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Precap: *Betterman v. Montana*

Jason Collins
Alexander Blewett III School of Law

PRECAP; *Betterman v. Montana*

Jason Collins

I. QUESTION PRESENTED

Does the Sixth Amendment's Speedy Trial Clause apply to the sentencing phase of a criminal prosecution?

II. CONSTITUTIONAL PROVISION AT ISSUE

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.[1]

III. FACTUAL AND PROCEDURAL BACKGROUND

Brandon Thomas Betterman failed to appear in court on December 8, 2011 to face sentencing for felony partner or family member assault (PFMA).[2] The district court continued his proceedings for an additional day, but he still did not appear.[3] Instead, he surrendered to the Butte-Silver Bow Detention Center on February 9, 2012.[4] There, he wrote a letter to the district court, admitting he knew of the missed court date, but pleading that he missed it because he had no money and no transportation.[5] The state was unmoved and so brought felony bail-jumping charges against him on March 5; ten days later, the court sentenced him for the PFMA charges.[6] Betterman pled guilty to the bail-jumping charge at his April 19 arraignment, since he had already admitted to it in his letter.[7] That same day, the County Attorney moved to designate him a persistent felony offender to enhance his sentence, while the Butte-Silver Bow sheriff jailed him pending sentencing.[8] Betterman filed a Motion in Opposition and Motion to Strike on April 27.[9] Two months later, on June 28, the district

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[1] U.S. CONST. amend. VI.
[2] Appellant's Brief, *State v.* Betterman, 2014 WL 2466934 at *2 (Mont. May 19, 2014) (No. DA 13-0572).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at *2–3.
[8] *Id.* at *3.
[9] *Id.*

court heard the motion and then sent him back to Butte-Silver Bow until sentencing.[10] Five more months would pass before the court would rule on his designation as a persistent felony offender.[11]

Additional delays plagued the case, especially the slow Pre-Sentence Investigation (PSI).[12] Shortly after pleading to the bail-jumping charge, the court ordered an updated PSI on May 3—deciding to hold the sentencing hearing only after the updated PSI completed.[13] That updated report would not arrive until October 10. Not until two months later, on December 28, did the court schedule the sentencing hearing—for January 17, 2013.[14] At this point, eight months had passed since Betterman pled guilty to bail-jumping.[15]

So on the day of his sentencing hearing, Betterman moved to dismiss charges because the delays in sentencing violated his right to a speedy trial.[16] The State, seeing an opportunity for irony, promptly asked for and received additional time to respond—filing its response January 29, 2013.[17] Although the district court still had not held the sentencing hearing or heard his motion to dismiss, it did issue a written order ninety days later on April 29—denying his motion to dismiss on the merits, and relying on the *State v. Ariegwe*[18] to do so.[19]

The Kafka novel continued to write itself, however, when the Prosecution and Betterman jointly asked the court in March to schedule the sentencing hearing—only to have the court respond that it could not "'fast track' Betterman's case at this time."[20] Betterman resorted to filing an affidavit, explaining that he had been in Butte-Silver Bow Detention Center for the past 442 days, receiving poor medical care and suffering anxiety and depression because of these delays.[21] He pointed out he would have been eligible for conditional release at this point had he been promptly sentenced and incarcerated at a state Department of Corrections facility.[22] He listed other grievances as well: in jail, he could not complete the mental health counseling required under his PFMA conviction; in jail, he could not continue his schooling; and ultimately, he would like to be sentenced.[23]

The district court did finally hold his sentencing hearing—on June 27, 2013—nearly seventeen months after he first surrendered to Butte-

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[10] *State v. Betterman*, 342 P.3d 971, 973 (Mont.2015).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Betterman*, 342 P.3d at 973.
[17] *Id*.
[18] 167 P.3d 815 (Mont. 2007).
[19] *Betterman*, 342 P.3d at 973.
[20] Appellant's Brief, *supra* note 2, at 6 (quoting correspondence received from the district court).
[21] *Betterman*, 342 P.3d at 973–74.
[22] *Id.*
[23] *Id.*

Silver Bow.[24] But sentenced he was—seven years to Montana State Prison for bail-jumping, with four years suspended, running consecutively to his five-year sentence for PFMA. Betterman appealed to the Montana Supreme Court on the grounds that the delay between his guilty plea and sentencing hearing constituted a violation of his right to a speedy trial.[25] Montana practitioners might be forgiven for thinking that Betterman would prevail by relying on *State v. Mooney*,[26] where the Court had concluded "sentencing was part of trial for purposes of the Sixth Amendment and 'conclusively [held] that the right to speedy trial applies through sentencing.'"[27]

But the Court instead overruled *Mooney*, in part because it relied on *Pollard v. United States*[28] as a foundation for the opinion.[29] When *Mooney* was decided, *Pollard* was the only Supreme Court case that seemed to address on-point whether the Speedy Trial Clause applies to sentencing proceedings.[30] In *Pollard's* dicta, the United States Supreme Court assumed "arguendo" that sentencing is part of trial for Sixth Amendment purposes. "Arguendo" was not good enough, and the Montana Supreme Court denied Betterman's appeal, prompting him to successfully petition the United States Supreme Court for certiorari.[31]

IV. ARGUMENTS—*TEXT, HISTORY, PRECEDENT AND PURPOSE*

A. Reasoning of the Lower Court

The Montana Supreme Court recognized the issue at hand centers on one word: trial.[32] Since the Clause plainly states the accused has a right to a speedy *trial*, the necessary determination of the issue then is whether *sentencing* is part of trial, or if it is instead a distinguishable phase of prosecution.[33] The Court only touched on the plain language distinctions between the words, using Black's Law Dictionary to define both terms; Black's gave obviously different definitions for both *trial* and *sentencing*.[34] But the Court noted too, that the United States Supreme

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[24] *Id.*

[25] *Id.* at 972.

[26] 137 P.3d 532 (Mont. 2006).

[27] *Betterman*, 342 P.3d at 975 (quoting *Mooney*, 137 P.3d at 535).

[28] 352 U.S. 354 (1957).

[29] *Betterman*, 342 P.3d at 975.

[30] *Pollard*, 352 U.S. at 361.

[31] *Betterman*, 342 P.3d at 981; *Betterman v. Montana*, 136 S. Ct. 582 (2015).

[32] *Betterman*, 342 P.3d at 975–76.

[33] *Id.*

[34] *Id.* at 976 (noting Black's defines "trial" as "the formal judicial examination of evidence and determination of legal claims in an *adversary* proceeding," but defines "sentencing" as "judgment that a court formally pronounces *after* finding a criminal defendant guilty." The Court provided emphasis.); TRIAL, Black's Law Dictionary (10th ed. 2014); SENTENCING, Black's Law Dictionary (10th ed. 2014).

Court has also distinguished between sentencing and trial.[35] The Court found the language in *Apprendi v. New Jersey*[36] instructive: "'After trial and conviction are past,' the defendant is submitted to 'judgment' by the court—the stage approximating in modern times the imposition of sentence."[37] This language derived in part from Blackstone's *Commentaries on the Laws of England*, so the Montana Supreme Court recognized that here, the higher Court had acknowledged a demarcation point between trial and sentencing, while simultaneously providing a convincing historical source that could contextualize the framers' intent when the Clause was drafted.[38]

After establishing the historical foundation for separating the concepts of trial and sentencing, the Court examined the Clause's purpose.[39] The purpose-based analysis proved more facile since the Supreme Court had directly addressed it in *Barker v. Wingo*.[40] In *Barker*, the Court identified three interests the Clause was designed to protect: (1) prevent oppressive pretrial incarceration; (2) minimize the anxiety and concern of the accused; and (3) limit the possibility the defense will be impaired.[41] Of those three, the Supreme Court singled-out the third as the most important since it "skews the fairness of the entire system."[42] With those interests in mind, the Montana Supreme Court noted that once the *accused* becomes a *convicted* facing sentencing, those interests shift, and cannot be satisfactorily reconciled.[43] The passage of time, bundled with the fading memories and locations of witnesses, and the potential loss of exculpatory evidence, ceases to be a concern because those things do not hinder the convict's ability to argue for a lenient sentence.[44] Neither should there be cause for concern over the convict's anxiety, because the anxiety the Clause is meant to protect is the anxiety one faces from a cloud of suspicion while presumed innocent.[45] Convicts have no presumption of innocence since they have been found guilty by the jury.[46] In addressing oppressive pre-trial incarceration, the Court reasoned that this concern too, protects only those who retain the presumption of innocence, but

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[35] *Betterman*, 342 P.3d at 975–76.

[36] 530 U.S. 466 (2000).

[37] *Betterman*, 342 P.3d. at 975–76 (quoting *Apprendi*, 530 U.S. at 478 n.4 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 368 (1769)).

[38] *Betterman*, 342 P.3d at 975–76.

[39] *Id.* at 976.

[40] 407 U.S. 514, 532 (1972).

[41] *Id.*

[42] *Id.*

[43] *Betterman*, 342 P.3d at 977.

[44] *Id.*

[45] *Id.*

[46] *Id.*

nonetheless continue to have their liberty constrained.[47] Upon conviction however, the worry that a wrongly accused individual has been incarcerated disappears, and the worry instead turns to satisfaction that justice was rightly done.[48]

B. Arguments of the Parties Before the Supreme Court

1. Petitioner Betterman

Petitioner Betterman argues that although the text of the Clause incorporates only a right to a speedy *trial*, the Court has held before that other protections of the Sixth Amendment extend through sentencing because a prosecution does not truly end until sentencing completes.[49] This forms the basis of the Petitioner's contextual argument: that since the Court decided in *In Re Oliver*[50] that the public trial right of the Sixth Amendment extends to sentencing, it follows necessarily that the speedy trial right does also.[51] The right to a public trial, and the right to a speedy trial are "paired together" and should thus be judged to have the same reach through sentencing.[52] Betterman supports this argument with a survey of historical sources, citing the Assize of Clarendon in 1166, Magna Carta, and Edward Coke's Institutes of the Laws of England.[53] Betterman proffers these sources for the proposition that justice speedily achieved was an overarching goal of the common law from feudal times and through the founding fathers' drafting of the Constitution.[54] For Coke in particular, justice encompassed sentencing and marked the finality of criminal proceedings—and it was Coke's writings, Betterman argues, that were most well-known among the founders, and formed the basis of the Speedy Trial Clause.[55]

In contrast to the Montana Supreme Court and through the lens of historical sources, Betterman refuses to see a clear-cut distinction between the words *trial* and *sentencing*. Instead of relying on modern dictionary meanings, Betterman cycles through how the words were commonly understood when the Clause was written.[56] He avers that in a common law historical context, trial was commonly understood broadly to include a

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[47] *Id.*

[48] *Id.*

[49] Petitioner's Brief, *Betterman v. Montana*, 2016 WL 322583 at *15–17 (U.S. Jan. 19, 2016) (No. 14-1457).

[50] 333 U.S. 257 (1948).

[51] Petitioner's Brief, *supra* note 49, at 17.

[52] *Id.*

[53] *Id.* at 18–20.

[54] *Id.* at 18–22.

[55] *Id.*

[56] *Id.* at 24–29.

complete judicial examination that terminated only after sentencing completed.[57] Use of the word "trial" then, even as Blackstone would have meant it, was a type of "shorthand" that included all sentencing proceedings, from arraignment to sentencing and judgment.[58] Betterman supports the argument by citing relatively modern Supreme Court precedent.[59] *Apprendi*, and its progeny bolster the "historic link" between verdict and sentence such that division of responsibilities between judge and jury is not dispositive to the issue; rather, it is the solid connection between verdict and sentence that compels sentencing to be acknowledged as part of trial under the Speedy Trial Clause.[60]

In this contextual historical analysis, Betterman argues that a reconciliation of the *Barker* factors is indeed possible when *trial* encompasses *sentencing*.[61] Just like pretrial defendants, those who await sentencing suffer undue oppression when they are held in local jails lacking fundamental resources often allocated instead to long-term correctional facilities.[62] These local jails usually have no recreational and rehabilitative programs, and thus discount the dignity of the individual incarcerated while undermining the basic and desirable penological goal of rehabilitation.[63] Betterman's argument on the impairment of defense—identified as the most important of the*Barker* factors—centers on the fact that in the modern criminal justice system, most charges are resolved with a guilty plea, not trials.[64] This means that a delay in sentencing encumbers the sentencing defense which, under the modern regime, is often the only time that facts are actually adjudicated in court.[65] As an example, Betterman notes that defendants are allowed to procure witnesses to testify on their behalf for a lower sentence; without speedy sentencing, witness memories fade, and witnesses themselves may become unavailable, just as at trial.[66] Betterman further argues that under the last of the *Barker* factors, anxiety and concern, a convict differs little if at all from his accused counterpart. Again, under the modern criminal justice system, the complexity and range of a sentence to be imposed varies so widely, that one who awaits sentencing may well suffer greater anxiety and concern than one who is merely accused.[67]

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[57] Petitioner's Brief, *supra* note 49, at 26–27.
[58] *Id.*
[59] *Id.* at 30.
[60] *Id.* (citing *Apprendi*, 530 U.S. at 479–82).
[61] *Id.* at 34–36.
[62] *Id.* at 35.
[63] *Id.* at 36.
[64] *Id.* at 41–44.
[65] *Id.*
[66] *Id.* at 42–43.
[67] *Id.* at 45.

2. Respondent State of Montana

The State of Montana counters Betterman's arguments with a purpose-driven analysis.[68] Montana tackles first Betterman's contextual argument: that since other rights in the Sixth Amendment have been extended by the Court through sentencing, then the Speedy Trial right must likewise follow. To counter that argument, Montana postulates that although the rights are textually linked, they serve different purposes, and it is those distinct purposes that must control and deny the right's extension through sentencing.[69] To illustrate the point, Montana argues that the right to a trial by an impartial jury is similarly linked to the speedy trial right, but that the Court has never used the Petitioner's logic to identify a concomitant right to jury sentencing.[70] Instead, the Court has chosen to distinguish between the jury's role of fact-finding and the judge's role of imposing judgment and sentencing.[71] Montana makes another significant distinction by identifying a temporal disparity in the right to a public trial and the right to a speedy trial—the right to a public trial logically applies *during trial proceedings*, but the right to a speedy trial does not actually apply to trial proceedings at all; instead, the speedy trial right attaches to *the delay before trial proceedings begin*.[72] Thus, the speedy trial right and public trial right are temporally disjointed, rendering the textual linkage identified by Betterman inapposite.

Montana adds that a historical analysis aids in identifying the intended purpose of the speedy trial right, and supports the narrower reading that it would not apply through sentencing.[73] To make this assertion, Montana uses many of the same historical sources as Betterman: Blackstone, Magna Carta, and Coke.[74] Montana assures the Court these historical sources show that semi-feudal notions of speedy justice pertain only to the accused's right to be "release[d] from any unwarranted restraints on his liberty [and] to the government's obligation to bring the accused 'speedily . . . to his trial.'"[75] When those texts speak of "justice" then, the commonly understood meaning would be trial proceedings, not sentencing.[76] Additionally, the State notes that even if "justice" in these texts did extend the notion of trial through sentencing, the drafters of the Constitution, doubtlessly aware of the idea, deliberately chose not to

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[68] Respondent's Brief, *Betterman v. Montana*, 2016 WL 704819 at *17 (U.S. Feb. 18, 2016) (No. 14-1457).
[69] *Id.* at 18.
[70] *Id.* at 19.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 20–24.
[74] Respondent's Brief, *supra* note 68, at 20–22.
[75] *Id.* at 21.
[76] *Id.* at 22–23.

include a guarantee of "speedy justice."[77] Instead, the phrase they chose is "speedy trial"—and the phrase should be respected and read "to mean exactly what it appears to say . . . trial without undue delay."[78]

The State takes a moment to use these historical sources to make one additional contextual point—that the right belongs to the "accused" and not the "convicted" is no accident.[79] When the Bill of Rights was drafted, the founders were doubtlessly aware that Blackstone had made a distinction between those "accused" and those "convicted."[80] The Speedy Trial Clause would therefore have been understood to afford the right only to those who had not yet been convicted.[81] This then aligns perfectly with the intent in similar provisions "dating back to Magna Carta": to protect the accused from the anxiety and concern that accompanies public accusation.[82]

The logically following purpose of the Speedy Trial Clause is to safeguard the rights of only the accused, by avoiding their prolonged detention, and mitigating the stressful consequences of accusation while awaiting a fair trial to determine guilt or innocence.[83] Within this framework, Montana examines the first of the *Barker* factors, and argues that one who is convicted does not suffer undue and oppressive incarceration by awaiting sentencing in jail because his incarceration is rightly due to him by virtue of his conviction.[84] That a prison has better amenities than a jail is of no matter because differences in penal institutions are not a basis for constitutional challenge under *Meachum v. Fano*.[85] Montana further contends that even if Betterman's penological differences argument had merit, it is at best speculative and subjective, requiring a ranking of prison and jail facilities that would be impossible because the modern truth is that every one of those facilities is underfunded and overcrowded.[86]

Montana next addresses the anxiety and concern factor from *Barker*. Montana adopts the Montana Supreme Court argument that the anxiety and concern *Barker* meant to protect was only *pre-trial* anxiety and concern.[87] Pre-trial anxiety is grounded in the presumption of innocence, and oppresses the will of those facing the machinations of the

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[77] *Id.* at 23.

[78] *Id.* at 24 (quoting United States v. Marion, 404 U.S. at 307, 314, n.6 (1971)).

[79] *Id.* at 27.

[80] Respondent's Brief, *supra* note 68, at 28.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 29.

[84] *Id.* at 30–31.

[85] *Id.* at 32; 427 U.S. 215, 225, 228 (1976).

[86] Respondent's Brief, *supra* note 68, at 32–33.

[87] *Id.* at 39–40.

justice system.[88] Pre-trial concerns differ substantially from those arising post-conviction because "[o]nce a defendant is convicted, he is not merely accused, 'living under a cloud of suspicion'—the suspicion has been confirmed and any ignominy that flows from that is deserved."[89] Pre-trial anxiety is thus an "objective reality," whereas post-conviction anxiety is largely fabricated by those seeking to minimize the impact of their future incarceration and punishment.[90]

Montana counters the most important of the *Barker* factors, the impairment of the defense, by undermining the Petitioner's argument that sentencing hearings are, in effect, "mini-trials," necessitating coverage by the Speedy Trial Clause.[91] To do so, Montana distinguished sentencing hearings from fact-finding trials: in reality, few witnesses are ever called; no evidence is presented except for the pre-sentence investigation report; and because the parties have come to an agreement on the sentence to be imposed, it is improbable that any factual issues will require resolution. But ultimately, the purpose between sentencing hearings and trials is fundamentally different—a trial is designed to determine the narrow issue of guilt, and a sentencing hearing is a broader matter, meant to impose a wide range of possible sentences by a judge wielding considerable discretion.[92]

V. ANALYSIS

Because the Sixth Amendment guarantees a right to a speedy trial, Betterman must convince the Court that *trial* concomitantly means both fact-finding and sentencing. History and precedent are obstacles for the Petitioner. Betterman grounds his historical argument in feudal notions of speedily-served Justice. Justice, under the texts he cites, encompasses both *trial* and *sentencing*, essentially conflating the two concepts into a single ideal subsequently incorporated into the Constitution as the Speedy Trial Clause. The problem with that argument, as the State noted, is two-fold. First, if the word Justice encompassed both trial and sentencing at the time of drafting, then the drafters could have chosen to use "justice" in lieu of "trial." But they did not. If trial is a subpart of Justice as the Petitioner argues, then the articulation by the drafters of that subpart alone may be seen by the Court as a rejection of the broader notion. *Expressio unius est exclusio alterius*.[93] The fact that the drafters had available to them these

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[88] *Id.*

[89] *Id.* at 40.

[90] *Id.* at 40–41.

[91] *Id.* at 41–42.

[92] Respondent's Brief, *supra* note 68, at 43–45.

[93] A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS, Black's Law Dictionary (10th ed. 2014).

texts that talked of speedy justice, but chose instead to draft a speedy *trial* clause, weighs in favor of the state.

Second, prior Supreme Court rulings acknowledge a distinction between trial and sentencing. As the Montana Supreme Court noted, *Pollard* seemed to address directly whether sentencing is part of trial for the purposes of the Sixth Amendment. Although that Court originally saw *Pollard* as a supporting authority for equating the two in *Mooney*, *Pollard* is arguably more persuasive for an opposite finding. Because *Pollard* assumed *arguendo* that sentencing was a part of trial for Sixth Amendment purposes, the meaning of *arguendo* is important. The word connotes a hypothetical posited purely for the sake of argument. A hypothetical employs a fiction to demonstrate a point. Thus, it requires accepting as true, a concept not before acknowledged as such. The fiction accepted as true in *Pollard* is that sentencing is part of trial. *Pollard* thus establishes the notion as a fiction. This shifts the weight of authority prior to *Pollard* in favor of the State as well—before *Pollard*, the Court had not acknowledged sentencing to be a part of trial, and was doing so in *Pollard*, only for the sake of illustrating an argument. The Court might thus view the conflation of sentencing with trial as no less fictive today as when *Pollard* was decided.

While *Pollard* arguably supports the notion the Court has not before seen trial concomitant with sentencing, other decisions subsequent to *Pollard* reject the notion in dicta. For instance, Betterman cites *Apprendi* for the proposition that verdict and sentence are indissoluble, and therefore support treating sentencing as part of trial; however, in *Apprendi*, the Court explained that a trial is commonly understood to be a fact-finding endeavor before a jury of one's peers, but that sentencing naturally follows the verdict of the jury*after the trial*.[94] Other cases similarly erode Betterman's position. In *Doggett v. United States*,[95] the Court noted that the "right of the accused to a speedy trial has no application beyond the confines a formal criminal prosecution."[96] After a conviction at trial, the accused becomes the convicted as Montana argued. Once that occurs, the penological interest shifts and there is no longer a formal, criminal prosecution—instead there is an interest of the state in post-conviction penological goals: rehabilitation, retribution, deterrence, community safety, or a combination thereof. But formal prosecution is not among the pursuits of the state post-conviction. The Court remarked too, in *United States v. Loud Hawk*,[97] that the "Speedy Trial Clause's core concern is the impairment of liberty."[98] This mirrors the State's argument

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[94] *Apprendi*, 530 U.S. at 477–79.
[95] 505 U.S. 647 (1992).
[96] *Id.* at 662.
[97] 474 U.S. 302 (1986).
[98] *Id.* at 312.

under the *Barker* factors that oppressive incarceration is practically an impossibility for one who is no longer accused, but convicted. Incarceration of the convicted is a legal and societal expectation, not an aberrance in need of correction. A convicted thus rightly awaits sentencing in jail and his impairment of liberty is not wrongful as it would be for an accused later to be found innocent—the obvious concern of *Loud Hawk*.

Other *Barker* factors burden the Petitioner as well. Since the *Barker* factors were written with pre-trial concerns in mind, the Petitioner is tasked with forcing a fit for each factor into concerns arising after conviction—a full two stages (trial, and post-conviction) after the pre-trial stage the *Barker* factors were meant to cover. The safeguarding of the accused's ability to present a defense is a good example. In order for this factor to apply neatly, the Court must buy into Betterman's assertion that sentencing hearings are not hearings at all, but as the State labels them—"mini-trials." To sell that buy-in, Betterman is again relying on the proposition that there are not in fact these disjointed stages, but an overall, cohesive concept of Justice that includes pre-trial, trial, and post-conviction concerns. If the Court cannot find traction with the Petitioner's historical argument supporting this theory of cohesion, then Betterman's *Barker* arguments have little to stand on.

By contrast, Betterman's strongest argument is contextual. The contextual argument grounds the potential expansion of the right in both precedent and text of the Amendment itself. The Court may see an argument rooted in precedent and text as the toehold it needs to expand the Speedy Trial Clause to sentencing, just as it ostensibly did with the Public Trial clause in *Oliver*. But whether the Court has in fact extended the Public Trial right to cover sentencing is a threshold issue for Betterman if this argument is to have merit. If Betterman misread *Oliver*, or the Court finds it distinguishable, then the argument has little foundation. Betterman is not helped by the fact that the State makes a compelling point by seizing on the right to a jury trial, and noting that it has not been extended through sentencing, even though it is textually similarly situated. This will likely be a key issue for the Court to probe at oral argument.