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A Right to Speedy Sentencing? Not so Fast.

Introduction

Imagine the feeling of finally knowing the outcome of what may be the most important moment of your life. All the stress and anxiety is finally over as you wait for a hearing to know how past actions will affect the upcoming years of your life. While most defendants are detained following a determination of guilt, a small number are released prior to sentencing.¹ Some of these defendants hope to draw the process out for some time in an attempt to avoid incarceration; for others they may wish to know their fate at sentencing. For most, that hearing may not come for months or even years, creating a feeling of perpetually living in the past, thinking about the result of a criminal trial.

Federal courts have in almost all cases performed extraordinarily well fulfilling their obligations in sentencing convicted defendants.² In a small number of circumstances defendants sentencing proceedings are delayed. In these circumstances, victims and defendants are left feeling unresolved as they wait for their sentence. Such delays have detrimental outcomes for both the interests of the defendant and government in the criminal justice system.

For close to sixty years, almost all federal courts have stated with little explanation that the right to speedy sentencing is encapsulated within the Sixth Amendment's right to a speedy trial. Instead, this Note intends to demonstrate that such a right is captured in the Fifth

¹ E.g. Mark Motivans, Ph.D., *Federal Justice Statistics 2010-Statistics Tables* (<http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>) (Table 3.2, shows that 32% of defendants are released at the disposition of the case.)

² See Jason Gibson, *The U.S. Sentencing Guidelines: A Surprising Success?* 1998 U. Rich. Law Faculty Publications (Stating that while there are criticisms of Federal Guidelines for sentencing, many Judges find it the most appropriate approach.).

Amendment's procedural due process clause, which requires the Government to provide certain procedures prior to depriving an individual of life, liberty or property.

Part A of this Note examines the Supreme Court's decision in 1957 when the Court assumed *arguendo* that the Sixth Amendment's right to a speedy trial is applicable to a defendant's right to speedy sentencing.³ Next this section will review the Third and Fifth Circuits decisions which maintained the Supreme Court's assumption in applying the Sixth Amendment to oppressive delays in sentencing.⁴ Finally, Part A will explain the Second Circuit's argument, in 2009, that a Fifth Amendment Due Process Claim, rather than a Sixth Amendment Claim, is more applicable to a defendant's delay in sentencing.

Part B of this Note will further expand the Second Circuit's decision by looking briefly at the historical importance of a trial as it pertains to criminal sentencing.⁵ The United States took many aspects of the English legal system when forming a new nation, including the criminal trial system. By reviewing the common criminal trial practice, this Note seeks to explain that criminal sentencing is a distinct and separate part of the criminal trial, which does not lend itself to rights of the Speedy Trial Clause of the Sixth Amendment and instead is better served by review under the Fifth Amendment. Furthermore, this part will examine recent US legislation demonstrating Congress's intent to not include sentencing while promulgating statutes regarding criminal trials.

Lastly, Part C will examine why the Second Circuit's application of the Fifth Amendment Due Process clause in delays in sentencing may correct the extreme outcome of an application of the Sixth Amendment when applied to sentencing. As the Supreme Court stated in *Strunk v. United States*, the only acceptable outcome in a violation of the Sixth Amendment is a dismissal

³ Pollard v. United States, 352 U.S. 354 (1957).

⁴ United States v. Campbell, 531 F.2d 1333 (5th Cir. 1976). and Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987).

⁵ United States v. Ray, 578 F.3d 184 (2009).

of the conviction with prejudice.⁶ Such a resolution to a delay in sentencing allows those who have pleaded guilty or have been convicted of a crime to proceed without punishment, which does not allow for retribution or other interests in criminal sentencing. Such an outcome, while beneficial for the defendant, is also adverse to the the government's interests. Following the Second Circuit's approach, a court may determine if a violation occurred and gauge the amount of prejudice the defendant incurred in the delay. If a violation is found in the sentencing proceedings the Second Circuit's approach permits the court to reduce the potential sentence, which provides a balancing of interests between failing to cure a constitutional violation and dismissing the matter with prejudice. The reduction in sentence allows for the defendant to receive a lesser sentence as a result of prejudice while protecting the government's interest in punishing those who are found guilty.

Part A Effect of *Pollard* and Moving Forward

Defendants have challenged delays in sentencing in federal courts believing that their constitutional rights have been violated, with the vast majority of claims brought under the Sixth Amendment.⁷ First, this section will review the Supreme Court's decision regarding delays in sentencing, that set much of the framework for how these issues are viewed today. Next, a review of decisions from both the Third and Fifth Circuits will show that both courts did not expand on the Supreme Court's assumption regarding the application of the Sixth Amendment to sentencing delays. Lastly, an examination of the Second Circuit's decision in 2009 provides a change in analysis and framework regarding sentencing delays.

⁶ U.S. v. Strunk, 412 U.S. 434, 436 (1973).

⁷ Susan L. Thomas, J.D., *When Does Delay in Imposing Sentencing Violate Speedy Trial Provision*, 86 A.L.R.4th 340 (1991).

The Supreme Court addressed the issue of oppressive sentencing delays in *Pollard v. United States*.⁸ The defendant in this case was charged with and eventually pleaded guilty to the unlawful taking and embezzlement of a treasury check pursuant to 18 U.S.C. § 1702.⁹ Prior to sentencing, the defendant was previously incarcerated.¹⁰ While commending the defendant for his rehabilitation during his imprisonment, the Court stated that he would be placed on probation for three years.¹¹ The sentence was placed on the record after the defendant had already left the courtroom and he was not given a copy of the order.¹²

Two years after the imposition of the defendant's probation, a bench warrant was issued by the trial judge after discovering the defendant violated the terms of his probation.¹³ Following his arrest, the defendant was sentenced to two years' imprisonment.¹⁴ The defendant appealed the sentencing, claiming that his sentence of probation was invalid because he was not present pursuant to F.R.C.P. 43 and as a result his sentence of two years' imprisonment was invalid.¹⁵ In his claim to the Supreme Court, the defendant argued that the imposition of two sentences for the same crime violated the Double Jeopardy Clause of the Fifth Amendment.¹⁶ Furthermore, the defendant asserted that the circumstances surrounding his sentencing violated his rights to a speedy trial pursuant to the Sixth Amendment and that he was deprived due process of law under the Fifth Amendment.¹⁷

⁸ 352 U.S. 354 (1957).

⁹ *Id.* at 355.

¹⁰ *Id.* (Defendant was serving a sentence in Minnesota for an unrelated crime and was scheduled to be released within weeks following the hearing.)

¹¹ *Id.* (Defendant's probation was set to begin following his release from incarceration.)

¹² *Id.* (The Defendant was unaware of the sentence being placed on the record.)

¹³ *Id.* at 356.

¹⁴ *Id.*

¹⁵ *Id.* at 357.

¹⁶ *Id.* at 359.

¹⁷ *Id.*

The Court examined the district court's role in sentencing to determine if it had erred in its decision.¹⁸ Turning to the question of the applicability of the Sixth Amendment claim to sentencing the Court stated, "We will assume *arguendo* that sentence is part of trial for purposes of the Sixth Amendment."¹⁹ The Court went on to say that any such delay must prove to be oppressive or purposeful for a constitutional violation to have occurred.²⁰ The Court found no such occurrence and therefore no constitutional violation.²¹ Lastly, the Court noted that the timing of sentencing is not at will for the judge in any case, but is rather governed by Rule 32(a) of the Federal Rules of Criminal Procedure.²²

The issue was confronted by a Federal Circuit Court of Appeals in 1976, when the Fifth Circuit decided *United States v. Campbell*.²³ The court issued defendant, William Campbell, the maximum sentence permitted under the provisions of 18 U.S.C. § 4208(b).²⁴ However, the sentence was suspended pending a study by the Director of the Bureau of Prisons.²⁵ The defendant was confined in a state jail when his conviction was affirmed following an appeal; however, he was wrongfully released after serving a previous sentence for an unrelated crime.²⁶

Campbell was taken in to federal custody more than four years following his release and was placed in technical custody at his home due to his severe medical condition.²⁷ The court ordered study by the Bureau of Prisons was not completed until Campbell was taken into

¹⁸ *Id.* at 361.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 362.

²² *Id.* at 361. (Finding that the Federal Rules on Criminal Procedure require the imposition of a sentence without unreasonable delay)

²³ 531 F.2d 1333 (5th Cir. 1976).

²⁴ *Id.* (The maximum penalty permitted under the statute was five years on each of the counts. The Defendant was ordered that the sentence was to be served consecutively)

²⁵ *Id.* (The Bureau was requested by the Court to conduct the study to determinate an appropriate sentence as a result of the Defendant's muscular dystrophy.)

²⁶ *Id.* at 1335. (The state authorities who were confirming Campbell were served with a detainer notice, alerting them not to release Campbell at the end of his current sentence. Campbell was released and returned home.)

²⁷ *Id.*

custody.²⁸ After the report was completed, Campbell was sentenced to three year's probation, more than six years following the hearing with the District Court.²⁹

Much like the defendant in *Pollard*, Defendant Campbell claimed that the four-year delay in the imposition of his sentence violated the Sixth Amendment's right to a speedy trial, F.R.C.P. Rule 32 and a denial of due process under the Fifth Amendment.³⁰ The Court quoted the Supreme Court that an "unreasonable delay in sentencing may constitute a violation of the defendant's Sixth Amendment right to a speedy trial."³¹ The Court then went on to evaluate the delay in sentencing under the *Barker v. Wingo*³² four-prong test, which is the standard test to determine if a Sixth Amendment violation had occurred.³³ The court examined the length of the delay; whether a defendant has asserted his Sixth Amendment right and whether prejudice to a defendant has resulted from the delay.³⁴

The Court found that the length of the delay was unreasonable and that there lacked any sufficient reason for the delay.³⁵ It stated that the district court, while not appearing to have prejudiced the defendant by any intention, must review the record and make a determination.³⁶ The Fifth Circuit failed to expand or give any reasoning behind the Supreme Court's assumption that sentencing was under the umbrella of the Sixth Amendment.³⁷ Instead, the Court confined its review to the Sixth Amendment.³⁸

²⁸ *Id.*

²⁹ *Id.* at 1334.

³⁰ *Id.* at 1335.

³¹ *Id.*

³² 407 U.S. 514 (1972).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1336.

³⁶ *Id.* (The Court found the District Court made a simple mistake in failing to schedule the sentencing at a proper time and noting was done with the intent to delay.)

³⁷ *Pollard*, 352 U.S at 361.

³⁸ *Campbell*, 531 F.2d at 1335.

Eleven years following the Fifth Circuit's decision, the Third Circuit reviewed *Burkett v. Cunningham*.³⁹ The Defendant, Paul Burkett, raised two habeas corpus appeals due to a delay in sentencing following three Pennsylvania state court convictions.⁴⁰ Burkett argued a violation occurred as a result of his continued custody in all three of his conviction.⁴¹ He stated that the delay in trial had violated his right to a speedy trial pursuant to the Sixth Amendment and that due process violations have taken place.⁴² The Third Circuit noted that the right to a speedy trial is "a fundamental tenant of Anglo-American jurisprudence" insinuating to its importance.⁴³

The Third Circuit acknowledged that neither that court nor the Supreme Court had definitively held that the right to speedy trial pursuant to the Sixth Amendment applies to post-verdict or post-conviction proceedings.⁴⁴ Instead, the Third Circuit noted that both it and the Supreme Court have assumed arguendo that such a right is applicable.⁴⁵ While the Court offered no explanation as to why it has continually assumed the right to speedy sentencing is encapsulated by the Sixth Amendment, it explicitly stated that the speedy trial clause applies from the time an accused is arrested or criminally charged, as well as through the sentencing phase of prosecution.⁴⁶ The court even went on to state that the Tenth Circuit and all others that had addressed the issue have treated the Supreme Court's assumption as established law or have continually perpetuated the Court's assumption in *Pollard*.⁴⁷

³⁹ 826 F.2d 1208.

⁴⁰ *Id.* at 1210. (One sentencing, which encompassed two separate convictions, was delayed two years and four months following trial. The Defendant had yet to be sentenced for the last conviction, after five and a half years following trial as well as two years after the district court stated that his right to a speedy trial would be violated if it did not occur within sixty days.)

⁴¹ *Id.* at 1212.

⁴² *Id.*

⁴³ *Id.* at 1219.

⁴⁴ *Id.* at 1220.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

After stating that the court would examine the defendant's claim under the Sixth Amendment, the court announced that the *Barker v. Wingo* factors were the appropriate test to determine if constitutional violation occurred as a result of the delay in sentencing.⁴⁸ It also stated that if a constitutional violation is in fact found, it may not go unrectified, but instead must be cured.⁴⁹ Lastly, the court stated that where the prejudice in delay may not be rectified, there is only one remedy applicable to such circumstances.⁵⁰ The court cited to *Strunk v. United States*⁵¹ in saying that "where the prejudice cannot be rectified, the remedy must be discharge from custody with prejudice to retrial".⁵²

Applying the *Barker* factors, the court found that a constitutional violation had occurred as a result of the delay.⁵³ The court noted that all of the *Barker* factors weighed to some extent towards the defendant's favor, including that the delay had resulted in prejudice.⁵⁴ The court went on to compare the incredible length of the defendant's delay in sentencing with other cases, which in most were not even half of that in the current case.⁵⁵ Ultimately, the court found that no lesser remedy than that described in *Strunk* was appropriate for such a delay.⁵⁶ The court released the defendant and discharged his convictions, with prejudice, as a result of the Sixth Amendment violation.⁵⁷

The Second Circuit decided to take a more in-depth review of the Six Amendment as it applies to delays in sentencing in *United States v. Ray*.⁵⁸ Defendant, Shenna Deloache Ray, was

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 412 U.S. 434 (1973).

⁵² 826 F.2d at 1220.

⁵³ *Id.* at 1223.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1224.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1224-1225.

⁵⁸ 578 F.3d 184 (2009).

convicted of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.⁵⁹ Ray pleaded guilty to the charge in 1991, however the case was remanded on direct appeal as both parties sought resentencing.⁶⁰ Defendant Ray requested the District Court to review mitigating factors such as her familial circumstances at the time; that the crime she committed was a result of threats against her; and her current pregnancy.⁶¹ Unaware if a departure from the sentencing guidelines was proper, the District Court denied her request. However, during her appeal the Third Circuit held in *United States v. Johnson*⁶² that such circumstances allow for such a departure.⁶³ It was then agreed upon by both parties that Ray would be resentenced pursuant to *Johnson* and a stipulation for the same was filed with the court.⁶⁴ Unknown to the state, no further action was taken on the Defendant's case for fifteen years.⁶⁵

Since that original sentencing date, Defendant Ray continued on with her life in a variety of areas.⁶⁶ However, when she sought new employment she was requested to provide documentation concerning the result of her 1992 conviction.⁶⁷ After requests to both the District Court and Second Circuit for documentation, she received a re-sentencing date in March 2008.⁶⁸

At the hearing, Ray's counsel implored the court to consider a lenient sentence given the rehabilitation since her crime.⁶⁹ After hearing arguments from both the government and Ray's

⁵⁹ *Id.* at 186.

⁶⁰ *Id.* (In 1992, the court held a sentencing hearing where Ray was categorized as a level thirteen offender pursuant to the U.S. Sentencing Guidelines with a criminal history of 1. Pursuant to the mandatory sentencing guidelines, Ray could receive a punishment in the range of twelve to eighteen months)

⁶¹ *Id.* at 187.

⁶² 964 F.2d 124 (1992).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* (Defendant Ray gained lawful employment, enrolled in an associate's program at a community college and paid all of her taxes, with the government conceding that she "reformed her lifestyle and achieved successful self-rehabilitation")

⁶⁷ *Id.*

⁶⁸ *Id.* at 188.

⁶⁹ *Id.*

counsel concerning a possible violation of her right to a speedy trial, the District Court gave her a lenient sentence of one day imprisonment.⁷⁰ The court also required that Ray serve three years of supervised release with a special condition that she spend six months in a halfway house.⁷¹ Following her one day imprisonment, Ray immediately filed an appeal with the Second Circuit, arguing that her undue delay in sentencing violated her right to a speedy trial pursuant to the Sixth Amendment and that there was a violation of the Due Process Clause of the Fifth Amendment.⁷²

In its review of both the Fifth and Six Amendment Claims, the court reviewed previous determinations by courts presented with delays in sentencing.⁷³ Finding little assistance in previous decisions, the court looked to the plain text of the Sixth Amendment for further guidance.⁷⁴ The court quoting from *United States v. Sprague*⁷⁵ stated, “The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary meaning as distinguished from technical meaning.”⁷⁶ With that in mind the court turned towards the meaning of the word trial, as understood by the general public.⁷⁷ In review of previous court decisions, the court found that the word “trial” has generally been held as the determination of guilt or innocence of a defendant, as well as the facts required for the imposition of a sentence, but not the sentence itself.⁷⁸

Searching further for an explanation of the common usage and understanding of the word trial, the Second Circuit reviewed the writings of Sir William Blackstone, the famed English

⁷⁰ *Id.* at 189.

⁷¹ *Id.*

⁷² *Id.* at 190.

⁷³ *Id.* at 192-194.

⁷⁴ *Id.* at 194.

⁷⁵ *United States v. Sprague*, 282 U.S. 716 (1931).

⁷⁶ 578 F.3d at 194., quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931).

⁷⁷ *Id.* at 194.

⁷⁸ *Id.* at 195.

legal scholar.⁷⁹ The court found it instructive that Blackstone noted the separation of a trial and sentence in criminal prosecutions.⁸⁰ Next, the court looked to early decisions of American courts that reflected the distinction between trial and sentencing.⁸¹ The court concluded that “the passage of two centuries since the Framing era has not changed the basic divide between trial and sentencing.”⁸²

The court then focused on American criminal procedure which developed in the 20th Century to further its examination of the Sixth Amendment’s application to the imposition of a criminal sentence.⁸³ The court looked to the Federal Rules on Criminal Procedure for guidance, finding that the rules themselves exhibit a differentiation between trial proceedings and sentencing.⁸⁴ Specifically, the court noted that Rules 23 through 31 directly pertain to trials, whereas both sentencing and judgment are addressed in Rule 32.⁸⁵ The court stated “The structure of the Rules reflects an understanding that trials conclude with the announcement of a verdict of guilt or not guilty, and sentencing takes place after trial.”⁸⁶

The court then examined the Speedy Trial Act of 1974, in which Congress created time limitations to ensure that a defendant was deprived of their Sixth Amendment right.⁸⁷ After review, the Court found that the Act does not specifically mention sentencing and creates no affirmative right to speedy sentencing.⁸⁸ The Court concluded that “If trials were generally understood to include sentencing proceedings, we would expect the Speedy Trial Act to apply to

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* 195-196., *See* Kennedy v. Commonwealth 4 Va. 510, 510 (1826); Burgess v. Commonwealth, 4 Va. 483, 486 (1825); Commonwealth v. Pease, 16 Mass.91, 94 n.6 (1819); Commonwealth v. Drew, 4 Mass. 391, 399 (1808)

⁸² *Id.* at 196.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 197.

⁸⁸ *Id.*

those proceedings. That the Act contains no reference to sentencing whatsoever suggests that Congress did not consider sentencing proceedings to be components of criminal trials.”⁸⁹

Lastly, the court reviewed the interests of a defendant that are sought to be protected by the Sixth Amendment’s Speedy Trial Clause.⁹⁰ The Supreme Court’s decision in *Doggett v. United States*⁹¹ recognized three primary concerns a defendant being delayed for trial.⁹² Those interests include: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the accused defense will be impaired by dimming memories and loss of exculpatory evidence.⁹³ The court found that the Eighth Circuit has already explained in *Brooks v. United States*⁹⁴ many of these factors are not applicable to a defendant who is awaiting criminal sentencing.⁹⁵

First, the court noted that pretrial incarceration is not at issue because a defendant has already been convicted of the crime at issue and is simply awaiting punishment.⁹⁶ The court then went on to state that a convicted defendant does not share the same kind or amount of anxiety and concern as does one who is awaiting trial.⁹⁷ The anxiety and concern related to the Speedy Trial Clause arise of one who is presumptively innocent; who is suspicious as to the outcome of their matter.⁹⁸ The Court noted that once a defendant has been found guilty the presumption of innocence is no longer present and while a defendant awaiting sentencing may still be under a

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 505 U.S. 647 (1992).

⁹² 578 F.3d at 197.

⁹³ *Id.*, citing *Doggett* 505 U.S. 647, 654 (1992).

⁹⁴ 423 F.2d 1149 (1970).

⁹⁵ *Id.*

⁹⁶ *Id.* at 197-198

⁹⁷ *Id.* at 198. (The Court finding its basis for this belief from the Eight Circuit’s review in *Brooks v. United States*, 423 F.2d 1149 (1970))

⁹⁸ *Id.*

cloud, it is one of public guilt.⁹⁹ Lastly, the court concluded that the third factor may have the most profound impact on sentencing, however not one that is fatal.¹⁰⁰ While the passage of time might impair a criminal defense, it does not foreclose the defendant to argue for leniency at sentencing.¹⁰¹ Accordingly, the court held that the Sixth Amendment is not applicable to a delay in sentencing proceedings.¹⁰²

The court, after noting that the concerns of a delay in trial are not applicable to those who are delayed in sentencing, recognized harms arising from any delays in sentencing proceedings.¹⁰³ Specifically, the court found that a delay in sentencing leaves both the defendant and victim in a state of limbo, uncertain of the future.¹⁰⁴ Furthermore, a delay also postpones the commitment of a defendant to federal institutions, which may result as a detrimental effect to any rehabilitation they may receive.¹⁰⁵ The court stated that these interests should be protected.¹⁰⁶

Finding that the Fifth Amendment “has a limited role to play in protecting against oppressive delay” the court began its review of the Fifth Amendment’s role in a delay in sentencing proceedings.¹⁰⁷ Looking again to the Federal Rules of Criminal Procedure, Rule 32(b)(1) provides that “the court must impose sentence without unnecessary delay”, unless the court finds good cause to change such time limits prescribed by the rule.¹⁰⁸ After a finding that the Sixth Amendment is not applicable to these circumstances, the court found that delays in

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 198-199.

¹⁰³ *Id.* at 198.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 199. (quoting *United States v. Lovasco*, 431 U.S. 783, 789 (1977)).

¹⁰⁸ *Id.* at 199.

sentencing may amount to a violation of due process in the Fifth Amendment as a result of an individual being denied liberty.¹⁰⁹

One of the main reasons of the court's determination that the Sixth Amendment is inapplicable to a delay in sentencing is the remedy. The court acknowledged that the Supreme Court has stated that the only remedy for a delay pursuant to a Sixth Amendment violation is a dismissal of the charges.¹¹⁰ Such a remedy may only be described as extreme as it would permit those who are found guilty of a crime to be vindicated of all charges with prejudice. The court noted that other courts have expressed that such a remedy is unsatisfactory.¹¹¹ Specifically, the court found guidance from the *Bozza v. United States* decision.¹¹² The court quoted the *Bozza* court, wherein it expressed its rejection of such a remedy, stating "its rejection of the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence'".¹¹³

Finding that such a remedy is extreme, the court found that sentencing delay violations when viewed pursuant to the Fifth Amendment permits the court to avoid such a result.¹¹⁴ Instead, the court fashioned a two-prong test, taking what it believed to be two of the most crucial factors from the *Barker* court to evaluate delays in sentencing.¹¹⁵ The court stated that when determining if a violation of the Fifth Amendment occurred due to a delay in sentencing, the court must determine 1) the reasons for delay as well as; 2) the prejudice to the accused.¹¹⁶ Providing some clarification to the test, the court noted that while prejudice is necessary,

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 193.

¹¹¹ *Id.* at 193-194.

¹¹² 330 U.S. 160.

¹¹³ *Id.* at 166. (quoting *In re Bonner*, 151 U.S. 242, 260 (1894))

¹¹⁴ 578 F.3d at 194.

¹¹⁵ *Id.* at 199.

¹¹⁶ *Id.*

prejudice alone is not enough to warrant a finding of a violation.¹¹⁷ Instead, a defendant asserting a claim must evidence prejudice and an unjustified reason for the delay in order to prove a due process violation.¹¹⁸ These considerations must be weighed and evaluated together rather than independently, as they must be considered related factors.¹¹⁹

Turning back to the circumstances before the court, it applied the first prong of the newly promulgated test to defendant Ray's facts.¹²⁰ In reviewing the reasons for delay, the court found guidance from the Supreme Court that while "deliberate delay to hamper the defense weighs heavily against the prosecution, more neutral reasons such as negligence or overcrowded courts weigh less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."¹²¹ The court found that the reason for the delay was negligence on behalf of the government, allowing it to languish for close to fifteen years.¹²² The court also considered whether the defendant should bear any burden for such a delay, but reiterated that neither the defendant or their counsel have an affirmative duty to seek criminal prosecution or sentencing.¹²³

The court then sought to determine the degree of prejudice the defendant faced as a result of the delay.¹²⁴ The amount of prejudice may not simply be minimal but instead must be substantial and demonstrable for a violation to be found.¹²⁵ In finding prejudice, the court

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 200.

¹²¹ *Id.* (quoting *Vermont v. Brillion*, 129 S. Ct. at 1290 (2009))

¹²² *Id.* (The court noted that the government conceded that the claim was left stale for that period of time.)

¹²³ *Id.*

¹²⁴ *Id.* at 201.

¹²⁵ *Id.*

reviewed what transpired in the defendant's life during the fifteen year delay in proceedings.¹²⁶ It found that since being convicted the defendant had been rehabilitated.¹²⁷

As the last part of the Second Circuit's approach, the court balanced both the reason for delay and the prejudice Ray experienced as a result of the delay.¹²⁸ Finding that even while the reason for delay was the negligence of the government, something that should not be weighed heavily, the Court found the prejudice significant.¹²⁹ The Court found that a due process violation existed.¹³⁰ It reasoned that Ray's sentence of residing in a halfway house for six months would only uproot her successful rehabilitation and chose to vacate that part of her sentence.¹³¹ However, the court pursuant to its determination that the Fifth Amendment is proper in these circumstances, did not dismiss Ray's conviction with prejudice.

Since the *Ray* decision, some courts¹³² have chosen not to adopt the Second Circuit's approach when determining a delay in sentencing. Upon further review, many courts may be inclined to adopt the Second Circuit's two-prong test to determine if a due process violation exists, allowing those courts to determine a more appropriate remedy rather than dismissal of the charges.

While many courts have failed to adopt the Second Circuit's approach, it has been received with some thought from others. Specifically, Circuit Judge Gruender, in his concurring opinion in *United States v. Thompson*, found the Second Circuit's review of the Sixth

¹²⁶ *Id.*

¹²⁷ *Id.* (The Court found that since her arrest that led to the issue, that she has since remarried, raised a family, has been steadily employed, obtained a higher education and did not commit any further criminal acts. It felt that such progress would possibly be undermined by the prejudice the defendant would face by imposing a sentence.)

¹²⁸ *Id.* at 202.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 203.

¹³² See *United States v. Carpenter*, 781 F.3d 599, 609 (1st Cir. 2015); *SEC v. Boyd*, 2012 U.S. Dist. LEXIS 43317 (2012).

Amendment as it applies to sentencing to be rather convincing.¹³³ Judge Gruender believed the Constitution was written to be understood by its plain meaning and the terminology used in the text should be construed as it was used in everyday language.¹³⁴ Judge Gruender noted, as the Second Circuit found, that trial and sentencing proceedings are and were often bifurcated. This led him to believe that the Fifth, rather than the Sixth Amendment, is more applicable to such delays, as sentencing does not have a place within the plain meaning of the Sixth Amendment.

A brief review of history will illuminate both the roles of juries in sentencing, as well as to provide a better understanding of what a criminal trial contemplated in early American jurisprudence. Providing a broad historical background can assist in determining the applicability of the Fifth Amendment rather than the Sixth Amendment as it applies to delays in sentencing.

Part B- Historical Aspect

Providing a broader historical setting to the time period when the Constitution was written permits a greater understanding of how criminal juries functioned in the late 18th and early 19th centuries, as well as the limitations in their duties. This section will also review legislation from the twentieth century, both the Speedy Trial Act and Rules of Criminal Procedure, to demonstrate Congress's separation of the trial and sentencing phases in criminal prosecution.

In its review of the Sixth Amendment and its application to delays in sentencing, the Second Circuit examined the text of the Sixth Amendment to determine its meaning in light of the historical context when it was passed.¹³⁵ The court looked at the text of the Constitution on the assumption that “the Constitution was written to be understood by the voters; its words and

¹³³ 713 F.3d 388, 396-97 (8th Cir. 2013).

¹³⁴ *Id.*

¹³⁵ *Id.* at 196.

phrases were used in their normal and ordinary meaning as distinguished from technical meaning.¹³⁶ The Second Circuit’s textual review of the Sixth Amendment, rather than assuming *arguendo* that it applies to sentencing, supports the applicability of the Fifth Amendment to the issue.

A review of history reveals the word “trial” refers to the stage at which a defendant’s case is unearthed and facts are found in an attempt to determine if that individual is guilty.¹³⁷ For those in the legal community it often refers to the stage at which we present the issues of both fact and law before a factfinder. Specifically, Black’s Law Dictionary refers to a trial as “the judicial determination of issue between parties to an action, whether they be issues of law or fact, before a court that has jurisdiction”¹³⁸ It appears that the word trial encompasses that specific function in the criminal prosecution, something that sentencing is not part of. Furthermore, it provides some clarification that there was a distinction between the determination of guilt and sentencing.

While these current definitions may shed some light on the common understanding of the word specifically invoked in the Sixth Amendment, a brief historical recall of the English legal system will only further exhibit that both trial and sentencing are different phases within the criminal prosecution of a defendant. Review of the history of the English trial from the 17th and 18th centuries will assist to exhibit that the main purpose of a trial at that time period was for the discovery of facts and the determination of guilt of a defendant.

¹³⁶ *Id.*

¹³⁷ *Supra* note 72.

¹³⁸ Black's Law Dictionary 1504 (6th ed. 1990).

Trials were introduced in the early 13th century and were deemed valuable at the time of the signing of the Magna Carta.¹³⁹ During this time period, William Blackstone noted:

But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.¹⁴⁰

Such a remark shows that the jury was used for the purpose of seeking the truth of the claims set forth before the court.

The advent of trials was not absent from the early American colonies. Much of the English common law was adopted as a result to fill the need of a lack of substantive and procedural law in early American times. While not all of the common law was used it has been stated “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation”.¹⁴¹ One of the English common law elements that was promoted at this time was a public trial. However, one additional aspect that was permitted of these procedures was that in comparison to English juries, early American juries were permitted to make findings of both fact and law.¹⁴²

With the principle purpose of the common law trial well founded, a review of a jury’s role in sentencing is also crucial in understanding the inapplicability of the Sixth Amendment to

¹³⁹ William Blackstone, *Commentaries of Law, of Trial and Conviction* (1766-1779).

¹⁴⁰ *Id.*

¹⁴¹ *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 143-44 (1829).

¹⁴² Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

sentencing proceedings. As previously stated, juries were used to review facts and law in order to return a more insightful and just verdict for a defendant.¹⁴³ However, what remains clear through reviewing the history of trials is that sentencing proceedings were distinct from a jury's determination of guilt.

Turning once again to Blackstone for guidance of the English trial system, his writings clearly evidence that imposing a sentence upon the defendant was a distinct proceeding, one that is separate from the trial's function. He notes, "We are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors, as are either too high or too low to be included within the benefit of clergy: which is that of judgment".¹⁴⁴ Blackstone states, however, that in certain circumstances a technical hearing would be appropriate in which a defendant would be permitted to present evidence to support a mistrial or to request reprieve of punishment.¹⁴⁵ This hearing was separate from the determination of facts and guilt, which was established at trial, leading to believe that this was the onset of what would be sentencing hearings, a separate proceeding from the trial.

Sentencing hearings or the earliest form of such proceedings appeared to gain some ground in the late 18th century, as defendants were permitted to submit affidavits to combat the proposed harsh punishment a defendant was set to face.¹⁴⁶ The purpose of these affidavits was

¹⁴³ Supra note. 139.

¹⁴⁴ William Blackstone, *Commentaries of Law, of Judgment and its Consequences* (1766-1779).

¹⁴⁵ *Id.*

¹⁴⁶ Chitty, 1816: 651–94.

not to challenge the final determination of the trial but instead to present evidence as to why a punishment should not be imposed on the defendant.¹⁴⁷ English scholar J. Chitty stated:

When the defendant has been convicted of a misdemeanor in the King's Bench
. And as the prosecutor is only permitted on the trial to produce such of his evidence as is sufficient to convict the defendant. Therefore, upon this motion affidavits may be read in aggravation of the offence and on the defendant's part in mitigation, as the defendant may by affidavit lessen the degree of his guilt. Each party must, therefore, then come prepared with affidavits disclosing all the circumstances of the case, taking care however not to attempt to dispute the propriety of the verdict.¹⁴⁸

Such a determination was made by the court, not the jury, in imposing the sentence, further separating the trial function from sentencing. The separation of functions between the judge and jury notes that distinct proceedings after trial were promulgated to relate directly to sentencing of a defendant, something that the jury in the trial did not encompass.

Judges' role in sentencing was also found in the late 18th century in the United States. Judges were permitted in misdemeanor cases to apply discretion in sentencing defendants based upon the facts presented to the court.¹⁴⁹ However, this discretion was soon applied to all types of crimes. When Congress promulgated the first federal legislated criminal laws, judges were often given their own discretion to apply the sentence that they believed was just and deserving.¹⁵⁰ It evidences a separate proceeding in which courts, by means of judges, would make an independent decision in a separate proceeding from trial that pertained only to sentencing.

Early American courts also noted the separation of trial and post-conviction proceedings. In these cases, as the Second Circuit noted, motions were made after conviction and heard in a

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should meet the Rules*, 79 Cornell L. Rev. 299 (1994).

¹⁵⁰ *Id.*

separate proceeding.¹⁵¹ The proceedings were to determine facts or claims regarding the imposition of a certain sentence. Some of these motions also claimed that the trial was unjust, arguing that a new trial was warranted.¹⁵² The court notes that the determination of these motions or hearing was not heard by the jury but instead simply by the judge.¹⁵³ Therefore, it appears that judges, rather than juries, had a distinct role in sentencing proceedings. That role being the determination of a specific sentence based upon the juries' determination of guilt.

While trials, by means of juries, were used to determine facts and law of claims against defendants as well as provide a determination of guilt, its role was not one of sentencing. Instead, that role was with the court and may be subject to the discretion of the judge who would hear facts in a separate proceeding as to why the defendant should receive the proposed punishment. Such a difference is well noted in review of the Sixth Amendment as strict constructionists, like the Second Circuit, reviewed the text of the amendment at the time and context of the founders who wrote it.¹⁵⁴ A review of history demonstrates that the word trial does not by itself encompass sentencing proceedings, thereby suggesting the text of the Sixth Amendment inapplicable to such proceedings.

The separation of the trial phase and sentencing proceedings continually was noted by legislation through the 20th century. Specifically, the Federal Rules of Criminal Procedure, which was enacted in 1946 by the Federal courts, notes the difference by the organization of the rules. Title VI of the rules are under the heading of "trial", Rules 23 through 31 address the this phase

¹⁵¹ Supra note 80.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Edwin Meese III, *Our Constitution's Design: The Implications for its Interpretation*, 70 Marq. L. Rev. 381 (1987). (Addressing the strict constructionist view on which Judge's look to the intent and context of the language of the Constitution).

of a criminal prosecution, including juries,¹⁵⁵ testimony¹⁵⁶ and the jury verdict.¹⁵⁷ Whereas, Title VII is titled post-conviction proceedings which refers to all proceedings that occur after trial.¹⁵⁸ Specifically, Rule 32 relates to sentencing and judgment in which the court should review facts and circumstances surrounding the defendant in applying the appropriate sentence.¹⁵⁹ It would appear from the structure and organization of the Rules that the courts who promulgated the same noted a distinction between trials and sentencing.

Lastly, Congress enacted legislation in in 1974 to combat and provide guidance to delays in trial that would violate the Sixth Amendment. The Act provides time limitations in which each stage of the criminal prosecution and trial should be completed. However, what remains clear from the text of the Act is that in no place does Congress refer to sentencing or sentencing proceedings. By applying the basic principles of statutory interpretation we must look to the text of the legislation to determine Congress's true intent, or simply referred to by the Supreme Court as the plain meaning rule.¹⁶⁰ As the Supreme Court has stated "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive".¹⁶¹ Thus, while it appears that there is no contrary meaning Congress's intent in passing such legislation, it would appear that it did not seek to include

¹⁵⁵ Fed. R. Crim. P. R. 23

¹⁵⁶ Fed. R. Crim. P. R. 26

¹⁵⁷ Fed. R. Crim. P. R. 31

¹⁵⁸ *Id*

¹⁵⁹ Fed. R. Crim. P. R. 32

¹⁶⁰ *E.g.* Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al., 447 U.S. 102 (1980).

¹⁶¹ *Id.*

sentencing in the Act to ensure that defendants did not succumb to prejudice by a violation of the Sixth Amendment.¹⁶²

Review of early American trials and recent legislative acts relating to criminal procedure provides insight as to how trial and sentencing are separate criminal proceedings. By establishing the separation of the proceedings the Second Circuit of Appeals noted that the Supreme Court may have overlooked the applicability of the Fifth Amendment as it applies to sentencing. Had the Supreme Court undertaken the task of searching for the meaning of the text of the Sixth Amendment at the time of its inception, they may have found that the founders looked to cure delays in trials rather than sentencing proceedings by means of the Sixth Amendment.

While a review of the meaning of the word trial and history of sentencing proceedings may appear to be trivial, it could have a profound impact upon the remedy if a constitutional violation exists. Currently, the remedy for such a violation is a dismissal of the defendant's charges with prejudice. However, if courts were to believe that issue is encapsulated in the Fifth Amendment, a less severe remedy may be provided that protects the interests of both the government and the defendant.

Part C- Barker and Strunk

Section C of this Note seeks to demonstrate the current remedy fashioned by the courts may be perceived as a harsh remedy by members in the legal community and one that courts seek to avoid. A review of two Supreme Court decisions will evidence the reasoning behind the remedy, as well as the factors the courts use in their determination.¹⁶³ Finally, this section will address the public policy concerns, regarding sentencing that are threatened by such a remedy.

¹⁶² See. A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, (Fed. Justice Center 1980). (Legislative records show that there were proposed amendments to the Act by Daniel J. Reed regarding the amount of time between conviction and sentencing, however these amendments were not put into effect.).

¹⁶³ U.S. v. Strunk, 412 U.S. 434 (1973) and Barker v. Wingo 407 U.S. 514 (1972).

Part C-I- Barker and Strunk

The United States Federal Courts, including the Supreme Court, have encountered Sixth Amendment claims in which defendants have claimed that the right to a speedy trial has been denied by oppressive pre-trial delays. Concerned regarding the liberties of the accused defendants, courts have found that when a Sixth Amendment violation exists, dismissal of the charges is the only resolution.¹⁶⁴ While such a remedy may assist in dealing with the issues arising during pre-trial delays, or even those at trial, the remedy is adverse to the modern goals of sentencing by permitting guilty defendants to escape punishment. By following the Second Circuit's approach in applying the Fifth Amendment to unlikely and distinct circumstances of delays in sentencing proceedings, the approach allows courts to fashion an equitable remedy for such delays while maintaining the principles in sentencing convicted defendants.

The Supreme Court's decision in *Barker* was one of the first to note that the remedy for a violation of the Sixth Amendment right to a speedy trial must be the dismissal of the charges against the defendant. The *Barker* Court was addressing a Sixth Amendment claim from a defendant who was charged with murder.¹⁶⁵ The defendant's trial was delayed for over five years as a result of a co-defendant's charge for the same crime, which required six trials as a result of several deficiencies.¹⁶⁶ Furthermore, the defendant requested a continuance of his own trial for several reasons.¹⁶⁷ After more than five years the defendant was convicted and given a life sentence.¹⁶⁸ Feeling as though he was prejudiced by the delay, the defendant asserted a Sixth Amendment claim.¹⁶⁹

¹⁶⁴ *See Id.*

¹⁶⁵ *Barker*, 407 U.S., 517.

¹⁶⁶ *Id.* at 516-518.

¹⁶⁷ *Id.* at 517.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 517-518.

In evaluating the defendant's claim, the Court noted that there were numerous concerns regarding a defendant who is delayed in awaiting trial.¹⁷⁰ The Court also developed the four-prong test, that has since been used by the majority of courts in determining if a Sixth Amendment did occur.¹⁷¹ Lastly, the Court also noted that because the right to a speedy trial is so crucial to a defendant, dismissal of such charges is a proper remedy.¹⁷² Realizing that such a remedy is severe the Court stated "this is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy".¹⁷³

The *Barker* Court stated that dismissal was the only possible remedy, however the Supreme Court was against faced with the question only a year after in *Strunk v. United States*. In that case the Court was presented with affirming its decision of dismissal due to a Sixth Amendment claim, when the defendant was delayed ten months before appearing for trial.¹⁷⁴ The government claimed that the delay in trial was not oppressive, however Court of Appeals found that the delay was not the fault of the defendant.¹⁷⁵ As a result of the prejudice, the Court of Appeals found that a Sixth Amendment violation did exist and noted that the traditional remedy was dismissal of the convicted and charges.¹⁷⁶

Believing that the *Barker* court only set forth the four-prong test to determine if a violation did occur and not the remedy, the Court of Appeals fashioned its own practical

¹⁷⁰ *Id.* at 519-521.

¹⁷¹ *Id.* at 530.

¹⁷² *Id.* at 522.

¹⁷³ *Id.*

¹⁷⁴ *Strunk*, 412 U.S. at 436.

¹⁷⁵ *Id.* at 436-37.

¹⁷⁶ *Id.* at 438.

remedy.¹⁷⁷ The court determined that the case should be remanded with the instruction that the defendant be sentenced while crediting the time from the defendant's indictment and the date of arraignment.¹⁷⁸ The Court of Appeals acknowledging the extreme outcome of the remedy stated, "Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial".¹⁷⁹ On review the Supreme Court reversed the Court of Appeals determination and held that in fact the *Barker* decision was correct in finding that the appropriate remedy was dismissal.¹⁸⁰

Thus, at the sentencing phase, such a violation would occur when a defendant has already been convicted and not awaiting trial. Meaning that a defendant has already either admitted to such a crime and pleaded guilty or has been found guilty by a jury of their peers. A violation of the Sixth Amendment as it applies to sentencing would permit a convicted defendant to simply be released as a result of delay. Such a resolution is squarely against the role of sentencing in the American Justice system. Furthermore, such a resolution appears to be at odds with the public policy reasons promulgated by legal scholars.

Part C-II-Public Policy for Criminal Punishment

While it has been disputed by both courts and legal experts, there are four main reasons or principles as to why the American criminal system punishes those who have been found guilty of a crime.¹⁸¹ These principles include retribution, deterrence, incapacitation and rehabilitation.¹⁸² It is true that many of these principles have been called into question over

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 339.

¹⁸¹ Andrew Ashworth, *Sentencing and Criminal law (Law in Context)* (2010).

¹⁸² *Id.*

decades from sentencing and criminal statistics¹⁸³; however, they remain the most common categorical reasons as to why society believes in the importance of sentencing those who have been found guilty of a crime. Dismissal of convictions of defendant certainly impedes if not goes against all four policy reasons for sentencing.

Deterrence is the general theory that postulates that the increasing fear or apprehension from punishment in society deters members of society as a whole from committing crimes.¹⁸⁴ Thus, criminal sentencing and punishment is intended to deter convicted defendants from recidivating or returning to their previous course of pattern.¹⁸⁵ Deterrence is categorized as either general or specific.¹⁸⁶ General deterrence refers to the threat of criminal punishment that is aimed to deter the general public, while specific deterrence is aimed to discourage the individual from repeating his' or hers' criminal behavior.¹⁸⁷ Even more applicable to the issue of this Note, deterrence has been said to be most effective when the administration of justice is done with certainty, swiftness and severity.¹⁸⁸

A delay in sentencing alone violates many of the ideologies of deterrence in punishing those who are found guilty. A delay would certainly not be swift nor certain as a defendant is left waiting to see what the result to the criminal proceeding will bring. However, a dismissal pursuant to the *Barker* and *Strunk* courts simply would abolish any role in the justice system from specifically deterring that individual from committing another crime. Instead, these

¹⁸³ See National Statistics on Recidivism (found at <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx>).

¹⁸⁴ David Mulhhausen, *Theories of Punishment and Mandatory Minimum Sentencing*, May 27, 2010 (Speaking directly to Congress concerning mandatory minimum sentencing Mulhhausen provides an overview of the goals of sentencing as a society).

¹⁸⁵ *Id.*

¹⁸⁶ Daniel S. Nagin, *Deterrence in the Twenty-first Century: A Review of the Evidence*, Carnegie Mellon University (2013) at pg. 2.

¹⁸⁷ *Id.*

¹⁸⁸ Cesare Beccaria, *On Crimes and Punishments and Other Writings*, *Journal of Political Economy*, Vol. 76, No. 2 (1968), pp. 169-217.

defendants would face no punishment for crimes committed and while the thought of having to experience another criminal prosecution may arise to a level of deterrence, it is certainly not equal to that of having a sentence imposed.

Another strong principle in criminal sentencing is incapacitation, or the use of sentencing to restrain criminals from reentering society. The restraint of these criminals attempts to limit the amount of crime taking place in society by ensuring those who have already been convicted of crime do not continue to do so.¹⁸⁹ Physical incarceration serves this purpose of reducing crime by excluding those in society who commit it.¹⁹⁰ By allowing defendants, who have been convicted by a jury, to escape sentencing due to a delay in the sentencing proceedings goes against the heart of the incapacitation principle. The result would allow those individuals to remain in the general population. By allowing these individuals to remain in society it creates the possibility that they may continually contribute to unlawful behavior.

The third principle and the most often criticized is rehabilitation of the criminal defendant by means of punishment. Rehabilitation generally assumes that society is the “root cause” of criminality.¹⁹¹ Under this principle crime is predominately a product of societal factors and is determined by such factors like poverty, racial discrimination and lack of employment opportunities.¹⁹² The rehabilitation model of criminal sentencing had its greatest effect on society in the 1960s and 1970s.¹⁹³ However, since that time this principle has come under attack by many, including the courts as simply being unworkable and ineffective.¹⁹⁴ Justice Scalia has stated “Well, I thought that modern penology has abandoned that rehabilitation thing, and they—

¹⁸⁹ David Muhlhausen, *Theories of Punishment and Mandatory Minimum Sentencing*, May 27, 2010.

¹⁹⁰ *Id.*

¹⁹¹ J. Robert Lilly, Francis T. Cullen, and Richard A. Ball, *Criminological Theory: Context and Consequences*, 3rd Edition (2002).

¹⁹² David Muhlhausen, *Theories of Punishment and Mandatory Minimum Sentencing*, May 27, 2010.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

they no longer call prisons reformatories or – or whatever, and punishment is the – is the criterion now. Deserved Punishment for the crime”.¹⁹⁵ Regardless of sentiment and controversy surrounding the rehabilitation policy of sentencing, it has remained an interest by those who look to take a more utilitarian view of the criminal justice system. In more recent years, a utilitarian resurgence has occurred with many scholars taking the perspective that correctional treatment programs can successfully reduce crime in society.¹⁹⁶

The harsh remedy required by the *Barker* and *Strunk* holdings combat the very idea behind rehabilitating convicted defendants by allowing for a dismissal of the charges due to a violation of the Sixth Amendment as applied to sentencing. A dismissal of the charges would allow defendants to avoid any treatment programs that the court may find suitable in sentencing the defendant based upon the crime they committed. While rehabilitation has come under attack from several scholars, dismissal of the charges does not allow the courts to assess what possible remedies in sentencing may assist the defendant with life after punishment. Treatment programs such as probation, community service or even diversion programs may not be administered as a result of delay in sentencing.

The last policy reason for criminal sentencing is on the opposite end of the spectrum in comparison to the three utilitarian policies listed above. Instead, Retributivists seek to sentence those convicted of crimes for the purpose of retribution for their acts towards victims and society in general. Sometimes referred to as “moral deserts”, individuals who believe in this ideology find that the commission of a crime is itself sufficient justification for punishment.¹⁹⁷ Some have

¹⁹⁵ *Miller v. Alabama*, The Oyez Project at IIT Chicago-Kent College of Law (http://www.oyez.org/cases/2010-2019/2011/2011_10_9646).

¹⁹⁶ David Muhlhausen, *Theories of Punishment and Mandatory Minimum Sentencing*, May 27, 2010.

¹⁹⁷ *Id.*

also stated that retribution also serves the purpose of teaching those within society of what constitutes acts that lack morals and are damaging to the society as a whole.¹⁹⁸

Following the precedent of the courts addressing Sixth Amendment violations, such a extreme remedy when a violation is found forgoes the retributionist theory of allowing those who have committed “moral horrors” to return to society without punishment. Dismissing charges of a convicted defendant leaves that individual without facing the punishment and may leave those who were affected by the defendant’s crimes, especially victims, feeling as though the criminal justice system failed to find justice.¹⁹⁹

What remains clear is punishment regardless of the ideology behind it serves an important purpose within the criminal justice system, one that a dismissal of charges against a convicted defendant lies directly adverse to. The Courts who have promulgated these remedies have addressed the sheer dissatisfaction with the result stating that it is “serious consequence”.²⁰⁰ By adopting the Second Circuit’s approach to sentencing, many of these concerns and ideologies may remain unaffected and promoted by permitting the court to simply alter the sentence of the defendant rather than disposing of the same.²⁰¹ The approach allows for courts to gauge the amount of prejudice that an individual faced by the delay and reduce the sentence as they believe in the interests of justice. While not the sole intention behind finding the Fifth Amendment is applicable to post-conviction sentencing delays such an approach would allow for the four policies of punishment listed above to still be served. Furthermore, it would allow a defendant to

¹⁹⁸ James Q. Wilson, *Thinking About Crime*, Revised Edition (1983), pg. 163 (James Q. Wilson explained: “The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault; these acts are destructive of the very possibility of society and affronts to the humanity of their victims. Parents do not instruct their children to be law abiding merely by pointing to the risks of being caught”)

¹⁹⁹ *See Id.* (Lastly, the dismissal would violate Wilson’s position that punishment of an individual may serve as instruction for society that when one commits immoral crimes one is faced with a penalty.)

²⁰⁰ *Supra* note 143

²⁰¹ *Supra* note 116

be “given credit” for any delay, allowing for a unique sentence that addresses what punishment may assist in allowing for these individuals to return to society in a more productive manner.

If courts adopted the Second Circuit’s approach it would allow defendants to still be sentenced, while being able to look at the totality of the circumstances, including those of the court to fashion the most reasonable remedy and serve the interest of justice. As the Second Circuit did in *Ray*, they first looked to their two-prong test to see if a violation did occur as a result of any delay at the sentencing proceeding.²⁰² Then, the Court reviewed the circumstances surrounding the defendant throughout the delay, allowing the Court to determine what were the effects of the criminal prosecution on the individual.²⁰³

Realizing that the defendant had made great strides towards resuming a normal life and role in society the Court was able to fashion a remedy that allowed for the justice system to maintain the principles set forth above, while providing punishment that would not hinder or impede Ray’s positive steps.²⁰⁴ In its review, the Court found that Ray had assumed a positive role in society by remarrying, having children, abiding laws and even went on to higher education.²⁰⁵ Ray was sentenced to supervised released, or probation, with a special condition that she spend six months in a halfway house.²⁰⁶ The Court found that the whole sentence should not be dismissed, but instead adjusted to permit Ray to avoid having to leave her rehabilitated life to reside in a hallway house.²⁰⁷

Another potential concern of the harsh remedy for a violation of the Sixth Amendment is fear that courts are unwilling to find a violation due to the idea that it could create a potential

²⁰² Supra note 112.

²⁰³ Supra note 116.

²⁰⁴ Supra note 127.

²⁰⁵ Supra note 127.

²⁰⁶ Supra note 71.

²⁰⁷ Supra note 127.

windfall.²⁰⁸ The *Strunk* Court noted that such a remedy may dissuade judges from finding such a violation realizing that in essence letting a guilty defendant be released without punishment.²⁰⁹ The unwillingness of judges to find such violations is an injustice in which the defendant must face alone, who regardless of the time period of the delay or degree of prejudice must still submit to the court for punishment. The Second Circuit's approach permits judges to still impose a sentence upon the defendant despite a constitutional violation, while lessening it if necessary for prejudice. Such an approach would cut directly to the fear of a windfall to these individuals speak of.

The reasoned approach by the Second Circuit allows any court who adopts such an approach to avoid the "unsatisfactorily severe" outcome of simply allowing a convicted defendant to go unpunished after being convicted.²¹⁰ Instead courts would be permitted under the Second Circuit's Fifth Amendment approach to craft their own sentence that would permit an equitable result to the defendant while maintaining the principles behind sentencing. Defendants would still face a punishment, if the court felt it justified, allowing them to be incapacitated, deterred, rehabilitated and would be punished fulfilling the retribution theory that some hold dire to the criminal justice system. Thus the Second Circuit's approach falls more squarely in line with the interest of criminal sentencing, while permitting the defendant to have an altered sentence based upon the circumstances of his or her life.

Conclusion

²⁰⁸ Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, Geo. L.J. (1996) (Expressing the fear of such a windfall as it applies strictly to the Sixth Amendment right to a speedy trial without making an express fear of the same windfall by delays in sentencing.)

²⁰⁹ *Strunk*, 412 U.S. at 439.

²¹⁰ *Ray*, 578 F.3d, at 191.

Federal Courts have done an extraordinary job in timely sentencing defendants who have been convicted by a trial or those who have pleaded guilty to the crimes alleged against them. However, there remains those rare cases in which defendants are left waiting for the imposition of their sentence. Some of these defendants are not permitted to proceed in their lives as a result of these delays and the government must face the harsh remedy if a violation is found under the Sixth Amendment.

The Second Circuit was correct in their holding that the Fifth Amendment is applicable to sentencing proceedings after review of what is commonly understood by the word trial. By reviewing the role of trials as trier of facts and law in the late 17th century, it provides guidance that the role did not extend to sentencing of a defendant. Instead, like English courts the U.S. legislature permitted judges to have a distinct role in sentencing, allowing for defendants to present facts as to why they should receive a more lenient sentence. This proceeding was one independent of trials in convicting the defendant and provides context that at the time of ratification of the Sixth Amendment that the early stages of sentencing hearing were present. Furthermore, an examination of legislation in the 20th century only bolstered the theory that sentencing is viewed by the majority as a separate proceeding, one that is distinct from the trial process. Both the Federal Rules of Criminal Procedure and the Speedy Trial Act show Congress's separation of trial and sentencing. Such a review shows support for these circumstances to be reviewed under the Fifth Amendment.

The *Wingo* and *Strunk* Courts went on to apply the only remedy that was available to a violation of the Sixth Amendment, dismissal of all charges. Such a remedy when applied to those who have claimed that they have been prejudiced by a delay in sentencing is directly adverse to the interests in imposing punishment on those who have been convicted of a crime. Such a result

of a criminal prosecution is at arms with the four general principles of punishment. The proposed approach by the Second Circuit permits courts to avoid the outcome in which a convicted defendant may completely avoid punishment as a result of a post-conviction delay.

The Second Circuit promulgated the two-prong test to examine if a violation of the Fifth Amendment occurred as a result of the delay. If a violation is found, then the Court would be permitted to alter or fashion a new sentence to varying degrees based upon the amount of prejudice the defendant faced. If other courts were to adopt the Second Circuit's approach it would allow defendants to be given relief as a result of prejudice, while maintaining the purpose of criminal sentencing.

In conclusion the application of the Second Circuit's approach provides a workable framework in reviewing claims of delays in sentencing. Not only does it provide a court a practical test but provides a framework for the government to avoid the harsh remedy of the *Strunk* Court by applying the Fifth Amendment Due Process Clause. If more courts were willing to review the Constitutional Amendment in the same manner as the Second Circuit, they would find that not only is the Fifth Amendment proper, but would provide a more workable remedy that benefits that of both the government and even the defendant.