or military records or interview members of Porter’s family and did not pursue the defendant’s court-ordered competence investigation files. These files included information on Porter’s childhood abuse, long-term drug abuse, impaired mental health and mental capacity, and heroic combat and wounding during the Korean War. The jury instead heard none of this information that might “well have influenced the jury’s appraisal of [Porter’s] culpability” (Porter v. McCollum, 558 U.S. 30 [2009]).

In Bobby v. Van Hook, the Supreme Court held that “there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distracting from more important duties. . . . [G]iven all the evidence they unearthed from those closest to Van Hook’s upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents. This is not a case in which the defendant’s attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained” (Bobby v. Van Hook, 558 U.S. 4 [2009]).

In Maryland v. Kulbicki, James Kulbicki was convicted of killing his mistress. At Kulbicki’s 1995 trial, a FBI expert on comparative bullet lead analysis (CBLA), Earnest Peele, testified that the molten lead of a bullet fragment found in Kulbicki’s truck matched the composition of lead in a bullet fragment removed from the victim’s brain. A similarity of the sort one would expect if examining two pieces of the same bullet. He also testified that the bullet taken from Kulbicki’s gun was not an “exact” match to the bullet fragments but was similar enough that the two bullets likely came from the same package.

Kulbicki, contended, in a claim of ineffective assistance of counsel filed in 2006, that his defense lawyer was ineffective for failing to uncover a report coauthored by Agent Peele in 1991 that “presaged the currently recognized flaws in CBLA evidence.” The passage asserted that it might have been a “mere coincidence” that the composition of lead in some bullets was the same as that of lead in other bullets packaged many months later in a separate box. In other words, bullets with the same lead content might have been packaged in different batches of bullets and might not necessarily have been packaged together. In 2015, the Supreme Court held that Kulbicki’s defense lawyer would have had to expend incredible effort in 1995, before the worldwide web, to locate the libraries in which the report was housed. Even if they had found it the lawyers would have had to locate the single section that questioned CBLA among the many findings in a lengthy report endorsing CBLA. CBLA was widely accepted and widely admitted into evidence until 2003. The Court stated that it had adopted the rule of contemporary assessment of counsel’s conduct. The reasonableness of counsel’s challenged actions is to be viewed at the time of a lawyer’s representation. That is “especially the case here, since there is no reason to believe that a diligent search would even have discovered the supposedly crucial report.” The Court of Appeals in finding Kulbicki’s defense lawyer ineffective “demanded something close to ‘perfect advocacy’—far more than the ‘reasonable competence’ the right to counsel guarantees” (Maryland v. Kulbicki, 577 U.S. ___, 130 S. Ct. 2 [2015]).

Perjury. A lawyer is not required to break legal rules to assist his or her client. In Nix v. Whiteside, the lawyer told Whiteside that if Whiteside committed perjury, the lawyer was obligated to report this misconduct to the judge, highlight the defendant’s perjury at trial, and withdraw from the case.
Whiteside decided to testify truthfully and was convicted. The U.S. Supreme Court held that the lawyer had acted properly in accordance with codes of professional conduct (Nix v. Whiteside, 475 U.S. 157 [1986]).

Closing Argument. In Yarborough v. Gentry, the U.S. Supreme Court held that a lawyer's closing argument is subject to review for ineffective assistance of counsel. The defense counsel in Yarborough offered a “relatively brief” nine-paragraph closing argument that failed to mention various aspects of a stabbing that indicated that it might have been accidental. The Supreme Court held that there are various approaches to a closing argument, that “which issues to sharpen and how best to clarify them are questions with many reasonable answers,” and that when a lawyer “focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect” (Yarborough v. Gentry, 540 U.S. 1 [2003]).

Consultation With Defendant. In Florida v. Nixon, public defender Michael Corin unsuccessfully attempted to persuade the prosecutor to drop the capital punishment charge against Nixon in exchange for Nixon's guilty plea. Corin decided that based on the overwhelming evidence of Nixon's guilt, the best course was for Nixon to “concede guilt, thereby preserving . . . credibility in urging leniency during the penalty stage of the proceedings.” Nixon was unresponsive and “never verbally approved or protested” Corin's proposed strategy. The jury recommended the death penalty despite the fact that Corin presented eight witnesses who testified that Nixon suffered from a personality disorder and brain damage. The U.S. Supreme Court held that Corin fulfilled his duty to consult with Nixon and to explain the costs and benefits of the proposed trial strategy. The fact that Nixon remained “unresponsive” did not make Corin's proposed course of action “unreasonable.” Death penalty cases present unique challenges, because the defendant's life is at stake, and a lawyer may reasonably decide to focus on the penalty stage in an effort to spare his or her client's life. The question is whether the lawyer's strategy satisfied the requirements of the Strickland test (Florida v. Nixon, 543 U.S. 175 [2004]).

Strategy. In Harrison v. Richter, the defense attorney, rather than presenting expert witnesses, cross-examined the prosecution's experts. The Supreme Court noted that the defense attorney had grounds to believe that any experts that he presented would contradict the defendant's version of the shooting. The Court noted that there are “countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . Here it would be well within the bounds of [reason for the] defense counsel . . . [to] follow a strategy that did not require the use of experts regarding the pool of blood in the doorway to Johnson's bedroom” (Harrington v. Richter, 562 U.S. 86 [2011]).

The Supreme Court generally has recognized that defense attorneys have significant flexibility in adopting a sentencing strategy. In Wong v. Belmontes, Belmontes was convicted of murder and sentenced to death. There was evidence that linked Belmontes to another homicide. The defense attorney called nine witnesses to testify to Belmontes's difficult and deprived childhood; and he had to carefully question the witnesses to prevent the prosecutor from being able to ask about the prior murder on cross-examination. “A heavy-handed case to portray Belmontes in a positive light, with or without experts, would have invited the strongest possible evidence in rebuttal—the evidence that Belmontes was responsible for not one but two murders.” This was the “most powerful imaginable aggravating evidence,” and the “notion that the result could have been different if only [the defense attorney] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful” (Wong v. Belmontes, 558 U.S. 15 [2009]).

In Cullen v. Pinholster, the Court observed that the defense lawyers had an “unsympathetic client” who boasted of his prowess as a burglar, who used guns rather than knives during robberies, and who described himself as a white supremacist who carved swastikas into people's property. The Court noted that under the circumstances, a “family-sympathy” mitigation strategy at sentencing was a reasonable approach that was consistent with the approach of the legal profession in California. “[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's family is a better idea because the defendant himself is simply unsympathetic” (Cullen v. Pinholster, 563 U.S. 170 [2011]).

Plea Bargain. In Premo v. Moore, the defense attorney was held to have acted reasonably in advising his client to plead no contest to a felony murder charge in exchange for the minimum sentence of three hundred months. The Supreme Court held that the defense attorney reasonably concluded that a motion to suppress would have been futile. The lawyer also reasonably believed that the prosecutor was developing a strong case against the accused and that delaying a plea bargain risked that a favorable bargain would be unavailable. The Court concluded that the defendant was not
prejudiced by entering into the plea bargain because it was reasonable to conclude that he would have pled guilty even if the confession had been excluded from evidence. Moore's prospects at trial were uncertain. "Even now, he does not deny any involvement in the kidnapping and killing. In these circumstances, and with a potential capital charge lurking, Moore's counsel made a reasonable choice to opt for a quick plea bargain" (*Premo v. Moore*, 562 U.S. 115 [2011]).

**Immigration.** Jose Padilla, a native of Honduras, had been a lawful permanent resident of the United States for more than forty years and had served in Vietnam. Padilla's attorney did not inform him that he faced deportation after pleading guilty to the transportation of a large amount of marijuana. He testified that his lawyer told him that he "did not have to worry about immigration status since he had been in the country so long." Padilla relied on his counsel's advice and pled guilty to the drug charges.

Conviction of the narcotics offense resulted in his deportation being "virtually mandatory." The immigration statute at the time that Padilla pled guilty provided that "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ... other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

The Supreme Court held that a lawyer must advise a client regarding the risk of deportation. "The severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation" (*Padilla v. Kentucky*, 559 U.S. 356 [2010]).

Jae Lee was indicted on one count of possessing ecstacy with intent to distribute. Lee had moved to the United States from South Korea at age thirteen and had lived in the United States for thirty-five years and operated a successful restaurant. He was not a citizen, living instead as a lawful permanent resident, and feared that a criminal conviction might affect his immigration status. Lee's attorney assured him there was nothing to worry about—the government would not deport him if he pled guilty. Lee had no defense to the narcotics charge and decided to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee's attorney provided him incorrect advice. The conviction meant that Lee was subject to mandatory deportation from this country. Lee contended that his goal was to avoid deportation and that he would have "gambled" on an acquittal at trial despite the "smallest chance of success" even if it meant the likelihood of a longer sentence. He desperately wanted to avoid deportation, and it was inconsequential whether he would have been deported following a shorter prison sentence (with a plea bargain) or a longer prison sentence (following a trial).

Justice Roberts, in his majority decision, noted that typically where a defendant's prospects for success at trial are "unlikely," the defendant will rarely be able to demonstrate prejudice from accepting a guilty plea that offers a better resolution than likely would be available following a conviction at trial. Roberts, however, concluded that "[i]n the unusual circumstances of this case," that Lee had "adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation." There is "substantial and incontrovertible contemporaneous evidence that there was a reasonable probability that, but for his counsel's errors, that Lee would not have pleaded guilty and would have insisted on going to trial." Both Lee and his attorney testified that avoiding deportation was Lee's "sole focus" in deciding whether to plead guilty or to proceed to trial. (*Lee v. United States*, 582 U.S. ___ [2017]).

**Presumption of Prejudice.** On the same day that the Supreme Court issued a judgment in *Strickland v. Washington*, the Court handed down a decision in *United States v. Cronic*. The Supreme Court held that a defendant convicted of a check-kiting scheme was not denied effective assistance of counsel when the young real estate lawyer who was assigned to represent him was given only twenty-five days to prepare for a trial and to review thousands of documents. The importance of *Cronic* is that the Court indicated that there are cases in which a lawyer's conduct so dramatically falls below the expected standard that prejudice will be automatically presumed and the defendant's conviction reversed. This arises where the defense lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing" and makes no meaningful effort to represent the defendant at trial. The Court also observed that there are some instances, such as *Powell v. Alabama*, in which the "likelihood that any lawyer... could provide effective assistance is so small" that there is a "presumption of prejudice" and that the court is not required to examine the "actual conduct of the trial" (*United States v. Cronic*, 466 U.S. 648 [1984]).

An example of a presumption of prejudice is *Holloway v. Arkansas*. In *Holloway*, the Supreme Court relied on this "automatic reversal" rule to overturn the conviction of three individuals who were represented by the same appointed attorney. The defendants' lawyer claimed that he had a conflict
of interest and unsuccessfully requested the trial court to appoint additional lawyers. The defense attorney pointed out that by claiming that one of the defendants was innocent, he would be placing the burden of guilt on one of the other two defendants whom he was representing. The Supreme Court held that the trial court was required either to appoint separate counsel or to satisfy itself that the conflict would not interfere with the defense (Holloway v. Arkansas, 435 U.S. 475 [1978]). A court may refuse to permit a defendant to waive a conflict of interest that it views as preventing a defendant from receiving adequate representation and may require the defendant to be represented by a different attorney at trial (Wheat v. United States, 486 U.S. 153 [1988]).

Critics claim that the test for ineffectiveness of counsel is too demanding and that defendants have little chance to succeed in challenging their conviction. The Center for Capital Litigation in Columbia, South Carolina, has compiled data that indicate that courts have held that lawyers acted in a constitutionally competent fashion in approximately 97 percent of the cases in which their conduct was challenged.

In the next case in the text, Buck v. Davis, the Court found the defense attorney's strategy at sentencing denied defendant Duane Buck effective assistance of counsel. Duane Buck was convicted in Texas of capital murder. The jury, in the sentencing phase of the trial, found that Buck was likely to commit acts of violence in the future, and he was sentenced to death. The defense attorney called Dr. Walter Quijano, a psychologist, to testify in the sentencing hearing as to whether Buck likely would engage in violent conduct in the future. Quijano testified that Buck probably would not engage in violence in prison in the future because his acts of violence in the past had been committed against women with whom he was romantically involved, and his prison record indicated that future violence was "unlikely." However, he also stated that one of seven factors in assessing an individual's propensity for violence was race and that Buck was statistically more likely to act in a violent fashion because he was African American. Dr. Quijano affirmed this conclusion on the prosecutor's cross-examination. Consider whether you agree with Chief Justice John Roberts that Duane Buck was denied effective Sixth Amendment representation at the sentenced stage of his death penalty trial as a result of the defense lawyer's decision to call Dr. Quijano as a witness.

---

**Was Buck denied effective assistance of counsel?**

**BUCK V. DAVIS,**

480 U.S. ___, S. CT. 759 (2017), ROBERTS, C.J.

**Issue**

A Texas jury convicted petitioner Duane Buck of capital murder. Under state law, the jury could impose a death sentence only if it found that Buck was likely to commit acts of violence in the future. Buck's attorney called a psychologist to offer his opinion on that issue. The psychologist testified that Buck probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person's propensity for violence was his race and that Buck was statistically more likely to act violently because he is black. The jury sentenced Buck to death. Buck contends that his attorney's introduction of this evidence violated his Sixth Amendment right to the effective assistance of counsel.

**Facts**

On the morning of July 30, 1995, Duane Buck arrived at the home of his former girlfriend, Debra Gardner. He was carrying a rifle and a shotgun. Buck entered the home, shot Phyllis Taylor, his stepsister, and then shot Gardner's friend Kenneth Butler. Gardner fled the house, and Buck followed. So did Gardner's young children. While Gardner's son and daughter begged for their mother's life, Buck shot Gardner in the chest. Gardner and Butler died of their wounds. Taylor survived.

Police officers arrived soon after the shooting and placed Buck under arrest. An officer would later testify that Buck was laughing at the scene. He remained "happy" and "upbeat" as he was driven to the police station, "[s]miling and laughing" in the back of the patrol car.

Buck was tried for capital murder, and the jury convicted. During the penalty phase of the trial, the jury was charged with deciding two issues. The first was what the parties term the “future dangerousness” question. At the time of Buck's trial, a Texas jury could impose the death penalty only if it found—unanimously and beyond a reasonable doubt—"a probability that the defendant would commit criminal
acts of violence that would constitute a continuing threat to society.” The second issue, to be reached only if the jury found Buck likely to be a future danger, was whether mitigating circumstances nevertheless warranted a sentence of life imprisonment instead of death.

The parties focused principally on the first question. The State called witnesses who emphasized the brutality of Buck’s crime and its evident lack of remorse in its aftermath. The State also called another former girlfriend, Vivian Jackson. She testified that, during their relationship, Buck had repeatedly hit her and had twice pointed a gun at her. Finally, the State introduced evidence of Buck’s criminal history, including convictions for delivery of cocaine and unlawfully carrying a weapon.

Defense counsel answered with a series of lay witnesses, including Buck’s father and stepmother, who testified that they had never known him to be violent. Counsel also called two psychologists to testify as experts. The first, Dr. Patrick Lawrence, observed that Buck had previously served time in prison and had been held in minimum custody. From this he concluded that Buck “did not present any problems in the prison setting.” Dr. Lawrence further testified that murders within the Texas penal system tend to be gang related (there was no evidence Buck had ever been a member of a gang) and that Buck’s offense had been a “crime of passion” occurring within the context of a romantic relationship. Based on these considerations, Dr. Lawrence that Buck was unlikely to be a danger if he were sentenced to life in prison.

Buck’s second expert, Dr. Walter Quijano, had been appointed by the presiding judge to conduct a psychological evaluation. Dr. Quijano had met with Buck in prison prior to trial and shared a report of his findings with defense counsel. Like Dr. Lawrence, Dr. Quijano thought it significant that Buck’s prior acts of violence had arisen from romantic relationships with women; Buck, of course, would not form any such relationships while incarcerated. Dr. Quijano likewise considered Buck’s behavioral record in prison a good indicator that future violence was unlikely. But there was more to the report. In determining whether Buck was likely to pose a danger in the future, Dr. Quijano considered seven “statistical factors.” The fourth factor was “race.” His report read, in relevant part: “4. Race. Black: Increased probability. There is an over-representation of Blacks among the violent offenders.”

Despite knowing Dr. Quijano’s view that Buck’s race was competent evidence of an increased probability of future violence, defense counsel called Dr. Quijano to the stand and asked him to discuss the “statistical factors” he had “looked at in regard to this case.” Dr. Quijano responded that certain factors were “know[n] to predict future dangerousness” and, consistent with his report, identified race as one of them. “It’s a sad commentary,” he testified, “that minorities, Hispanics and black people, are over represented in the Criminal Justice System.” Through further questioning, counsel elicited testimony concerning factors Dr. Quijano thought favorable to Buck, as well as his ultimate opinion that Buck was unlikely to pose a danger in the future. At the close of Dr. Quijano’s testimony, his report was admitted into evidence.

After opening cross-examination with a series of general questions, the prosecutor likewise turned to the report. She asked first about the statistical factors of past crimes and age, then questioned Dr. Quijano about the roles of sex and race: “You have determined that the sex factor, that a male is more violent than a female because that’s just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?” Dr. Quijano replied, “Yes.”

During closing arguments, defense counsel emphasized that Buck had proved to be “controllable in the prison population,” and that his crime was one of “jealousy, . . . passion and emotion” unlikely to be repeated in jail. The State stressed the crime’s brutal nature and Buck’s lack of remorse, along with the inability of Buck’s own experts to guarantee that he would not act violently in the future—a point it supported by reference to Dr. Quijano’s testimony (“You heard from Dr. Quijano, . . . who told you that . . . the probability did exist that [Buck] would be a continuing threat to society.”).

The jury deliberated over the course of two days. During that time it sent out four notes, one of which requested the “psychology reports” that had been admitted into evidence. These reports—including Dr. Quijano’s—were provided. The jury returned a sentence of death.

Buck’s conviction and sentence were affirmed on direct appeal. His case then entered a labyrinth of state and federal collateral review, where it has wandered for the better part of two decades.

Reasoning

We begin with the District Court’s determination that Buck’s constitutional claim failed on the merits. The Sixth Amendment right to counsel “is the right to the effective assistance of counsel.” A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel’s deficient performance caused him prejudice.

*Strickland*’s first prong sets a high bar. A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client’s case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the “wide range of professionally competent assistance.” It is only when the lawyer’s errors were “so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment” that *Strickland*’s first prong is satisfied.

504  CRIMINAL PROCEDURE
The District Court determined that, in this case, counsel’s performance fell outside the bounds of competent representation. We agree. Counsel knew that Dr. Quijano’s report reflected the view that Buck’s race disproportionately predisposed him to violent conduct; he also knew that the principal point of dispute during the trial’s penalty phase was whether Buck was likely to act violently in the future. Counsel nevertheless (1) called Dr. Quijano to the stand; (2) specifically elicited testimony about the connection between Buck’s race and the likelihood of future violence; and (3) put into evidence Dr. Quijano’s expert report that stated, in reference to factors bearing on future dangerousness, “Race. Black: Increased probability.”

Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano’s report said, in effect, that the color of Buck’s skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race. No competent defense attorney would introduce such evidence about his own client.

To satisfy Strickland, a litigant must also demonstrate prejudice—“a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Accordingly, the question before the District Court was whether Buck had demonstrated a reasonable probability that, without Dr. Quijano’s testimony on race, at least one juror would have harbored a reasonable doubt about whether Buck was likely to be violent in the future. The District Court concluded that Buck had not made such a showing. We disagree.

In arguing that the jury would have imposed a death sentence even if Dr. Quijano had not offered race-based testimony, the State primarily emphasizes the brutality of Buck’s crime and his lack of remorse. A jury may conclude that a crime’s vicious nature calls for a sentence of death. But it insists that this is not such a case, because Buck’s prior violent acts had occurred outside of prison, and within the context of romantic relationships with women. If the jury did not impose a death sentence, Buck would be sentenced to life in prison, and no such romantic relationship would be likely to arise. A jury could conclude that those changes would minimize the prospect of future dangerousness.

But one thing would never change: the color of Buck’s skin. Buck would always be black. And according to Dr. Quijano, that immutable characteristic carried with it an “[i]ncreased probability” of future violence. Here was hard statistical evidence— from an expert—to guide an otherwise speculative inquiry.

And it was potent evidence. Dr. Quijano’s testimony appealed to a powerful racial stereotype—that of black men as “violence prone.” In combination with the substance of the jury’s inquiry, this created something of a perfect storm. Dr. Quijano’s opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.

This effect was heightened due to the source of the testimony. Dr. Quijano took the stand as a medical expert bearing the court’s imprimatur. The jury learned at the outset of his testimony that he held a doctorate in clinical psychology, had conducted evaluations in some 70 capital murder cases, and had been appointed by the trial judge (at public expense) to evaluate Buck. Reasonable jurors might well have valued his opinion concerning the central question before them.

For these reasons, we cannot accept the District Court’s conclusion that “the introduction of any mention of race” during the penalty phase was “de minimis.” There were only two references to race in Dr. Quijano’s testimony—one during direct examination, the other on cross. But when a jury hears expert testimony that expressly makes a defendant’s race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.

Holding

The State acknowledges, as it must, that introducing “race or ethnicity as evidence of criminality” can in some cases prejudice a defendant. But it insists that this is not such a case, because Buck’s own counsel, not the prosecution, elicited the offending testimony. We are not convinced. In fact, the distinction could well cut the other way. A prosecutor is seeking a conviction.

(Continued)
(Continued)

      Petitioner ignored her pleas, placed the gun on her chest, and shot her. Petitioner does not claim that he was in a romantic relationship with either Ebnezer or Taylor.

      After shooting Taylor, petitioner cornered one of Gardner’s friends, Kenneth Butler, and shot him, as well. He then exited the house and chased Gardner into the middle of the street. She turned to him and pleaded, “Please don’t shoot me. Please don’t shoot me. Why are you doing this in front of my kids?” Her son, Devon, watched from the sidewalk. Her daughter, Shennel, begged petitioner to spare her mother and even attempted to restrain him. Petitioner pointed the gun at Gardner and said, “I’m going to shoot you. I’m going to shoot your ass.” He then did so. The flight path of the bullet suggests that Gardner was on her knees when petitioner shot her.

      Second, the evidence of petitioner’s lack of remorse, largely ignored by the majority, is startling. After shooting Gardner, petitioner walked back to his car and placed the firearms in the trunk. He then returned to taunt Gardner where she lay mortally wounded and bleeding in the street. He said, “It ain’t funny now. You ain’t laughing now.” Police arrived shortly thereafter and arrested him. In the patrol car, petitioner was “laughing and joking and taunting.” He continued to smile and laugh during the drive to the police station. When one of the officers informed petitioner that he did not find the situation humorous, petitioner replied that “[t]he bitch got what she deserved.” He remained happy and upbeat for the remainder of the drive, even commenting that he was going to heaven because God had already forgiven him.

      The majority suggests that the use of race in petitioner’s capital proceeding injured the public’s confidence in the integrity of our judicial system. This argument cannot be squared with the District Court’s finding that the challenged racial testimony was “de minimis.” It also ignores the fact that petitioner’s own counsel elicited the testimony. The majority obscures this point by citing cases concerning alleged racial discrimination by an agent of the state. Here, the injury to public confidence derives from the fact that the government itself is discriminating against the defendant. The same cannot be said, however, when defense counsel introduces harmful testimony or makes a bad strategic choice.

      In conjunction with its observations about race, the Court notes that the Texas attorney general, in response to similar testimony from Dr. Quijano in another case, issued a press release decrying the use of race in the justice system and subsequently waived all procedural obstacles to resentencing in several cases in which Dr. Quijano testified. But Texas had good reason for treating this case differently from the others. Of those cases, this is the only one where “it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense.”
Questions for Discussion

1. Why does Chief Justice Roberts conclude that Buck’s lawyer was ineffective in calling Dr. Quijano to testify?

2. Explain Justice Roberts’s assertion that there was a reasonable probability that Dr. Quijano’s testimony was prejudicial to Buck.

3. How does Justice Thomas respond to the argument that Dr. Quijano’s testimony was prejudicial to Buck?

4. In five cases, the State of Texas called Dr. Quijano to testify on behalf of the prosecution, and in each instance he testified that the defendants posed a risk of future dangerousness because they were either African American or Hispanic. The Texas Attorney General later stated that it was inappropriate to allow race to be a “factor” in the criminal justice system and consented to the defendants being resentenced. In Buck, Texas opposed resentencing on the grounds that the defense counsel rather than the prosecution had called Dr. Quijano to testify. Do you agree?

5. Apply the Strickland standard and explain whether you agree or disagree with the decision of the U.S. Supreme Court in Buck v. Davis.

YOU DECIDE 12.4

Defense counsel represented an African American defendant charged with the murder of a Caucasian female. During voir dire, the defense attorney told the prospective jurors that he was a Southern white male, that he did not like African Americans, and that he was ashamed of his prejudice. At the penalty phase, he urged the white jurors not to let race become a factor in their decision and to resist any prejudicial feelings that they had. The lawyer failed to call various witnesses and to cross-examine a key prosecution witness. Were the defense lawyer’s remarks a reasonable strategic approach to the trial? See State v. Davis, 872 So. 2d 250 (Fla. 2004).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmancp4e.

THE RIGHT TO SELF-REPRESENTATION

What if a defendant insists on representing himself or herself at trial? This is termed acting pro se (on his or her own). Recognition of a right to self-representation would seem at odds with the U.S. Supreme Court’s conclusion in Gideon that individuals who represent themselves are unable to present an effective defense to a criminal charge.

In 1975, in Faretta v. California, the Supreme Court held that the trial court had unlawfully refused to permit Anthony Faretta to represent himself in a prosecution for grand theft. Justice Stewart reviewed the history of self-representation in England and in the American colonies and states, and he concluded that the Sixth Amendment provides a “constitutionally protected right” to the accused to represent himself or herself. A refusal to permit a defendant to represent himself or herself will result in a reversal on appeal of the verdict in the trial court (Faretta v. California, 422 U.S. 806, 816–832 [1975]). This decision was based on several policy considerations:

- **Personal choice.** The right to make an individual choice as to how to conduct a defense is a fundamental constitutional principle.

- **Consequences.** The defendant “suffers the consequences if the defense fails.”

- **Respect for the law.** Compelling a defendant to accept a lawyer will lead the accused to question the fairness of the justice system and may result in the reluctance of the accused to cooperate with his or her attorney.

- **Strategy.** There may be instances in which self-representation benefits the accused by eliciting sympathy from the jury.

Justice Blackmun, in dissent, objected that the decision in Faretta formally recognized the constitutional right of an individual to “make a fool of himself” (852).
A judge is not obligated to warn defendants of the risks of representing themselves. The Supreme Court requires judges only to inform defendants of the charges against them, of their right to a lawyer, and of the possible punishment. To relinquish their right to appointed counsel, defendants must unequivocally waive their right to counsel and invoke the right to self-representation (Faretta v. Towar, 541 U.S. 77 [2004]). The decision in Faretta suggests that there are three limitations on self-representation.

- **Notice.** A defendant must inform the court in advance and not interfere with the schedule of the trial by making the request for self-representation at the last minute.
- **Competence.** Defendants must be competent to stand trial and to represent themselves and must knowingly and intelligently waive their right to an attorney. They are not required to be aware of the law or the rules of evidence (see Indiana v. Edwards, discussed below).
- **Disruptive.** Defendants who interfere with the conduct of the trial forfeit the right to self-representation.

In McKaskle v. Wiggins, the U.S. Supreme Court upheld the practice of appointing a “standby counsel” to assist a defendant with his or her defense. The “standby lawyer” may not interfere with the defendant’s decisions at trial or “overshadow the defendant” by actively participating in the trial. There is no constitutional right to a “hybrid representation” in which the defendant and the lawyer divide responsibilities at trial (McKaskle v. Wiggins, 465 U.S. 168 [1984]). There also is no right to self-representation on an appeal (Martinez v. Court of Appeal of California, 528 U.S. 152 [2000]).

Several Supreme Court justices in Martinez v. Court of Appeal of California expressed doubts about the wisdom of the decision in Faretta and suggested that recognition of the right of self-representation interferes with the smooth functioning of trials. The justices also expressed concern that defendants lacked the knowledge and expertise required to present an effective defense.

In 2008, in Indiana v. Edwards, the U.S. Supreme Court responded to this criticism of Faretta, holding that the right of self-representation “is not absolute.” Defendant Ahmad Edwards was charged with attempted murder, battery, and other crimes stemming from an attempt to steal a pair of shoes from a department store. Edwards suffered from schizophrenia, but because he had had a number of years of treatment, he was found competent to stand trial. (Competency requires that defendants have the capacity to understand the nature of the charges against them and that they have sufficient ability to consult with their lawyers.) The trial court ruled that even though Edwards had been found competent to stand trial, he lacked the mental capacity to represent himself, and the trial court appointed a lawyer to represent him. Edwards subsequently was convicted of murder and battery; he appealed based on the trial court’s refusal to permit him to represent himself at trial.

The U.S. Supreme Court affirmed the denial of Edwards’s request for self-representation, holding that the Constitution permits states to insist upon representation by counsel for those competent enough to stand trial, but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

The Supreme Court explained that by upholding the right of a trial court judge to deny a mentally challenged defendant the right of self-representation, the Court hoped to lessen the concerns of critics who claimed that Faretta resulted in unfairness to defendants who represented themselves (Indiana v. Edwards, 554 U.S. 164 [2008]).

In the most recent Supreme Court decision on pro se defense, Otis Lee Rodgers was charged with several firearms-related offenses. On three occasions prior to trial, he waived and subsequently invoked his right to an appointed attorney at trial. He ultimately represented himself pro se. Following his conviction, the trial court rejected Rodgers’s request that the court appoint an attorney to assist him to file a motion for a new trial.

The U.S. Supreme Court held that a California state court had not deviated from clearly established federal law in determining that the decision whether to provide legal assistance for a posttrial motion for a new trial to a pro se defendant should be based on the totality of circumstances. A California appellate court had affirmed the trial court judge and concluded that “the totality of the circumstances—and especially the shifting nature of [Rodgers’s] preferences, the unexplained nature of his motion, and his demonstrated capacity to handle the incidents of trial—supported the trial court’s decision” (Marshall v. Rodgers, 569 U.S. 58 [2013]).

The decision is a retreat from the approach adopted by most federal courts of appeals that requests for legal representation by pro se defendants should be granted in the absence of extraordinary circumstances, such as a strong likelihood that a defendant will dismiss the lawyer.
The prosecutor has been called one of the most powerful persons in the criminal justice system. He or she possesses broad discretion to charge an individual with a crime, as well as broad discretion to determine what crime is charged. Courts take the position that prosecutors' exercise of authority is ill suited for judicial review and adhere to a presumption of regularity. The presumption is that prosecutors honestly, fairly, and responsibly exercise their authority. Two constitutional limitations on prosecutorial discretion are discussed in the chapter:

**Selective Prosecution.** The Equal Protection Clause of the Fifth and Fourteenth Amendments prohibits prosecution of individuals because of their race, gender, or exercise of fundamental rights.

When an individual is arrested without an arrest warrant or formal indictment by a grand jury, the first step for the prosecutor is a determination that there is probable cause to detain the suspect. In *Gerstein v. Pugh*, the U.S. Supreme Court held that the Constitution requires a judicial determination of probable cause as a condition for an "extended restraint of liberty." This "nonadversarial" probable cause hearing must be held "promptly" following an arrest. In *County of Riverside v. McLaughlin*, the U.S. Supreme Court defined promptly and held that a forty-eight-hour period of delay is a presumptively reasonable period of time within which to hold the hearing.

The next step is the first appearance. The first appearance has four major purposes.

- **Criminal charges.** The defendant is informed of the precise charges against him or her.
- **Constitutional rights.** The defendant is informed of his or her rights.
- **Pretrial release.** A determination is made as to whether the defendant is to be released from custody prior to trial. The judge will fix the amount of bail or the conditions of the defendant’s pretrial release.
- **Attorney.** A lawyer is appointed for indigent defendants.

The U.S. Constitution provides for bail in the Eighth Amendment, which states that "excessive bail shall not be required." The bail provision has not been incorporated into the Due Process Clause of the Fourteenth Amendment. Most state constitutions, however, create a right to bail in all but capital cases. Despite the fundamental nature of individual access to bail, the Bail Clause has never been thought to accord a right to bail in all cases, but merely to provide that bail should not be excessive in those cases where it is proper to grant bail. . . . Thus, in criminal cases, bail is not compulsory where the punishment may be death.

A bail amount that is more than the amount required for a defendant to appear for trial is constitutionally excessive. In 1987, in *United States v. Salerno*, the U.S. Supreme Court affirmed the constitutionality of the preventive detention of individuals whose appearance at trial cannot be guaranteed and who pose a threat to other individuals or to the community.

An individual who is not released prior to trial typically is detained in a short-term correctional facility. In *Bell v. Wolfish*, the Supreme Court held that while detainees retain their constitutional rights in such facilities, they are subject to reasonable regulations adopted to ensure order and security in the institution. The Court cautioned that detainees have not been convicted of a crime and may not be subjected to "arbitrary or purposeless" conditions that constitute punishment.

An indigent defendant is entitled to legal representation. In 1963, in *Gideon v. Wainwright*, the U.S. Supreme Court held that the Fourteenth Amendment incorporates the Sixth Amendment right to counsel and held that indigent individuals charged with felonies in state courts are entitled to an appointed counsel. The Court has held that an individual has the right to representation by a lawyer when formal adversarial criminal proceedings are initiated against him or her. Following the initiation of formal criminal proceedings, the right to counsel attaches at a "critical stage" of the prosecution. A critical stage is considered any phase of the prosecution that might negatively impact the defendant’s ability to present a defense at trial and at which the presence of an attorney would safeguard the defendant.

Are defendants entitled to a lawyer in all criminal trials? In *Argersinger v. Hamlin*, the U.S. Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel." In *Scott v. Illinois*, the Supreme Court held that there is no right to counsel when a monetary fine is imposed.

The Supreme Court has not defined the standards for determining whether a defendant is an indigent who is entitled to the appointment of a lawyer in a criminal prosecution. States have varying standards for indigency, and in many states, the standard is defined in a state legislative statute.

A defendant has no right to be represented by a specific appointed counsel, although a court may take the defendant’s preference into consideration. A nonindigent defendant possesses the Sixth Amendment right to be represented by the lawyer of his or her choice. A defendant does not have the right to be represented by an individual who is not a member of the bar, who has a conflict of interest, or whom he or she cannot afford.

The Court held in *Strickland v. Washington* that the Sixth Amendment guarantees an indigent as well as a nonindigent defendant representation by "effective counsel." The U.S. Supreme Court has held that there is a two-pronged test for ineffective assistance of counsel.
1. **Deficient performance.** The defendant is required to identify specific aspects of the lawyer’s performance that fall below the range of reasonably effective competence demanded by an attorney in a criminal case.

2. **Prejudice.** If counsel had not made errors in the defense, is there a “reasonable probability that the result would have been different”? A “reasonable probability” is probability sufficient to undermine confidence in the outcome.

The Court has indicated that there are cases in which the lawyer’s conduct so dramatically falls below the expected standard that prejudice will be automatically presumed.

In 1975, in *Faretta v. California*, Justice Stewart reviewed the history of self-representation in England and in the American colonies and states, and he concluded that the Sixth Amendment provides a “constitutionally protected right” of defendants to represent themselves. Individuals who lack the requisite mental capacity do not possess a right of self-representation.

**CHAPTER REVIEW QUESTIONS**

1. Discuss the presumption of regularity regarding a prosecutor’s filing of criminal charges. Why is the exercise of prosecutorial discretion in bringing criminal charges considered to be ill suited for judicial review? What is the legal test for selective prosecutions and vindictive prosecutions?

2. What is the significance of *Gerstein v. Pugh* and of *County of Riverside v. McLaughlin*?

3. Outline the purpose of the first appearance.

4. Discuss the law and purpose of bail. When is the preventive detention of a defendant legally justified?

5. Outline the Supreme Court’s decisions leading to the judgment in *Gideon v. Wainwright*. What is the holding in *Gideon*?

6. An individual has the right to legal representation in all criminal prosecutions. What is the dividing line between the cases in which an indigent has the right to the appointment of a lawyer and the cases in which an indigent does not have the right to the appointment of a lawyer? How does this distinction affect a judge’s sentencing of a defendant?

7. Discuss the legal test for determining a significant stage of prosecution.

8. What factors are considered in determining indigency?

9. Does an individual have an absolute right to a lawyer of his or her choice?

10. Outline the legal test for effective representation of counsel.

11. What are the limitations on the right of self-representation?

**LEGAL TERMINOLOGY**

- bail 473
- Bail Clause 473
- complaint 469
- critical stages of the prosecution 491
- first appearance 469
- indigent 495
- ineffective assistance of counsel 499
- money bail 473
- preventive detention 474
- pro se 507
- probable cause hearing 469
- release on recognizance 474
- surety bond 473
- vindictive prosecution 467

**TEST YOUR KNOWLEDGE: ANSWERS**

1. False.

2. False.

3. False.

4. False.

5. False.

6. False.

7. False.