No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR PETITIONER

STUART BANNER
UCLA SCHOOL OF LAW
SUPREME COURT CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095

CHAD WRIGHT
KOAN MERCER
OFFICE OF THE APPELLATE DEFENDER
255 Fuller Street
P.O. Box 200147
Helena, MT 59620

FRED A. ROWLEY, JR.
Counsel of Record
DANIEL B. LEVIN
THANE M. REHN
CATHLEEN H. HARTGE
ERIC C. TUNG
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave.
Los Angeles, CA 90071
Fred.Rowley@mto.com
(213) 683-9100

QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TREATISES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

BRIEF FOR PETITIONER

Petitioner Brandon Betterman respectfully requests that this Court reverse the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a) is published at 342 P.3d 971. The relevant orders of the trial court are unpublished, but are available at Pet. App. 24a–37a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on February 10, 2015. Pet. App. 1a. On April 23, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 10, 2015. *See* 14A1084. The petition was filed on June 10, 2015, and granted on December 4, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

The right to a "speedy and public trial" secured by the Sixth Amendment is "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). This case requires the Court to decide whether the right applies to delays at sentencing, or whether that right "cease[s] to apply" once "the conviction becomes definitive." Pet. App. 15a. This Court has construed the Clause to require "an early and proper disposition of [criminal] charges," *United States v. Marion*, 404 U.S. 307, 313 (1971), applying its protections to bar undue delays throughout pretrial proceedings. This Court also has held that the parallel right to a "public trial" applies at sentencing and non-trial hearings. The reasoning of those precedents shows that the Speedy Trial Clause should apply to bar undue delays between a defendant's conviction and sentencing.

The Clause's text and history confirm that conclusion. From its earliest common law formulations, the speedy trial right has guaranteed "full and speedy justice," requiring the government to bring prosecutions to swift resolution and judgment. As this Court has recognized, the Framers of our Constitution preserved and carried forward that common law understanding in the Speedy Trial Clause. Given that theirs was an era in which the sentence was determined by the jury verdict and imposed immediately thereafter, the Framers' choice of the words "speedy and public trial" entailed and included speedy sentencing. And while indeterminate sentencing has made modern sentencing proceedings more important and complex, those innovations cannot narrow the scope of the

centuries-old speedy trial right. *See Blakely v. Washington*, 542 U.S. 296, 308–09 (2004).

The Montana Supreme Court's contrary holding misconstrues this Court's precedents and the historical sources, and fails to respect the Speedy Trial Clause's underlying concerns. With most criminal convictions now entered by guilty plea, sentencing delays present an equal, if not greater, risk of harming defendants as trial delays. Sentencing hearings often resemble minitrials, and may be the only stage of a prosecution where factual issues are disputed and resolved. Lost witnesses or dimmed memories may be as prejudicial to the defense at sentencing as at trial. *Cf. Barker v. Wingo*, 407 U.S. 514, 532 (1972). Criminal defendants often face a wide range of possible sentences, and a protracted delay may exacerbate their "anxiety and concern" over their fate, *ibid*. And if, like Petitioner, the defendant is detained pending sentencing, he may be denied "recreational or rehabilitative" programs critical to parole. *Ibid.*

This Court should reverse.

1. Petitioner Brandon Betterman was charged in Montana state court with bail jumping after failing to appear for sentencing on a domestic assault conviction. Pet. App. 2a; J.A. 11. Betterman missed his sentencing hearing, he later explained, because he did not have the money or means of transportation to travel the 200 miles from his home in Billings to the courthouse in Butte, Montana. *Ibid*. Betterman, a longtime alcoholic, panicked after missing his sentencing and lapsed into drinking. J.A. 11.

Betterman turned himself in to county jail on February 9, 2012, and was sentenced a few weeks later to a term of incarceration on his assault

conviction. Pet. App. 2a; J.A. 96. Instead of being transported to the Department of Corrections to begin serving that sentence, however, he was committed to the custody of the county sheriff and detained in county jail pending his bail-jumping charge. Pet. App. 2a; J.A. 8–9.

On April 19, 2012, Betterman was arraigned on his bail-jumping charge and pled guilty. Pet. App. 2a–3a; J.A. 20. The trial court ordered the probation office to prepare a presentence investigation report, and Betterman was again "remanded ... to the custody of the sheriff." J.A. 20. Betterman would spend the next 14 months in custody at the county jail awaiting sentencing.

On the day of Betterman's arraignment and plea, the State filed a notice that it intended to designate Betterman a "persistent felony offender"—a designation that triggers enhanced penalties under Montana law. Pet. App. 3a; J.A. 25–27. Betterman filed a written motion to strike the persistent offender notice as untimely and invalid. Pet. App. 3a; J.A. 29–34. The court held a hearing on the persistent offender motion on June 28, 2012, and took the matter under submission. Pet. App. 3a. Five months later, on November 27, 2012, the court issued an order denying the motion. *Ibid.*; J.A. 53–60. By that time, Betterman had been detained for seven months awaiting sentencing.

The trial court did not set a sentencing hearing when it denied Betterman's motion. The court had previously indicated it would "set this matter for sentencing" "[u]pon receipt of the pre-sentence investigation" from the probation office. Pet. App. 3a; J.A. 36. That presentence investigation report was completed in October 2012, but the court waited an

additional two months, until December 2012, before setting a sentencing hearing date. Pet. App. 3a; J.A. 61. It scheduled Betterman's sentencing for January 17, 2013. J.A. 61.

2. On the day of the sentencing hearing, Betterman filed a written motion to dismiss the bail-jumping charge on the ground that the protracted delay in sentencing him violated his speedy trial right. Pet. App. 3a; J.A. 63–64. Betterman noted that his scheduled sentencing hearing was more than 318 days after the State first filed the bail-jumping charge, and 273 days after his guilty plea. J.A. 67–68. During that period, he stressed, he was unable to complete court-ordered rehabilitation programs because he was detained in county jail and not remanded to Department of Corrections custody. J.A. 66. These requirements included "obtaining a chemical dependency evaluation, a mental health evaluation, and other conditions." *Ibid.* The court continued the sentencing to give the State time to file a written response, but set no sentencing date. Pet. App. 3a; J.A. 71–72.

Two more months passed without the trial court setting sentencing or resolving Betterman's speedy trial motion. Pet. App. 3a–4a. In March 2013, the State and Betterman jointly requested that the court schedule a sentencing hearing. *Ibid.* But the trial judge's judicial assistant responded, by email, that the court would "not be able to 'fast track' Betterman's case" due to "several civil orders that are pending." *Ibid.*; J.A. 90.

The trial court never held a hearing on Betterman's speedy trial motion, but issued a written order several weeks later denying it. Pet. App. 3a–4a, 26a–27a. In that April 2013 Order, the court

found that "the majority of the delay in this matter is attributed to the State," but that it was not the product of bad faith or want of diligence. *Id.* at 33a–35a. The court concluded that despite his motion to dismiss, Betterman had not shown "a persistent or sincere desire to assert his speedy trial right" or made a showing of prejudice. *Id.* at 34a–35a. The court reasoned that Betterman was not prejudiced by the delay because he "could not avoid pretrial incarceration" due to his domestic assault sentence, and because he purportedly demonstrated no undue anxiety or prejudice to his defenses. *Ibid.*

Betterman moved for reconsideration one week later. In support of that motion, he submitted a sworn affidavit explaining the consequences of his extended stay in county jail awaiting sentencing:

- "I have now spent approximately 442 or more days … on the sentence in DC-11-36 [the domestic assault conviction] in the Butte Jail. In theory, I would be eligible for conditional release … if I were in the Department of Corrections[']actual system."
- "[D]ue to my incarceration in the Butte Jail as I am informed, I have a warrant out in Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County."
- "In DC-11-36, I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail. I have completed Phase I of the Anger Management Group while in jail."

- "I have been on [an] emotional roller coaster due to the anxiety and depression caused by the uncertainty and have sought counseling for my mental state with Mr. William Keller."

J.A. 87–88. The affidavit explained further that Betterman was unable to pay child support or to help raise his son, and that the county refused to provide medical attention for his health issues. *Id.* at 88.

The trial court denied Betterman's reconsideration motion on June 24, 2013, and finally held Betterman's sentencing hearing on June 27, 2013. Pet. App. 4a; J.A. 110–11. By then, Betterman had spent 14 months, since pleading guilty, locked up in county jail.

Betterman faced a prison term of up to 10 years under Montana's bail jumping statute, *see* Mont. Code Ann. § 45-7-308(4), or, alternatively, a 5-100 year range if designated a persistent felony offender, *see id.* § 46-18-502(1). The Probation Office recommended a five-year prison term or a seven-year term if the court found Betterman to be a Persistent Felony Offender. J.A. 93–94, 104. Both the probation officer and the prosecutor noted that the recommended terms fell within the statutory range "regardless of whether [Betterman] qualifies as a persistent felony offender." J.A. 102–03.

The court did not designate Betterman as a Persistent Felony Offender, J.A. 114, but sentenced Betterman to a seven-year term, with four years suspended, Pet. App. 4a. Although the court had the discretion to make Betterman's new sentence concurrent to his existing sentence, *see* Mont. Code Ann. § 46-18-401(1), (4), the court ordered that the new sentence run consecutively to his five-year domestic assault sentence, Pet. App. 4a. The

judgment specified that "the Defendant shall not receive any credit for time served in the Butte Silver Bow County Jail" because that incarceration related to that prior sentence. J.A. 114.

3. Betterman appealed the denial of his speedy trial motion to the Montana Supreme Court, and that court affirmed.

The Montana Supreme Court overruled its prior holding in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), "that the right to a speedy trial applies through sentencing." Pet. App. 7a. It held that the Sixth Amendment's speedy trial right "cease[s] to apply when conviction becomes definitive," and that any "unreasonable delay in sentencing must find its remedy in an alternative constitutional or statutory provision." *Id.* at 8a, 15a. The holding rested on three grounds:

First, the court found a "distinction between trial, to which a constitutional speedy trial right clearly attaches, and sentencing." Pet. App. 8a. That distinction, the court reasoned, was recognized in precedents applying the jury trial right to facts triggering enhanced penalties (*ibid.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), and reflected in Montana statutory law (*id.* at 9a–10a). Based on its understanding of "the historical meaning of the word 'trial,'" the court concluded that the word did not "include[] sentencing." *Id.* at 10a–11a.

Second, the court concluded that "[a] delayed sentencing raises different concerns than [does] a delay in proceeding to trial." Pet. App. 13a. It reasoned that the defendant's "defense cannot be impaired once he has been convicted," and that a convicted defendant does not suffer "the same anxiety and concern" as one awaiting trial. *Id.* at 12a–13a.

The court noted that "[a] delay in sentencing 'may leave the defendant … in limbo concerning the consequences of conviction,'" postpone "the commitment of the defendant to corrections facilities," and "have a detrimental effect on rehabilitation." *Id.* at 13a (citation omitted). But despite recognizing that "these concerns are compelling," the court deemed them "ill-suited for remediation through the constitutional right to speedy trial." *Ibid.*

Third, the court expressed concern that the only remedy available for a Speedy Trial Clause violation is dismissal of the charges. Pet. App. 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). Applying the Clause at sentencing, the court concluded, would contravene precedents barring a defendant from "escap[ing] punishment altogether" simply because a "court committed an error in passing sentence." *Ibid.* (quoting *Bozza v. United States*, 330 U.S. 160 (1947)).

The court then reframed Betterman's challenge as a due process claim. It looked to "(1) the reasons for the delay, and (2) the prejudice to the defendant" (Pet. App. 15a–17a (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977))), placing the burden to make a prejudice "showing" on Betterman (*id.* at 22a). The court found that Betterman's 14-month wait between conviction and sentencing "was unacceptable delay," that the delay "must be attributed to the State," and that the State offered "no legitimate reason" for the delay. *Id.* at 20a–22a. But the court deemed the prejudice to Betterman "neither substantial nor demonstrable," dismissing as "speculative" his "anticipated benefits [from] participating in various DOC programs, anticipated

dates for conditional discharge, and anticipated enrollment in rehabilitation services." *Ibid.*

SUMMARY OF ARGUMENT

I. This Court's precedents, as well as the text and history of the Speedy Trial Clause, support its application through sentencing and judgment.

A. The Speedy Trial Clause guarantees a criminal defendant "an early and proper disposition of the charges against him." *Marion*, 404 U.S. at 313. That right embraces the full course of prosecution proceedings, from charging, through the determination of guilt, and until the pronouncement of sentence and judgment. The Court has consistently applied the Clause to delays in the course of pretrial proceedings, not just in the narrow confines of the petit jury trial. If a defendant is convicted, the criminal proceedings continue and reach fruition only when the court imposes sentence and judgment. Because a "prosecution terminates only when sentence is imposed," *Bradley v. United States*, 410 U.S. 605, 609 (1973), speedy trial protections should apply equally to undue delays between conviction and sentencing. Indeed, this Court has already held that the textually interwoven right to a "*public* trial" applies at sentencing and other non-trial proceedings. *See, e.g.*, *In re Oliver,* 333 U.S. 257, 266–73 (1948).

B. Applying the Speedy Trial Clause through sentencing and judgment accords with "the history of the right to a speedy trial and its reception in this country." *Klopfer*, 386 U.S. at 226. As the Court in *Klopfer* recognized, the Clause's protections are rooted in centuries-old common law principles guaranteeing criminal defendants "full and *speedy justice*," COKE, THE SECOND PART OF THE INSTITUTES

OF THE LAWS OF ENGLAND 43 (Rawlins, 6th ed. 1681) (emphasis added), and not merely a swift verdict. That common law right embraced the culmination and result of the prosecution, and was carried forward in this Nation by early state constitutions.

C. At the time the Framers embodied the common law right to swift justice in the Sixth Amendment's guarantee of a "*speedy* and public *trial*," criminal proceedings were unitary, and there was an "intimate connection" between the jury's verdict and the sentence imposed. *Alleyne v. United States*, 133 S. Ct. 2151, 2159 (2013). Fixed penalties meant that the jury's verdict determined the punishment for most felonies, *id.* at 2158–59, and the sentence was announced immediately or soon thereafter, *see, e.g.*, 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *368. Unsurprisingly, the word "trial" often connoted a criminal proceeding as a whole, running from arraignment through sentence. By casting the common law right to swift justice as a right to "speedy … trial," the Framers adopted protections encompassing not just the petit jury stage, but also the sentence and judgment that followed.

D. The advent of discretionary sentencing by trial courts, and the resulting expansion of sentencing litigation and procedures, underscore the importance of preserving the original scope of the Speedy Trial Clause. This Court has stressed that legislative innovations in sentencing and procedure cannot alter the scope of core Bill of Rights protections. *See Blakely*, 542 U.S. at 308–09. Because the Framers guaranteed that criminal prosecutions would be brought to swift resolution, today's expanded sentencing proceedings must meet the same stricture.

II. Applying the Speedy Trial Clause through sentencing and judgment furthers its purposes.

A. The three "interests of defendants which the speedy trial right was designed to protect" all apply at sentencing. *Cf. Barker*, 407 U.S. at 532.

The risk that the defendant will suffer undue oppression during a protracted delay, 407 U.S. at 532, continues even after a defendant has been convicted and is awaiting sentencing. A detained defendant such as Betterman will nearly always be confined in a county jail pending sentencing. *See id.* at 520. Jails are marked by "overcrowd[ed] and generally deplorable" conditions, and typically "offer little or no recreational or rehabilitative programs." *Id.* at 520, 532. These conditions may prevent a defendant from participating in counseling or programs that he is required to complete, or that may improve his chances for parole or early release.

The delay in sentencing may "impair the ability of an accused to defend himself" or muster a case for a reduced sentence. *See United States v. Ewell*, 383 U.S. 116, 120 (1966). Sentencing is often the most critical phase of a modern criminal proceeding, and often the only contested phase. Sentencing proceedings require courts to resolve substantial factual and legal matters, and may involve evidentiary hearings and witness testimony, as well as statements from family members, the community, and victims. For this reason, the risk of "dimming memories and loss of exculpatory evidence" is as significant at sentencing as it is at trial. *Cf. Doggett v. United States*, 505 U.S. 647, 654 (1992).

Finally, unreasonable delays at sentencing may cause a defendant to suffer "anxiety and concern" over his fate on par with a defendant awaiting trial,

Barker, 407 U.S. at 532. Indeed, in modern criminal systems dominated by guilty pleas and discretionary sentencing, the typical defendant is more likely to face stress and anxiety over his possible sentence than over the outcome of a trial.

B. The fit between sentencing delays and the core concerns of the Speedy Trial Clause is confirmed by the *Barker* test's "functional analysis," 407 U.S. at 522. For decades, lower courts have analyzed sentencing delays, in straightforward fashion, by considering the four *Barker* factors: length of the delay, reasons for the delay, the defendant's assertion of the right, and prejudice. *Id.* at 530. The application of that test does not mean, as the Montana Supreme Court assumed (Pet. App. 14a), that the Court would be bound to grant the "severe remedy of dismissal," *Barker*, 407 U.S. at 522. This Court's Sixth Amendment cases call for "tailored" remedies, *see United States v. Morrison*, 449 U.S. 361, 364 (1981), and the lower courts have granted lesser remedies (like modifying or vacating the remaining sentence) where appropriate.

III. Applying the *Barker* factors here shows that the more than 14-month delay in Betterman's sentencing proceedings violated his speedy trial right. The Montana Supreme Court attributed the delay to the State, characterizing the delay as "unacceptable," and backed by "[n]o legitimate reason." Pet. App. 20a–21a. Betterman repeatedly asserted his right to a prompt sentencing. And he offered unrebutted evidence that his protracted detention in county jail denied him access to programs that were essential to his rehabilitation and his chances for parole. The Court should hold that Montana violated Betterman's Sixth Amendment right to a speedy trial.

ARGUMENT

I. THE SPEEDY TRIAL CLAUSE APPLIES IN CRIMINAL PROSECUTIONS THROUGH SENTENCING AND JUDGMENT

A. This Court's Precedents Support Application of the Speedy Trial Clause to Sentencing

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This Court assumed without deciding that the Speedy Trial Clause applies to sentencing in *Pollard v. United States*, 352 U.S. 354, 361 (1957). An examination of the Court's case law construing the constitutional right to a speedy trial and the parallel right to a public trial supports the conclusion that *Pollard*'s assumption was correct.

1. When considering the scope of the Speedy Trial Clause, this Court has recognized that the Clause "would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him *an early and proper disposition* of the charges against him." *Marion*, 404 U.S. at 313 (emphasis added). Final disposition or "[f]inal judgment in a criminal case means sentence." *Berman v. United States*, 302 U.S. 211, 212 (1937). "To create finality it [is] necessary that [the] conviction should be followed by sentence," and "[t]he sentence is the judgment" in a criminal case. *Ibid.*; *accord Miller v. Aderhold*, 288 U.S. 206, 210–11 (1933) ("In a criminal case final judgment means sentence."). Because the sentence and judgment are a part of—and indeed, the "culmination of" (*United States v. Alcantara*, 396 F.3d 189, 196 (2d Cir. 2005))—the trial for purposes of the Sixth

Amendment, the Speedy Trial Clause is most naturally understood to apply to sentencing.

2. Consistent with *Marion*'s focus on the need for swift disposition, this Court has recognized that the Speedy Trial Clause requires the government to conduct criminal proceedings, and not just petit jury trials, swiftly. The speedy trial right attaches "when a criminal prosecution has begun," regardless of whether it is initiated by way of "a formal indictment or information" or "actual restraints imposed by arrest and holding to answer a criminal charge." *Marion*, 404 U.S. at 313, 320. The right has been held applicable from that point throughout the course of pretrial proceedings, *see Barker*, 407 U.S. at 533, and has never been limited to a "trial" in the narrow sense of a petit jury proceeding.

The Court's focus on the broader prosecution process is reflected in decisions applying the Speedy Trial Clause to delays in instituting grand jury proceedings, and securing an indictment, following a defendant's arrest. *See United States v. MacDonald*, 456 U.S. 1, 7–10 (1982) ("[T]he period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim."); *Dillingham v. United States*, 423 U.S. 64, 64–65 (1975) (per curiam). The Clause's protections apply to delays in pretrial proceedings even if the government forgoes prosecution and suspends the charges outright. *See Klopfer*, 386 U.S. at 214, 216. Indeed, a pretrial delay may "trigger the speedy trial enquiry" even if the defendant was not tried *at all*, but entered a plea of guilty. *Doggett*, 505 U.S. at 652, 658 n.3.

Just as the Speedy Trial Clause applies when the prosecution begins, *see Marion*, 404 U.S. at 320, and throughout its pretrial and trial or guilty-plea

proceedings, *Dillingham*, 423 U.S. at 64, so must the right apply through the termination of the prosecution. "In the legal sense, a prosecution terminates only when sentence is imposed." *Bradley*, 410 U.S. at 609. The prosecution does not terminate when the jury returns a verdict, when the defendant pleads guilty, or at any other point in time before judgment. The protections of the Speedy Trial Clause abate only when the criminal prosecution has reached its "disposition," *Marion*, 404 U.S. at 313, with the imposition of sentence and judgment.

3. Third, this Court's public trial jurisprudence compels the conclusion that the Speedy Trial Clause applies to sentencing. The text of the Sixth Amendment—guaranteeing a "speedy and public trial"—makes the two rights parallel. The Court has held that the public trial right is not limited to petit jury trials, but applies to other non-jury stages of criminal proceedings. *See Waller v. Georgia*, 467 U.S. 39, 43 (1984) (applying Public Trial Clause to suppression hearings); *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam) ("extend[ing]" the public trial right "to the *voir dire* of prospective jurors").

More critically, the Court has held that the right to a public trial prohibits the accused from being sentenced in secret. *See Oliver*, 333 U.S. at 266–73. In *Oliver*, a judge conducting a single-judge grand jury proceeding secretly "tried, convicted, and sent [a witness] to jail" for criminal contempt. *Id.* at 258, 271. The Court grounded its analysis in the "traditional Anglo-American distrust for secret trials" as reflected in the Sixth Amendment and its antecedents. *Id.* at 268–70. Noting that "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt

with and not unjustly condemned," *id.* at 270 n.25, the Court held that the Constitution "means at least that an accused "cannot be thus sentenced to prison," *id.* at 273.

Because the secret trial and sentencing in *Oliver* were part of a contempt proceeding, the procedural protections arose under the Fourteenth Amendment. *See Levine v. United States*, 362 U.S. 610, 616–17 (1960) ("Criminal contempt proceedings are not within 'all criminal prosecutions' to which [the Sixth] Amendment applies."). But the Court's analysis of the public trial right, its recognition that the right is guaranteed for criminal prosecutions by the Sixth Amendment, and its application of the right to both the trial and the sentencing, compel the conclusion that the Sixth Amendment public trial right protects defendants at sentencing. *See Oliver*, 333 U.S. at 266–73. And just as the public trial right dictates that sentencing be public, so does the speedy trial right require that sentencing be speedy. The two rights are paired together in the Sixth Amendment and should be interpreted to have the same scope. The fact that the public trial right applies to sentencing means the speedy trial right must as well.

B. The Speedy Trial Right's Antecedents Guaranteed Prompt Resolution of Criminal Charges, Including Pronouncement of Sentence and Judgment

The guarantee of "an early and proper disposition of the charges against [a defendant]," embodied by the Speedy Trial Clause, *Marion*, 404 U.S. at 313, has its roots in the speedy trial right developed at common law and carried forward in colonial America. *See Klopfer*, 386 U.S. at 223–26. Because "[t]he

Framers seem clearly to have understood and valued the [speedy trial] right in the context of its common-law antecedents," *Dickey v. Florida*, 398 U.S. 30, 41 n.2 (1970) (Brennan, J., concurring), this Court has looked to these sources in interpreting the text, and articulating the contours, of the Speedy Trial Clause. The Clause's English and American antecedents both reflect a concern with bringing criminal prosecutions to a prompt resolution, not just a prompt determination of guilt. The same concern is reflected in colonial state charters, bills of rights, and ratification debates.

1. As discussed in *Klopfer*, the Speedy Trial Clause can be traced as far back as the Assize of Clarendon in 1166, which established procedures for bringing an arrested criminal promptly before "justices" riding circuit unless the justices were themselves able "to come speedily enough into the country" where the accused criminal was being held. 386 U.S. at 223 & n.9 (quoting 2 ENGLISH HISTORICAL DOCUMENTS 408 (1953)); *see also* Criminal Proceedings in Colonial Virginia, *in* 10 AMERICAN LEGAL RECORDS xxxvii (Hoffer ed., 1984) ("In England, the notion of speedy trial can be traced back to the requirement that assize justices tour the shires at least twice each year to empty the gaols.").

A few decades later, Magna Carta announced a principle that sought to guarantee the prompt administration of justice—a principle that the Framers eventually would adopt in the Speedy Trial Clause: "We will sell to no man, we will not deny *or defer* to any man either justice or right." Magna Carta c. 29 (1225) (emphasis added); *see also Klopfer*, 386 U.S. at 223–26. A subsequent English statute made clear that the requirement of a speedy trial

entailed speedy judgment—including speedy *punishment*. *See* East India Company Act 1784, 24 Geo. 3 c. 25 ("An Act … for establishing a Court of Judicature for the more *speedy and effectual Trial of Persons* accused of offenses committed in the East Indies"—whose stated purpose was "for the prosecuting and bringing to *speedy and condign punishment* persons guilty") (emphases added).

2. In the period leading up to the ratification of the Bill of Rights, the common law guaranteed to a criminal defendant the right to a speedy disposition of the accusations against him. That common-law right included the pronouncement of sentence or judgment.

Sir Edward Coke's Institutes of the Laws of England, which "were read in the American Colonies by virtually every student of the law," *Klopfer*, 386 U.S. at 225, explained that at common law, the justices "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner *full and speedy justice*, *by due trial*, without detaining him long in prison." COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 43 (Rawlins, 6th ed. 1681) (emphasis added). In describing the right in terms of the judge's duty to "give[] the prisoner full and speedy justice, by due trial," *ibid.*, Coke made clear that the right contemplated resolving the accused's criminal case entirely: "We shall not sell, deny, or delay justice and right. *Justitiam vel rectum*, neither the *end, which is justice*, nor the mean, whereby we may attain to the end, and that is the law." *Id.* at 56 (emphasis added). The term "justice" was well understood to encompass a sentence or judgment, which constituted the *end* of the criminal proceedings. *See* 1 JOHNSON, A

DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining "justice" to mean, among other senses, "punishment" or "[t]he virtue by which we give to every man, what is his due"); *Dawson v. Winslow*, Wythe 114, 120 (Va. High Ct. Ch. 1791) ("[T]he office of a judge … ought to give the *sentence* which the praecepts of *justice* dictate.") (emphasis added).

As explained in *Klopfer*, Coke's formulation of swift justice served as a foundational source of the Speedy Trial Clause. 386 U.S. at 225. When George Mason drafted the Virginia Declaration of Rights of 1776, he "us[ed] phraseology similar to that of Coke's explication" of the speedy trial right. *Ibid.* In turn, the Sixth Amendment uses language that tracks the language in the Virginia Declaration. *See ibid.*

The common law protection against delayed justice is reflected in other colonial-era charters and constitutions, which are instructive in understanding the Bill of Rights, *see Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1978). In *Klopfer*, this Court noted that the fundamental importance of the speedy trial right in the early period of our Nation's "history is evidenced by its guarantee in the constitutions of several of the States of the new nation." 386 U.S. at 225. On this point, the Court quoted specifically from the Massachusetts Constitution of 1780, Part I, Art. XI, which provided that "[e]very subject of the commonwealth ought to find a certain remedy, by having recourse to the laws … . He ought to obtain *right and justice freely … ; promptly, and without delay*." *Id.* at 225 & n. 21 (emphasis added). In doing so, the Court acknowledged that the speedy trial guarantee is a guarantee of speedy *justice*.

Similar to the Massachusetts Constitution, Pennsylvania's charter guaranteed "[t]hat all courts

shall be open, and justice shall neither be sold, denied nor delayed," and that "all … processes … in courts, shall be short, and … justice speedily administered." PENN, CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF PENNSYLVANIA, *Laws Agreed upon in England, &C.*, arts. V, VII (1682); *see also* PA. CONST. of 1776, ch. 2, § 26 ("All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay."); N.H. CONST. of 1784, pt. I, art. XIV; MD. CONST. of 1776, art. XVII; N.C. CONST. of 1776, art. XIII.

The debates during the state ratification conventions likewise emphasized the importance of ensuring a speedy resolution for the criminally accused. For instance, at Virginia's convention in 1788, the delegates approved a declaration of a bill of rights asserting, among other things, "[t]hat every freeman … ought to obtain right and justice freely, without sale, completely and without denial, *promptly and without delay*." 3 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 657–58 (2d ed. 1836) (emphasis added). Others characterized the jury trial as an "expeditious manner of *distributing justice*." 2 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 515–16 (Pennsylvania Convention) (emphasis added); *see also* Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations, *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 310, 313 (1894) (declaration by delegates "[t]hat every freeman ought to obtain right and justice, freely and without sale, completely and without denial, promptly and without delay"). There

is no way to read these early sources without concluding that the founding generation was concerned with the swift resolution and outcome of criminal proceedings.[1]

C. Criminal Law Usage and Practice During the Founding Era Confirm that the Speedy Trial Right Applies Through the Resolution of Criminal Charges and Imposition of Sentences

The criminal law usage and practice familiar to the Framers show that the phrase "speedy and public trial" embodies the common law right to swift progress of criminal proceedings through their resolution and judgment. Sentencing was closely bound up with the jury's verdict, and the word "trial" was often used to refer to criminal proceedings in general. It would have been unnecessary and nonsensical for the Framers to address sentencing or judgment separately in the Amendment's text.

---

[1] The leading treatises of the era further confirm this understanding. Criminologist Cesare Beccaria, whose works were relied upon by the founding generation, *e.g.*, *Ullmann v. United States*, 350 U.S. 422, 451-52 (1956) (Douglas, J., dissenting), insisted that it was "of the greatest importance that the punishment should succeed the crime as immediately as possible." BECCARIA, AN ESSAY ON CRIMES & PUNISHMENTS 76 (Ingraham trans., 2d ed. 1819); *accord* 2 WHEELER, REPORTS OF CRIMINAL LAW CASES WITH NOTES AND REFERENCES xiv (1851) ("All writers on criminal law agree that a crime should immediately be followed by trial and punishment, because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of *crime* and *punishment* … .").

1. Criminal Practice at Common Law

The Court has long adhered to the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). The term "trial" was sensibly and commonly used in the colonial era to include sentencing because sentencing in American and English criminal cases then was legally and procedurally bound to a jury verdict. In felony cases, the jury's verdict typically dictated the sentence, which was imposed "immediately" upon the verdict or "at a convenient time soon thereafter." 4 BLACKSTONE, at *368. The Framers and their contemporaries would therefore have understood that the government's "affirmative constitutional obligation to bring [a defendant] promptly to trial," *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 490 (1973), necessarily meant a duty to bring a defendant promptly to sentencing and judgment.

a. At English common law, "[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense." Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE JURY TRIAL IN ENGLAND, FRANCE, GERMANY, 1700-1900, at 36 (Schioppa ed., 1987). Courts "pronounce[d the] judgment, which the law hath annexed to the crime." 4 BLACKSTONE, at *369. Many felonies carried a sentence of death, *see id.* at *98; *Tennessee v. Garner*, 471 U.S. 1, 13 & n. 11 (1985), including "crimes which would be regarded as quite minor today," *Payne v. Tennessee*, 501 U.S. 808, 819–20 (1991). For this reason, punishment generally was "not left in the

breast of any judge." 4 BLACKSTONE, at *371. "The judge was meant simply to impose that [statutorily-prescribed] sentence," Langbein, *The English Criminal Trial Jury*, at 36–37, and the court's discretion was limited "to temporarily suspend[ing]" the sentence so "that pardon might be procured, or that a violation of law in other respects might be prevented," *Ex Parte United States*, 242 U.S. 27, 43–44 (1916); *accord Apprendi*, 530 U.S. at 478–79 (citing 4 BLACKSTONE, at *369–70).

Because statutes fixed a determinate sentence, the English practice of the era was for the judge to pronounce the sentence immediately or shortly after the verdict. "If the prisoner is convicted," a leading historian explained, "he is sentenced usually at once." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (London, MacMillan & Co. 1883); *see also* Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 4, 19 (1983) (noting that "in convictions for murder, … sentence was passed immediately upon the return of the verdict," and in other cases the sentence was imposed "at the end of the sessions," each of which lasted "three or four days").

b. In colonial America, as in England, the sentence for a felony offense was generally fixed by the crime of conviction. "In the early days of the Republic," "[e]ach crime had its defined punishment." *United States v. Grayson*, 438 U.S. 41, 45 (1978), *superseded by statute on other grounds*, *as recognized in Barber v. Thomas*, 560 U.S. 474, 482 (2010). While the death penalty and corporal punishment had begun to give way to terms of imprisonment, "the period of incarceration was generally prescribed with

specificity by the legislature." *Ibid.* The upshot was that the courts of early America had little sentencing discretion in felony cases. "At common law, the relationship between crime and punishment was clear": there was an "intimate connection between" the two, which "left judges with little sentencing discretion[] once the facts of the offense were determined by the jury." *Alleyne*, 133 S. Ct. at 2158–59; *see also United States v. Pinto*, 875 F.2d 143, 145 (7th Cir. 1989) (Easterbrook, J.) ("Judicial discretion in sentencing comes late to our history.").

The American colonies likewise followed English common law in closely sequencing the jury verdict and sentencing. "[A] few particularly salient examples illustrate the point." *Alleyne*, 133 S. Ct. at 2159. One prominent example of which the Framers would have been aware was the 1770 trial of the British soldiers (represented by John Adams) who participated in the Boston Massacre. Accounts of the trial dramatically illustrate that sentencing was both speedy and public following a jury verdict:

> The jury withdrew for about two hours and a half, and then returned into court, with a verdict of not guilty as to all the prisoners except Killroy and Montgomery, who were found ... guilty of manslaughter. They prayed the benefit of clergy, which was allowed them, and thereupon they were each of them burned in the hand, in open court, and were discharged.

1 CHANDLER, AMERICAN CRIMINAL TRIALS 301, 377, 414 (Boston, Little & Brown 1841) (footnote omitted); *see generally id.* at 301–418. Additional examples—

illustrating the early American adherence to prompt sentencing—abound.[2]

2. The Use of "Trial" at Common Law

a. Consistent with the determinate sentencing system that prevailed at common law and in the colonies, the term "trial" was understood to connote a "judicial examination." 2 JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789); 2 BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772); DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763). To be sure, the word "trial" was at times used narrowly to refer to a proceeding taking place in front of a petit jury. *E.g.*, 4 BLACKSTONE, at *301. But the colonial-era sources clearly indicate that the word was

---

[2] *See* Appendix (Table of Cases from John D. Lawson's multi-volume AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES, FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY). The Appendix lists chronicled cases from 1704–1855 where the number of days between the verdict and sentence could readily be determined, and an appeal did not delay sentencing. Those cases show that the average time between verdict and sentence was less than two days. *See* Appendix; *see also, e.g.*, 6 Lawson 687, 690, 694 (1916) (Matthew Lyon, convicted of seditious libel in Vermont in 1798, and sentenced the next morning to four months' imprisonment, costs of prosecution, and fine of one thousand dollars); 8 Lawson 1, 6–7 (1917) (Josiah Burnham convicted of murder in New Hampshire in 1806, and sentenced the next day); 6 Lawson 597, 624, 664–67 (1916) (Stephen Merrill Clark convicted of arson in Massachusetts in 1821, and sentenced the next day); 4 Lawson 649, 651 (1915) (James Williamson convicted of assault and battery in New York in 1819, and sentenced the same day).

generally understood also to have a broader sense encompassing "the examination of all causes, civil or criminal, according to the laws of our realm." 2 JOHNSON (describing "Judicial examination" in terms of how "*Trial* is used in law").

Understood as a "judicial examination," a trial in a criminal prosecution does not end, and the Speedy Trial Clause does not cease to apply, until the examination is over. And the judicial examination or trial is not over until the trial court pronounces the sentence in accordance with law and enters judgment. *See, e.g.*, *Century Indemnity Co. v. Nelson*, 303 U.S. 213, 216 (1938) ("[I]t appears plain enough that all parties understood the cause was 'in progress of trial' until entry of the final judgment.").

That is why early American courts and court clerks routinely used "trial" as shorthand for criminal proceedings, running from arraignment through sentencing and judgment. The Pennsylvania Supreme Court observed, for example, that in "every *trial* for felony at the common law," the defendant "is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him." *Prine v. Commonwealth*, 18 Pa. 103, 104 (1851) (emphasis added). In another case, the same court considered a docket entry stating that the defendant "was present in court during *every stage of the trial*, from the time of his arraignment up to the time when the sentence was passed by the … president judge of the court, on him." *Hamilton v. Commonwealth*, 16 Pa. 129, 133 (1851) (emphasis added); *see also Ball v. United States*, 140 U.S. 118, 130 (1891) (quoting *Hamilton*). Other early decisions similarly reflect the understanding that a "trial"

includes "arraignment and sentence." *State v. Outs*, 30 La. Ann. 1155, 1156 (1878) (examining if defendant was present at "every stage of the trial"); *Rolls v. State*, 52 Miss. 391, 397 (1876) ("[T]he trial closed with the judgment and sentence …. That was the closing, final act of the trial."); *see also Andrews v. State*, 34 Tenn. 550, 552 (1855).

b. Because "trial" was commonly understood to encompass sentencing in this context, at least one early state court decision construed the speedy trial guarantee to ensure speedy disposition, including punishment if the defendant were convicted:

> It is frequently a matter of consequence, not only to the innocent, *but to the guilty, that they should have a speedy trial*—to the former that they may be acquitted—*to the latter that the dreaded punishment be not long suspended*; the more especially where the accused is compelled to submit to imprisonment, either before or after conviction.

State v. Kreps, 8 Ala. 951, 955 (1846) (emphases added). Recognizing that "the end and design" of criminal prosecutions "is the *punishment* of the accused," *Ely v. Thompson*, 10 Ky. 70, 74 (1820) (emphasis added), early courts stressed "the great advantages resulting to the community from the speedy infliction of punishment, after the clear conviction of guilt," *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 47–48 (La. 1813).

c. The Montana Supreme Court drew a sharp distinction between "trial" and "sentencing," Pet. App. 8a, but provided no historical evidence showing that the word "trial" was understood to remove

"speedy and public" protections once the jury has rendered a verdict.[3] The Bill of Rights regularly uses particular words as a shorthand for a more general concept that would have been familiar to the audiences of the period. For example, the phrase "life or limb" in the Double Jeopardy Clause functions as a shorthand for all types of criminal punishment. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873) (holding that the Double Jeopardy Clause applies to all criminal prosecutions, not merely those involving potential capital or corporal punishment).

"In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation… ." SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (Princeton Univ. Press 1998). Just as the terms "speech" and "press" in the First Amendment stand as a synecdoche for the whole (*see id.* at 37–38), the right to a "speedy and public trial," properly viewed in historical context, protects the accused through sentencing and judgment.

---

[3] The Second Circuit in *United States v. Ray* emphasized that Blackstone's Commentaries has a separate chapter titled "Of Judgment and Its Consequences" that follows the chapter titled "Of Trial and Conviction." 578 F.3d 184, 195 (2d Cir. 2009). But that mode of argument would shrink the Speedy Trial Clause beyond recognition. Blackstone also has separate chapters on arrests, commitment and bail, indictment, arraignment, and plea. *See generally* 4 BLACKSTONE. That Blackstone treated the steps of the criminal process through judgment in multiple chapters hardly shows that the Framers would have understood the speedy trial right to terminate upon conviction and permit unduly delayed pronouncement of sentence.

3. This Court's Historical Understanding of the Jury Trial Right

Apprendi and its progeny specifically recognize the "historic link" between verdict and sentence. *See Apprendi*, 530 U.S. at 479–82 (explaining that "[t]he substantive criminal law … prescribed a particular sentence for each offense," and "[t]he judge was meant simply to impose that sentence"); *see also Alleyne*, 133 S. Ct. at 2158–59. Indeed, the holding of those decisions was that the right to a "trial by jury" may extend to determinations that the legislature had assigned to *sentencing proceedings*. *See, e.g.*, *Blakely*, 542 U.S. at 308–09.

On this score, the Montana Supreme Court missed the point, and misread *Apprendi*, when it stressed that facts increasing punishment were tried by the jury and sentences were imposed by the court. *See* Pet. App. 9a–10a. The allocation of responsibility between judge and jury is not what matters to the inquiry here. Rather, it is the indissoluble connection between verdict and sentence—a connection recognized in common law principle and practice—that requires sentencing be treated as part of the "trial" for purposes of the Speedy Trial Clause.

The "invariable linkage of punishment with crime" that the Court recognized in *Apprendi*, 530 U.S. at 478, refutes the Montana Supreme Court's attempt to narrow the "speedy and public trial" right to "the trial establishing guilt" (Pet. App. 9a). It confirms that the right applies to the sentencing that legally, and immediately, follows any verdict. *Cf. Alcantara*, 396 F.3d at 196 (holding that public trial right applies to sentencing and noting that "[s]entencing can occur before the termination of the trial proceeding, and,

even if it occurs in a separate hearing, it clearly amounts to the culmination of the trial") (quoting *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986)). Evidence of a uniform historical practice, buttressed by support for that practice in the leading expositions of the period, is highly probative of the meaning of Bill of Rights provisions. "We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject,—such as his ancestors had inherited and defended since the days of Magna Charta." *Mattox v. United States*, 156 U.S. 237, 243 (1895); *see also District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

The Sixth Amendment right at issue in these cases—the right to "an impartial jury"—coheres fully with the right to a "speedy and public trial," and does not cut off that right at the petit jury stage. *Cf.* Pet. App. 10a. As a matter of text and history, the right to an impartial jury necessarily is specific only to stages of the criminal process involving the "jury." *E.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 526–29 (1975) (petit jury). That interpretation does not carry over to limit the speedy and public trial right to only proceedings involving the petit jury. That is why this Court has never read the Impartial Jury Clause to limit the Speedy Trial Clause to the petit jury trial itself. Nor has it treated the Impartial Jury Clause as an obstacle to applying the "public trial" right to non-jury proceedings. *See Oliver*, 333 U.S. at 272–73; *Waller*, 467 U.S. at 46; *Presley*, 558 U.S. at 209–10. Those public trial precedents would make no sense if the right to an impartial jury limited the Sixth Amendment's guarantee of a "speedy and public trial"

to the petit jury stage of the proceeding. For the same reasons, the Constitution's Article III guarantee that a "Trial of all Crimes … shall be by Jury" (§ 2, cl. 3) does not limit the speedy and public trial right to only petit jury proceedings.[4]

D. The Expansion of Sentencing Proceedings Demands Faithful Adherence to the Original Scope of the Speedy Trial Right

The changes in American criminal procedure over the last 200 years make it critical to preserve the scope of the Speedy Trial Clause as originally understood. As this Court has noted, the nineteenth century saw a "shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Apprendi*, 530 U.S. at 481. With the movement

---

[4] Nor does Article I's provision that a "Party convicted [of impeachment by the Senate] shall … be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law" (§ 3, cl. 7) undermine the speedy and public trial right's application to sentencing. Interpreting the Impeachment Clause as restricting the Speedy Trial Clause to only petit jury proceedings would conflict with this Court's precedents holding that the speedy trial right applies at the time of indictment and that the public trial right applies to sentencing, *see supra* Part I.A. Moreover, such an interpretation would run contrary to the Speedy Trial Clause's history, which makes clear that the Clause applies to sentencing, *see supra* Part I.B–I.C. This Court has long held that "the peculiar sense in which [a word] is used in any sentence is to be determined by the context." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (Marshall, C.J.). The Impeachment Clause and the Speedy Trial Clause were ratified at different times, address different concerns, and derive from different historical origins.

toward indeterminate sentencing, jury trials have given way to guilty pleas, and plea bargains have become "central to the administration of the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Today, guilty pleas account for "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions," *ibid.*, making sentencing the primary battleground for most criminal defenses. In modern sentencing regimes, the prosecution and defense litigate, and the court must resolve, a wide range of factors relating to the offense and "the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 247 (1949).

The Sixth Amendment speedy trial right applies with the same, and perhaps greater, force to these modern sentencing proceedings. The objective of ensuring a prompt "trial," as that term was understood, encompassed the imposition of sentence. That the proceedings governing sentencing are now structurally separate means only that the criminal "trial" proceedings are potentially subject to greater delays. The separation cannot deprive a defendant of his right, as it was originally understood, to swift resolution of his criminal prosecution.

The speedy trial right, rooted in our fundamental criminal traditions, follows the branch of sentencing even as it grows from its guilt-stage limb. While today one might speak of the "trial" and "sentencing" as separate "phases" of a criminal proceeding, members of the founding generation and their English ancestors would have seen these as tied together such that the right to a speedy trial included the right to a prompt sentencing upon verdict. Indeed, historians have concluded that "one way to understand the English criminal jury trial of the

later eighteenth century is to say that it was primarily a sentencing proceeding." Langbein, *The English Criminal Trial Jury*, at 37.

This Court has repeatedly stressed that it must "assur[e] preservation of that degree [of protection]" guaranteed by the Bill of Rights at the time it was adopted. *Cf. United States v. Jones*, 132 S. Ct. 945, 947 (2012) (applying the Fourth Amendment). The advent of the plea-bargaining system cannot override the right to the effective assistance of counsel. *Frye*, 132 S. Ct. at 1407. Nor can the advent of "sentencing factors" narrow the scope of the jury trial right. *See Blakely*, 542 U.S. at 306. Likewise, the advent of distinct and procedurally complex sentencing proceedings cannot alter the constitutional imperative to conclude them quickly.

II. APPLYING THE SPEEDY TRIAL CLAUSE THROUGH SENTENCING AND JUDGMENT VINDICATES THE PURPOSES OF THE CLAUSE

This Court has consistently examined the Speedy Trial Clause's "purposes" in determining whether a stage in the criminal process implicates the "major evils" the Clause guards against. *Marion*, 404 U.S. at 320 (holding the Clause inapplicable before arrest or charging); *see also Klopfer*, 386 U.S. at 221–22. This Court has identified three such purposes: (1) to prevent "oppressive pretrial incarceration" or "restraints on … liberty"; (2) "to limit the possibility that the defense will be impaired"; and (3) "to minimize anxiety and concern of the accused." *Barker*, 407 U.S. at 532–33.

Sentencing delay implicates each of these purposes. Sentencing is often "as important as the trial itself." *Waller*, 467 U.S. at 46. In most cases, it is the only proceeding where factual and legal

determinations are made, and it may be the only hearing where "witnesses are sworn and testify" and "counsel argue their positions." *Cf. id.* at 47. The need to guard against undue delay therefore remains strong at sentencing, even if the particular "evils protected against" arise from oppressive jail conditions awaiting sentence (rather than awaiting trial), from prejudice to the defendant's case for a lesser sentence (rather than to his trial defense), and from anxiety about the court's sentence (rather than a jury verdict). *Cf. Marion*, 404 U.S. at 320.

A. The Speedy Trial Concerns Identified by This Court All Apply to Sentencing Delays

***Undue Oppression*:** The Montana Supreme Court concluded that "there is no risk of oppressive pretrial incarceration once a defendant is convicted of an offense" because he no longer enjoys "the presumption of innocence." Pet. App. 13a. In analyzing this factor, however, this Court has repeatedly focused on the potential of pretrial detention to undercut "the prospect of rehabilitation," *Strunk*, 412 U.S. at 439. That concern persists when a convicted defendant is forced to endure a long sentencing delay.

1. Defendants awaiting sentence, like pretrial defendants, are typically held in local jails rather than long-term correctional facilities. *See* 3 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 524 (4th ed. 2015); Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 4 n.14 (2011). This Court has recognized the oppressive nature of extended detention in local jails, which often suffer from "overcrowding and [a] generally deplorable state." *Barker*, 407 U.S. at 520. "Lengthy exposure

to these conditions has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." *Ibid.* This is in large part because "[m]ost jails offer little or no recreational or rehabilitative programs," such that "[t]he time spent in jail is simply dead time." *Id.* at 532–33.

The Montana Supreme Court acknowledged that these were "compelling" concerns (Pet. App. 13a), and that "[a] delay in sentencing or in the execution of a sentence interrupts the defendant's reintegration into the community and thus frustrates effective rehabilitation" (*id.* at 21a). Even considering that the defendant is no longer presumed innocent, a delay in sentencing while he remains in jail "may cause undue and oppressive incarceration." *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978). Conditions of confinement in local jails set the defendant at a real disadvantage compared to the conditions at federal and state penitentiaries, which generally have "serious rehabilitative program[s]," *McGinnis v. Royster*, 410 U.S. 263, 271 (1973).

The lack of rehabilitation programs at county jail may affect the defendant's ability to satisfy requirements for early release, to bolster his parole case, or to successfully complete a probationary term. Defendants sentenced to prison must often satisfy rehabilitation requirements in order to earn release. For example, under federal law, inmates lacking a high school diploma or its equivalent generally must enroll in an adult literacy program for a minimum of 240 hours, on pain of losing good conduct credits. *See* 18 U.S.C. § 3624(b)(1); 28 C.F.R. § 544.70. Montana law mandates that certain offenders complete rehabilitation programs before becoming eligible for

parole. *E.g.*, Mont. Code Ann. § 46-18-207(2), (3) (requiring certain sexual offenders to complete treatment programs for parole eligibility). Other states also condition early release or good-time credit on participation in prison programs. *E.g.*, Ky. Rev. Stat. Ann. § 197.045(1)(a) (educational or drug treatment programs); W. Va. Code § 62-12-13(b)(1)(B)(iv) (rehabilitation treatment program).

Courts or prison agencies often impose rehabilitation requirements that the defendant must complete as part of his sentence, or that may affect his case for parole or a successful probationary term. *See State v. VanWinkle*, 186 P.3d 1258, 1263 (Mont. 2008) (Rice, J., dissenting) ("On a daily basis, sentencing courts impose conditions which require defendants to participate in such programs as anger management counseling, sex offender treatment, mental health or chemical dependency evaluations, parenting classes … ."); Mont. Code Ann. § 46-18-202(1)(g) (allowing the judge to impose, as a condition of sentence, "any other limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society"). In imposing the sentence in this case, for example, the trial court ordered Betterman to undergo chemical dependency evaluation and treatment, expressing the "hop[e] that [he] will avail himself of such programming at Montana State Prison." J.A. 116, 118.

Defendants held in local jails awaiting sentencing all too frequently lack access to these rehabilitation programs. *See, e.g.*, Cullen & Jonson, *Rehabilitation and Treatment Programs*, *in* CRIME AND PUBLIC POLICY 293, 308 (Wilson & Petersilia eds., 2011) (noting that "56 percent of state prisons, 94 percent of federal prisons, 44 percent of private prisons, and 7

percent of local jails offer vocational training to their inmates") (emphasis added). The difference between the availability of programs in jail and prison may directly affect an inmate's prospects for early release. Lawson, *Turning Jails into Prisons—Collateral Damage from Kentucky's "War on Crime"*, 95 Ky. L.J. 1, 42 (2007) (observing that "a state inmate in jail is three to four times more likely to get a serve-out order than is a state inmate in prison"). Accordingly, if a defendant is detained in local jail pending sentencing, the "dead time" spent in jail custody may effectively slow his rehabilitation and progress toward release. *See Burkett v. Fulcomer*, 951 F.2d 1431, 1443 (3d Cir. 1991) (hereinafter "*Burkett II*") (finding prejudice from presentence delay because the defendant "was unable to avail himself of institutional programs, critical to his rehabilitation, available through the state but not the county penal system"). That risk exists apart from whether the defendant receives credit for presentencing custody.

2. The inability of a defendant awaiting sentencing to access rehabilitation programs may cause even greater harm where, as here, the defendant already is serving a sentence on a prior conviction. In that event, the defendant is prevented from satisfying any rehabilitation conditions on his existing sentence or completing programs that may bolster his parole case.

This Court addressed a similar concern in *Smith v. Hooey*, 393 U.S. 374 (1969), which centered on the "nature and extent" of a defendant's speedy trial right "when the person under the state criminal charge is serving a prison sentence imposed by another jurisdiction." *Id.* at 375. This Court observed that, "[a]t first blush it might appear that a man already in

prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.'" *Id.* at 378. "But," the Court went on, "the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in *as much oppression as is suffered by one who is jailed without bail upon an untried charge*." *Ibid.* (emphasis added).

As an example of such oppressive incarceration, the Court cited *Evans v. Mitchell*, 436 P.2d 408 (Kan. 1968), where "the pendency of [a] Kansas charge prevented any possibility of clemency or conditional pardon in Washington and made it impossible for the prisoner to take part in certain rehabilitation programs or to become a trusty [one entitled to certain privileges for good conduct] in the Washington prison." 393 U.S. at 378 & n.8.

Betterman's delayed detention similarly "made it impossible" for him to take part in important rehabilitation programs. While Betterman waited more than a year to be sentenced on his bail-jumping conviction, he languished in a local jail. J.A. 87. As Petitioner explained to the sentencing court: "In DC-11-36 [the underlying domestic assault case], I have been ordered to complete a chemical dependency evaluation …, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte jail." *Ibid*. These conditions were imposed on the suspended portion of Betterman's sentence for the assault conviction, and bore directly on his case for early release or parole. *See* Mont. Admin. R. 20.25.505(*l*) (identifying, as a factor for parole, "the offender's conduct in the institution, including particularly whether the

offender has taken advantage of opportunities for treatment").

In short, as in *Evans*, "the conditions under which" Betterman was forced to "serve his sentence" were "greatly worsened by the pendency of another criminal charge outstanding against him," *Smith*, 393 U.S. at 378. *Smith*, *Evans*, and now this case show why this Court's admonition against "overlook[ing] the possible impact pending charges might have on [the] prospects for parole and meaningful rehabilitation" applies to sentencing delays. *Cf. Moore*, 414 U.S. at 27 (citing *Strunk*, 412 U.S. at 439).

The *Smith* Court further observed that "if trial of the pending charge is postponed," the chance that a "defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost." 393 U.S. at 378. While the sentencing court here ultimately imposed a consecutive sentence on Betterman for his bail-jumping offense, the risk that delayed sentencing proceedings could deny a similarly situated defendant the chance to serve concurrent sentences is very real. *See Burkett v. Fulcomer,* 826 F.2d 1208, 1223–24 (3d Cir. 1987) (hereinafter "*Burkett I*").

3. Even apart from the conditions of confinement, there is an inherent risk that, in an extreme case, "indefinite incarceration could exceed the length of a fair sentence." *State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 739 (N.H. 1985) (Souter, J.). Indeed, if the defendant faces the possibility of a short sentence, any extended sentencing delay risks lengthening a detained defendant's overall time behind bars.

***Impairment of Defense*:** The critical importance of sentencing in modern criminal cases creates the risk that "long delay will impair the ability of the accused to defend himself" at sentencing. *Cf. Ewell*, 383 U.S. at 1120.

1. Because the overwhelming number of criminal convictions result from guilty pleas, *Frye*, 132 S. Ct. at 1407, "the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant, particularly where the defendant has pled guilty." Fed. R. Crim. P. 32, advisory committee's note to 1993 amendments (quoting *United States v. Rosa*, 891 F.2d 1074, 1079 (3d Cir. 1989)).

Sentencing proceedings have grown in both complexity and importance. Sentencing courts must now consider "aggravating and mitigating circumstances surrounding an offense," together with facts about "the defendant's 'character and propensities.'" *Grayson*, 438 U.S. at 46, 48 (citation omitted). Courts wield "broad discretion … within a statutory range" in how they resolve sentencing factors and fix the appropriate sentence. *See United States v. Booker*, 543 U.S. 220, 233 (2005); *see also, e.g.*, *State v. Herd*, 87 P.3d 1017, 1020 (Mont. 2004) ("District Courts are afforded broad discretion in criminal sentencing."). To aid the courts in exercising discretion, virtually all jurisdictions have established probation offices that prepare detailed reports about the defendant and the facts and circumstances of his offense. *See Grayson*, 438 U.S. at 48.

In Montana, for example, sentencing courts consider a range of statutory factors relating to the facts and circumstances of the offense and the offender. *See, e.g.*, Mont. Code Ann. § 46-18-225

(sentencing for non-violent felonies); *id.* § 46-18-222 (exceptions from mandatory minimums). Under certain circumstances, they may suspend a defendant's sentence and impose "reasonable restrictions or conditions" on his release. *Id.* § 46-18-201. And they have the discretion to determine whether sentences are consecutive or concurrent. *See id.* § 46-18-401(1), (4).

Defendants in the federal system face similar judicial discretion and fact-finding in sentencing. Under the post-*Booker* sentencing regime, a court must take account of the Sentencing Guidelines, which require the court to make numerous fact findings specific to the offense and offender. *See Booker*, 543 U.S. at 264. The court must also consider the broader sentencing considerations set forth in 18 U.S.C. § 3553(a), which include "the nature and circumstances of the offense and characteristics of the defendant," *id.* (a)(1), the need to "avoid unwarranted sentencing disparity," *id.* (a)(6), and the need for "just punishment," deterrence, and rehabilitation, *id.*(a)(2)(A), (D). *See Booker*, 543 U.S. at 264.

2. The nature of modern sentencing means undue delay risks impairing a defendant's ability to mount an effective sentencing defense.

A long presentencing delay may give rise to "dimming memories and loss of exculpatory evidence," *Doggett*, 505 U.S. at 654. This Court has recognized that "the defendant must be given an opportunity to speak and present mitigation testimony." *Irizarry v. United States*, 553 U.S. 708, 716 n.2 (2008) (citing Fed. R. Crim. P. 32(i)(4)(A)(ii)). Defendants may call witnesses to offer mitigating testimony about the crime of conviction or other

sentencing factors. *See, e.g.*, *United States v. Smith*, 387 F.3d 826, 835 (9th Cir. 2004) (reversing for consideration of testimony, offered at sentencing, that the victim had "escalated" the incident leading to defendant's crime); *State v. Herrmann*, 867 N.W.2d 772, 783–85 (Wis. 2015) (discussing defendant's "lengthy sentencing hearing" in which twenty individuals testified). Indeed, because nearly all criminal convictions result from guilty pleas, sentencing is, in most cases, the only point where fact disputes are adjudicated. *Cf. Waller*, 467 U.S. at 47 (noting that a suppression hearing sometimes may be "the *only* trial"). A delay in sentencing may diminish percipient witness testimony and make it harder for a defendant to arrange for character witnesses to appear and testify at sentencing. *See, e.g.*, *Gonzales*, 582 P.2d at 630 (noting that "witnesses may become unavailable … in support of a defendant's plea for a lesser sentence").

It is also commonplace for defendants to submit statements and letters of support from family members. *See, e.g.*, *United States v. Munoz-Nava*, 524 F.3d 1137, 1143 (10th Cir. 2008) (upholding sentencing variance based on "a large number of letters from community members, family members, and from defendant's employers"). A prolonged sentencing delay may create a disconnect between the person described in such letters and statements and the person standing before the court. The letter of support submitted by Petitioner's father, for example, was more than a year old by the time he was sentenced. *Compare* J.A. 2 (Letter from Jim Betterman to Hon. K. Krueger; Received 04/16/12, *State v. Betterman*, DC-12-45 (Mt. Dist. Ct.), Doc. No. 5.1), *with id.* at 4 (06/27/13 Minute Order).

The prejudice from an extended delay to the defendant's sentencing defense may be still worse if he is detained or incarcerated on a prior sentence. The "possibilities that long delay will impair the ability of an accused to defend himself" in sentencing proceedings "are markedly increased when the accused is incarcerated"—even if he is held locally. *Cf. Smith*, 393 U.S. at 379 (addressing "incarcerat[ion] in another jurisdiction"). Whether the defendant seeks to mount a vigorous trial or sentencing defense, delay may compound the difficulty he faces in working to "confer with potential defense witnesses, or even to keep track of their whereabouts." *Cf. id.* at 380–81.

These forms of sentencing prejudice refute the Montana Supreme Court's suggestion that "an accused's defense cannot be impaired once he has been convicted," and that delay "does not undermine a criminal defendant's ability to argue leniency." Pet. App. 12a. Rather, lower courts have found it "apparent that the defendant's ability to gather and present … evidence [relevant to his sentence] may be impaired" by unreasonable sentencing delays." *Jolly v. State*, 189 S.W.3d 40, 48 (Ark. 2004); *accord Gonzales*, 582 P.2d at 630. In addition, even though the Montana Supreme Court recognized that "no appeal" could "lie until … imposition of sentence" (Pet. App. 12a), it ignored the fact that a sentencing delay "could prejudice both the State and the defendant if a retrial should be ordered on appeal." *McLellan*, 498 A.2d at 739. In that event, "[w]itnesses may become unavailable should retrial be necessary." *Gonzales*, 582 P.2d at 633.

***Anxiety and Concern*:** A convicted defendant awaiting sentence may suffer "anxiety and concern"

when faced with an uncertain fate during an extended period of time. *Cf. Barker*, 407 U.S. at 532.

The Montana Supreme Court was wrong in concluding that "the anxiety of an accused is not to be equated for constitutional purposes with anxiety to be suffered by one who is convicted, in jail, unquestionably going to serve a sentence." Pet. App. 22a. The range of sentencing factors and discretion has dramatically increased the stakes at sentencing. Substantial legal and factual matters are often resolved at sentencing hearings. *See supra* at 41–44. Given these features of modern sentencing, the "anxiety and concern" created by a long sentencing delay may often outstrip the anxiety accompanying "public accusation" and the prosecution's guilt stage. *Cf. Klopfer*, 386 U.S. at 22; *see, e.g.*, *Burkett II*, 951 F.2d at 1443 (noting "uncontested evidence" of the defendant's "inability to eat and sleep" and "emotional distress"). And a prolonged delay "can have as depressive an effect" on a defendant as drawn-out pretrial proceedings. *Cf. Smith*, 393 U.S. at 379.

Even if, as in this case, the defendant is already in custody on a prior sentence, a long sentencing delay may cause serious anxiety and stress. This Court has explained that "uncertainties in the prospect … of receiving a sentence longer than, or consecutive to the one he is presently serving" may subject a defendant to "emotional stress" if he is forced to endure "a prolonged delay." *Strunk*, 412 U.S. at 439.

This case exemplifies why slow sentencing proceedings entail a risk of undue stress. In challenging the trial court's delay here, Betterman specifically complained that he had "been on [an] emotional roller coaster due to the anxiety and

depression caused by the uncertainty [of his sentence]." J.A. 88. The circumstances caused him to seek "counseling for [his] mental state." *Ibid.* A prompt sentencing, like "a prompt trial," may avoid such "uncertainties" and the anxiety they cause. *Cf. Strunk*, 412 U.S. at 439.

B. The Framework for Analyzing Speedy Trial Clause Violations and Sixth Amendment Remedial Principles Apply Cleanly to Sentencing Delays

This Court's precedents show not only that sentencing delays implicate core speedy trial concerns, but also that they are readily analyzed under the Court's existing test for speedy trial violations. The "*Barker* test furnishes the flexibility" to determine whether presentencing delay rises to the level of a constitutional violation. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 314 (1986). It guarantees the "orderly expedition" that the Sixth Amendment requires, *Smith v. United States*, 360 U.S. 1, 10 (1959), but that a generic due process test is inadequate to protect. And when the presentencing delay is of constitutional magnitude, the courts can tailor the remedy to match the violation.

1. The lower courts recognizing speedy trial protections at sentencing have had no trouble applying the *Barker* factors to sentencing delay. *See, e.g.*, *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976); *United States v. Washington*, No. 14-10623, 2015 WL 5607653, at *2 (5th Cir. Sept. 24, 2015); *Burkett I*, 826 F.2d at 1220; *Trotter v. State*, 554 So. 2d 313, 316 (Miss. 1989), *superseded by statute on other grounds*, Laws 2008, Ch. 457, § 1, eff. July 1, 2008; *Gonzales*, 582 P.2d at 633. This highlights that sentencing delays fit well within this

Court's speedy trial framework, and that they ought to garner Sixth Amendment scrutiny.

First, the "length of the delay" between conviction and sentencing proceedings can be calculated as readily as pretrial delay. *See Barker*, 407 U.S. at 530. The same markers used by courts to gauge the facial reasonableness of a delay may also apply to presentencing delays. *See, e.g.*, *Doggett*, 505 U.S. at 652 n.1 (noting that "lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year"). Second, the principles governing the "reason for the delay," and for allocating responsibility among the parties and courts, apply no less at sentencing. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett*, 505 U.S. at 657. Third, the courts may consider "the defendant's assertion of or failure to assert his right to a speedy trial" as it applies to sentencing. *Barker*, 407 U.S. at 528. As with pretrial delay, any knowing and voluntary waiver may be considered alongside the prosecution's burden to move the case along. *Id.* at 529; *accord Jolly*, 189 S.W.3d at 46 (emphasizing that the defendant "was not required to demand sentencing" under state law, and did not "actively avoid being sentenced").

The fourth factor, "prejudice to the defendant," is equally cognate in evaluating the effects of sentencing delays. That factor should be weighed in light of the Speedy Trial Clause's purposes, *see Barker*, 407 U.S. at 532, which, as noted, all apply to sentencing delays. Nor is there any reason to depart

from this Court's clear directive that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," *Doggett*, 505 U.S. at 655, and that prejudice carries no "talismanic" force, *Barker*, 407 U.S. at 533. Although some lower courts have suggested that a showing of "substantial and demonstrable prejudice" is required in the sentencing context, *e.g.*, *United States v. Nelson-Rodriguez*, 319 F.3d 12, 60–61 (1st Cir. 2003), that suggestion cannot be squared with the fundamental nature of the speedy trial right. The Framers' design and concerns make the speedy trial right a process right applicable until the prosecution ends, and the defendant's conviction does not end the prosecution.

For the same reasons, the Montana Supreme Court was wrong in relying on due process principles. Because the speedy trial right is "specifically affirmed" in the Sixth Amendment, *Barker*, 407 U.S. at 533, it is inappropriate to resort to more generalized due process protections, *cf. Graham v. Connor*, 490 U.S. 386, 394 (1989) ("[A]nalysis begins by identifying the specific constitutional right allegedly infringed by the challenged [governmental action]."). That is especially so because the test for a due process violation would effectively give the defendant the burden to establish that he was prejudiced, and perhaps even that the delay was due to a "tactical" reason. *See United States v. Lovasco*, 431 U.S. 783, 795 (1977); *see, e.g.*, *MacDonald*, 456 U.S. at 20 (Marshall, J., dissenting). Such a burden cannot be squared with this Court's precedents recognizing that the speedy trial right is "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer*, 386 U.S. at 223.

2. Nor do this Court's precedents leave it with the all-or-nothing choice on remedies that the Montana Supreme Court and the State have posited. Pet. App. 14a; BIO 18. This Court has characterized dismissal of the indictment as "the only possible remedy" for a speedy trial violation only in the context of delays before trial or conviction. *See Barker*, 407 U.S. at 522; *Strunk*, 412 U.S. at 438–40. Those precedents therefore do not preclude a court from crafting an appropriate remedy where an unconstitutional sentencing delay has occurred. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364.

Consistent with the flexible approach dictated by *Barker*, the courts can, and should, fix remedies appropriate to the circumstances of a presentencing delay. The lower courts, for example, have remedied such violations by modifying or vacating the sentence, while leaving the conviction intact. *See, e.g.*, *Burkett II*, 951 F.2d at 1449; *Washington*, 2015 WL 5607653, at *3; *Jolly*, 189 S.W.3d at 49; *Trotter*, 554 So. 2d at 319. Such a remedial approach is fully consistent with this Court's admonition in *Bozza v. United States* that a person found guilty should not be released simply because of "an error in passing the sentence." 330 U.S. at 165-66 (rejecting double jeopardy challenge to a mandatory fine omitted from the original sentence). Recognizing the speedy trial right here carries no risk that defendants would automatically be released due to a sentencing error, much less the sort of technical error at issue in *Bozza*.

III. The State Court's Inordinate Delay in Sentencing Petitioner Violated the Speedy Trial Clause

Applying the four-factor *Barker* test to Betterman's speedy trial claim shows that the 14-month-long sentencing delay he endured was unconstitutional.

The Montana Supreme Court recognized that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a. Indeed, a one-year delay is "generally sufficient to trigger judicial review." *Doggett*, 505 U.S. at 658 (citing *id.* at 652 n.1). The reason for delay also weighs heavily in favor of a violation. As the Montana Supreme Court observed, the "[p]reparation of the [presentence investigation] and the District Court's scheduling of a sentencing hearing took an inordinate amount of time, and these factors must be attributed to the State." Pet. App. 20a. "[N]o legitimate reason [was] set forth for such a delay." *Ibid.* And the fact that Betterman formally, and repeatedly, asserted his right to be sentenced promptly "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." *Barker*, 407 U.S. at 531-32.

The record also firmly establishes that Betterman was prejudiced by the delay. He argued, and his affidavit demonstrates, that his extended time in county jail awaiting sentencing denied him access to specific rehabilitation programs that he was ordered to complete. *See, e.g.*, J.A. 87. Those programs were also essential to his rehabilitation, as reflected in Betterman's testimony at sentencing (J.A. 101–02), and the trial court's observation that "Defendant is in desperate need for further chemical dependency

treatment" (J.A. 118). There is no dispute that these programs would have been available in prison had he been promptly sentenced. Nor has the State offered any evidence to contradict Betterman's testimony that the uncertainty of his fate caused him "anxiety and depression," requiring him to seek "counseling for [his] mental state," and that the county provided inadequate medical care. J.A. 88. This is hardly surprising, as Betterman faced a repeat-offender designation carrying a sentencing range of 5-100 years and the prospect of consecutive sentences. *See supra* at 7.

Because the Montana Supreme Court applied *Lovasco*'s due process test, that Court improperly assigned Betterman the burden of proving prejudice. Prejudice is not a bright-line requirement under *Barker*. *See* 407 U.S. at 533. And in the absence of contrary evidence, the court was obligated "to credit [Betterman's] assertions that access to rehabilitative programs … [was] an appealing and legitimately valid alternative to the limbo he experienced in the county system." *Cf. Burkett II*, 951 F.2d at 1443. By instead dismissing Betterman's undisputed evidence of prejudice as "neither substantial nor demonstrable" (Pet. App. 22a) the Montana Supreme Court erred as a matter of law.

CONCLUSION

The decision of the Montana Supreme Court should be reversed.

Respectfully submitted,

STUART BANNER
UCLA SCHOOL OF LAW
SUPREME COURT CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095

CHAD WRIGHT
KOAN MERCER
OFFICE OF THE APPELLATE DEFENDER
255 Fuller Street
P.O. Box 200147
Helena, MT 59620

FRED A. ROWLEY, JR.
Counsel of Record
DANIEL B. LEVIN
THANE M. REHN
CATHLEEN H. HARTGE
ERIC C. TUNG
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave.
Los Angeles, CA 90071
Fred.Rowley@mto.com
(213) 683-9100

January 19, 2016

APPENDIX
TABLE OF CASES FROM JOHN D. LAWSON, AMERICAN STATE TRIALS*

Case	Days Between Verdict and Sentence	Reference
Scudamore, et al. (Ct. of Admiralty, Mass. 1704)	0	Volume 5: pp. 353, 355
Tucker, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	6	4: 652, 702
Smith, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	6	4: 674, 702
Eddy, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	5	4: 677, 702

* The table includes all cases from around the time of the Framing and a few decades afterwards (1704–1855) that are recorded in Lawson's multi-volume collection—AMERICAN STATE TRIALS—where the number of days between verdict and sentence could readily be determined and an appeal did not delay sentencing. The table includes 39 cases, and the average time between verdict and sentence for those cases is 1.8 days.

Robbins, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	5	4: 682, 702
Robinson, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	4	4: 684, 702
Morrison, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	4	4: 689, 702
Brierly, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	1	4: 694, 701, 702
Bonnet (Ct. of Vice Admiralty, S. Carolina 1718)	1	4: 710, 717
Arnold (Ct. of Military Officers, New Jersey 1779)	0	6: 411, 462–63
Lyon (U.S. Cir. Ct., Vermont 1798)	1	6: 687, 694
Cooper (U.S. Cir. Ct., Penn. 1800)	12	10: 774, 783, 812

Callender (U.S. Cir. Ct., Virginia 1800)	0	10: 813, 876
Burnham (Sup. Ct. of Judicature, New Hamp. 1806)	1	8: 1, 6
Dean (S. Ct. of Vermont 1808)	3	3: 542, 557
Arbuthnot (Special Ct. Martial, Florida 1818)	0	2: 862, 887, 890
Ambrister (Special Ct. Martial, Florida 1818)	0	2: 891, 893, 900
Williamson (Ct. of General Sess., N.Y. City 1819)	0	4: 649, 651
Clark (Supreme Judicial Ct., Mass. 1821)	1	6: 597, 624, 664
How (Cir. Ct. of Alleghany Cty., New York 1824)	0	6: 865, 877, 879

McEvoy, et al. (Ct. of General Sess., N.Y. City 1824)	3	13: 205, 216
Thayer, et al. (Ct. of Oyer and Terminer, New York 1825)	3	7: 1, 39, 40
De Coster, et al. (Municipal Ct., Boston 1825)	0	12: 488, 493
Knapp (Supreme Judicial Ct., Mass. 1830)	1	7: 395, 589
Knapp, Jr. (Supreme Judicial Ct., Mass. 1830)	2	7: 594, 635
Gibert, et al. (U.S. Cir. Ct., Mass. 1834)	0	10: 699, 771–72
Crockett (Supreme Judicial Ct., Mass. 1835)	0	1: 440, 451
McConaghy (Ct. of Oyer and Terminer, Penn. 1840)	0	10: 601, 619

Darnes (Criminal Ct., St. Louis Cty. 1840)	0	16: 78, 322
Walker (U.S. Ct., Middle Dist. of Florida 1844)	0	3: 863, 866
De Wolf (Supreme Judicial Ct., Mass. 1845)	3	10: 540, 564
Freeman (Ct. of Oyer and Terminer, New York 1846)	1	16: 323, 517
Coolidge (Supreme Judicial Ct. of Maine, 1848)	1	3: 732, 802
Epes (Cir. Ct. of Law and Chancery, Virginia 1848)	0	3: 412, 474, 514
Webster (Supreme Judicial Ct., Mass. 1850)	2	4: 93, 312, 438–41
Allison, et al. (Cir. Ct. of Henrico Cty., Virginia 1851)	4	4: 464, 471

Douglass (Cir. Ct. of Norfolk, Virginia 1853)	0	7: 45, 56
Mayberry (Cir. Ct., Rock Cty., Wisconsin 1855)	2	2: 790, 834
Caldwell (Recorder's Ct., Chicago 1855)	0	1: 614, 670