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THE SIXTH AMENDMENT LIVES! A REPLY TO PROFESSOR JONAKAIT

CRAIG M. BRADLEY*

The spring before last, as I was teaching Criminal Procedure II, which covers defendants' trial rights, I thought that I noticed a trend in the Supreme Court's jurisprudence on the subject. It was couched in relativistic "due process" terms, rather than in the more absolute language dictated by the Sixth Amendment's command that "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 . . ." ¹ I envisioned an article analyzing this trend with the title, *The Disincorporation of the Sixth Amendment*, which I planned to begin writing late in the summer of 1992.

Imagine my dismay, when in May 1992, there arrived on my desk an article in this journal by Professor Randolph Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, ² which made essentially the same point I had planned to make. Like the man in the Tom Lehrer song, "The Great Lobachevsky," Professor Jonakait's "name in Bloomington was cursed, when I find out, he publish first!"

I glanced through Professor Jonakait's well-written article and saw that it made essentially the point I planned to make. I cursed briefly and put the issue aside until later. Now I have returned to it, and my opinion of Professor Jonakait's position has changed. I have concluded that Professor Jonakait's and my (initial) perception of a return to the pre-incorporation due process standard was inaccurate. The cases that Jonakait criticizes do not exemplify such a trend. Where he suggests that the cases are wrongly decided, I conclude that they are either right or, at least, not wrong for the reasons he suggests. Accordingly, I am grateful to Professor Jonakait for

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¹ U.S. CONST. amend. VI.

² 82 J. CRIM. L. & CRIMINOLOGY 713 (1992).

being the one who put what I now believe to be an erroneous impression on paper, for it is much easier to think critically about someone else's ideas than one's own.

Professor Jonakait's argument is as follows: The Sixth Amendment reposes a series of affirmative rights in the criminal defendant. These rights are by no means the same as the Due Process Clause guarantee, which only requires that a trial be "fundamentally fair."³ To the extent that the Supreme Court has, in a series of recent cases,⁴ conflated these two rights, it has had the effect of disincorporating the Sixth Amendment and returning to the pre-incorporation standard of "fundamental fairness." According to this standard, a conviction would only be reversed if the "trial [was] offensive to the common and fundamental ideas of fairness and right."⁵

As Professor Jonakait points out, under the Sixth Amendment, a defendant who is denied a jury trial would be entitled to have his conviction reversed, even if he had a fair trial before a judge.⁶ Under a "due process" regime, by contrast, he might not be entitled to a reversal.⁷ Indeed, the Supreme Court, by incorporating the jury trial right into the Fourteenth Amendment in *Duncan v. Louisiana*, recognized this: "A criminal process which was fair and equitable but used no juries is easy to imagine."⁸ Nevertheless, the Court held that such a trial would not pass muster under the Sixth Amendment, and it has not retreated from that position. Professor Jonakait agrees that the Supreme Court has not altered its position as to the jury trial right, but he argues that the Court has gone astray in other

³ *E.g.*, *Betts v. Brady*, 316 U.S. 455, 462 (1941).

⁴ *See Strickland v. Washington*, 466 U.S. 668 (1984); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1986); *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991).

⁵ Jonakait, *supra* note 1, at 716 (quoting *Betts*, 316 U.S. at 473).

⁶ *Id.* at 731.

⁷ This was not invariably true under the "due process" regime, however. For example, in *Rideau v. Louisiana*, 373 U.S. 723 (1963), the "Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial." *Estes v. Texas*, 381 U.S. 532, 538 (1965) (discussing *Rideau v. Louisiana*). Similarly, failure to provide counsel in a capital case is automatically reversible error as a matter of due process, without any assessment of the fairness of the trial. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

⁸ *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968). In *Duncan*, the Court noted that it had never explicitly approved a conviction in which a defendant had been deprived of a jury. The Court conceded, however, that in *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Snyder v. Massachusetts*, 291 U.S. 97 (1934), "important dicta assert[ed] that the right to a jury trial [was] not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments." *Duncan*, 391 U.S. at 155.

areas. He illustrates this trend by pointing to decisions concerning impartial juries, effective assistance of counsel and compulsory process.⁹

Exhibit one, offered by Professor Jonakait to show that the current Supreme Court has mislaid the principle of *Duncan* as to other Sixth Amendment rights, is *Mu'Min v. Virginia*.¹⁰ In *Mu'Min*, the Court dealt with a murder defendant who had been subjected to substantial adverse publicity before trial. Though the defendant asked the trial court to question the jurors *individually* about the *content* of the publicity to which they had been exposed, the court denied this request. Instead, the judge broke the venire into panels of four and conducted further questioning only of those jurors who indicated that they had read something about the case. The judge limited his questions to whether a juror could put aside what he had read, but the judge did not ask the jurors about the content of such reading. As the Supreme Court noted:

None of the those [jurors] eventually seated stated that he had formed an opinion, or gave any indication that he was biased or prejudiced against the defendant. All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence.¹¹

The Court then went on to make the statement that provides the basis for Professor Jonakait's argument:

Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that such questions might be helpful. *Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair.*¹²

Taken out of context, this statement might be read to stand for a different proposition: that if the trial is "fundamentally fair," then it does not matter whether the jury is biased. This seems to be Professor Jonakait's understanding of the *Mu'Min* decision. He then concludes that the Court's employment of a fundamental fairness approach "made the specific Sixth Amendment guarantee [of an impartial jury] superfluous."¹³ However, a consideration of the entire

⁹ See *supra* note 4.

¹⁰ 111 S. Ct. 1899 (1991).

¹¹ *Id.* at 1903. In *Irvin v. Dowd*, however, "two thirds of the jurors actually seated had formed an opinion that the defendant was guilty." *Mu'Min*, 111 S. Ct. at 1906 (citing *Irvin*, 336 U.S. 717 (1961)).

¹² Jonakait, *supra* note 1, at 715 (quoting *Mu'Min*, 111 S. Ct. at 1905 (emphasis added)).

¹³ *Id.*

Mu'Min opinion makes it clear that Jonakait misinterprets the quoted language.

Part of the reason for Professor Jonakait's misunderstanding lies in the nature of the "impartial jury" guarantee. Whereas it is entirely possible to have a "fundamentally fair" non-jury trial, as Professor Jonakait observed, it is hard to imagine a "fundamentally fair" trial before a biased jury.¹⁴ If, however, we assume that such a result is possible, how would one establish it? The only scenario that could remotely merit such a result is a trial in which the defendant's guilt is so overwhelming that no juror, regardless of bias, could find the defendant innocent.

But the majority opinion is devoid of any such analysis. Rather, it is clear that the majority simply assumed that there is no such thing as a fundamentally fair trial before a biased jury, and it devoted the opinion to establishing that the jury in this case was impartial (as the first paragraph quoted above shows), or at least that there was no "manifest error" in the trial judge's finding of impartiality¹⁵ [that is, that the procedures adopted by the trial court were "fundamentally fair."].

If the Court had found either that the jury was not "impartial" as the Sixth Amendment requires, or that the procedures adopted by the trial judge were not "fundamentally fair," as the Due Process Clause requires, then it is clear that the majority would have reversed the conviction. Indeed, the majority goes further by citing *Ham v. South Carolina*¹⁶ and *Turner v. Murray*¹⁷ for the proposition that, in certain cases involving black defendants and white victims, it is reversible error for the trial court to deny inquiry into possible racial prejudice on *voir dire*, regardless of any showing of prejudice.¹⁸

The dissenters in *Mu'Min* disagreed with the majority as to the

¹⁴ Indeed, in *Parker v. Gladden*, 385 U.S. 363 (1966), where the bailiff expressed his opinion to three jurors that the defendant was guilty, the conviction was reversed, despite no showing of actual prejudice.

¹⁵ See *Mu'Min*, 111 S. Ct. at 1907-08. It appears that Jonakait is satisfied with this standard, which places a heavy burden on the defendant if he is to prevail on appeal. At other times, however, Jonakait seems to suggest that any time the defendant advances a Sixth Amendment claim, the competing governmental interest must be "strictly scrutinized" by the appellate court, resulting in a reversal of the defendant's conviction, unless the prosecution can establish a "compelling government interest" sufficient to outweigh the defendant's claim. Jonakait, *supra* note 1, at 729.

¹⁶ 409 U.S. 524 (1973).

¹⁷ 476 U.S. 28 (1986).

¹⁸ *Mu'Min*, 111 S. Ct. at 1904. "[T]he possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice. . . ." *Id.*

proper procedures for determining juror impartiality. They argued that individual questioning about the content of pretrial publicity should have been undertaken by the trial judge.¹⁹ But the dissenters never claimed that the majority was using due process analysis as a means of sweeping biased jury claims under the “fair trial” rug. Rather, as the dissent conceded, this case was one of first impression, in which the Court was called upon to decide “the *procedures* necessary to assure the protection of the right to an impartial jury under the Sixth Amendment”²⁰: to decide, in short, what process was due the defendant. By definition, a “due process” analysis is appropriate for such an inquiry. It is Professor Jonakait, not the Court, who ignores the specific language of the Sixth Amendment when he concludes that it guarantees, not only an impartial jury, but also certain procedures to determine the impartiality of a jury.

As *Mu'Min* suggests, the modern Sixth Amendment stands for two different types of rights. The first type might be termed “absolute rights,” referring to rights are required by the text of the Sixth Amendment. Among these rights are the right to counsel,²¹ a jury trial²² and an impartial jury.²³ Once a court finds an abridgement of these “absolute” rights, it must reverse the conviction. The fairness of a trial cannot serve as a mitigating factor if an “absolute” Sixth Amendment right has been denied the defendant.²⁴

The second category of rights may be deemed “derivative” or “relative” rights. In addition to finding that the Sixth Amendment places certain absolute requirements on the criminal trial, the Court has determined that defendants are entitled to certain derivative rights, which are aimed at ensuring that the “absolute” or literal Sixth Amendment rights are rendered truly meaningful. Thus, for example, a defendant is entitled to *effective* assistance of counsel, a relative right, as well as to the absolute right to have a lawyer appear on his behalf.²⁵ *Mu'Min* applies this logic to the “absolute” right to an impartial jury. Though the defendant claimed that pretrial publicity deprived him of an impartial jury, the Court (both majority and

¹⁹ *Id.* at 1909-10 (Marshall, J., dissenting). Justice Kennedy, in a separate dissent, agreed that the jurors should have been questioned individually, but he would not have prescribed any particular form for that questioning. *Id.* at 1917-19.

²⁰ *Id.* at 1912 (Marshall, J., dissenting).

²¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²² *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²³ *Parker v. Gladden*, 385 U.S. 363 (1966).

²⁴ For example, in *Parker*, the Court held that “[a]side from [any showing of prejudice] . . . , we believe that the unauthorized conduct of the bailiff involves such a probability that prejudice will result that it is deemed [presumptively prejudicial]” *Id.* at 365 (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)). See also *supra* note 14.

²⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

dissent) did not consider the case in that light. Rather, the Court focused on what *procedures* the defendant is entitled to in order to insure that his absolute right to an impartial jury has not been violated.²⁶ Such a procedural issue has rightly been considered by the Court to be a matter for due process analysis.²⁷

Some of the textual Sixth Amendment rights are themselves relative in nature. *Barker v. Wingo*²⁸ illustrates the Court's different approach in the context of the relative textual right to a speedy trial. Unlike the right to counsel or to a jury trial, the right to a "speedy trial," while required by the Sixth Amendment, is never self-defining.²⁹ It is by nature a relative right.³⁰ Still, if a defendant is denied what the Court considers a "speedy trial," his conviction must be reversed.³¹ *Barker* reaffirmed the speedy trial right as "fundamental."³² The real issue, however, is what sorts of delays will be deemed violative of the "speedy trial" guarantee. Thus, in *Barker*, the Court "set out the criteria by which the speedy trial right is to be judged."³³ A unanimous Court used a due process balancing approach, requiring that lower courts consider the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" in determining whether a speedy trial violation has occurred.³⁴ In short, the defendant is entitled to a fair weighing of the factors in determining whether his speedy trial right

²⁶ *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1905 (1991).

²⁷ *Id.* (citing *Murphy v. Florida*, 421 U.S. 794 (1975)). See also *Geders v. United States*, 425 U.S. 80 (1976) (whether forbidding the defendant to speak to his counsel overnight violates the right to counsel); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (whether a 10-2 verdict violates the right to a jury trial). Other Sixth Amendment rights may also raise similarly difficult questions that will require a balancing of competing interests.

²⁸ 407 U.S. 514 (1972).

²⁹ "[T]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution. . . . [It] is a vague concept . . . We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." *Barker v. Wingo*, 407 U.S. 514, 519-21 (1972).

³⁰ While we may be able to look at a trial and find that the right to counsel or jury trial was clearly denied, the question of whether a delay rendered a trial insufficiently "speedy" is always going to require additional inquiry into the reasons for the delay.

In another context, the Court has recognized that "one must make a distinction between, on the one hand, trial rights that *derive* from the violation of constitutional guarantees and, on the other hand, the nature of those constitutional guarantees themselves. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990). Oddly, in *Rodriguez*, a consent search case, the Court distinguished between an absolute derivative right (that waivers of trial rights must be "knowing" and "intelligent") and the relative, constitutionally declared, right against "unreasonable" searches and seizures. *Id.* at 2798-99.

³¹ *Klopper v. North Carolina*, 386 U.S. 213 (1967).

³² *Barker*, 407 U.S. at 515.

³³ *Id.* at 515.

³⁴ *Id.* at 530.

has been abridged. Thus, recent cases do not represent a retreat from the principle that Sixth Amendment rights are "fundamental." Instead, this principle is assumed. The Supreme Court currently addresses questions concerning how these fundamental rights must be effectuated, and how their violation will be determined.

The Court's treatment of the right to compulsory process in *Pennsylvania v. Ritchie*,³⁵ which Professor Jonakait cites as another example of the Sixth Amendment's erosion, further demonstrates how the modern jurisprudence works. The right to compulsory process is, like the right to a speedy trial, absolute in form but relative in practice. No one, including Professor Jonakait, seriously claims that a defendant is entitled to subpoena every record or call every witness he wants, regardless of how irrelevant, prejudicial or confidential the evidence in question may be. Rather, the right to compulsory process necessarily is one in which the defendant's interest in the evidence is balanced against the various reasons that may be offered for denying it to him.

In *Ritchie*, a defendant charged with sexually abusing his daughter sought to discover the confidential records of the state agency that had initially investigated the charges. Instead of coming to grips with the relative nature of the right, as it had with the speedy trial right in *Barker*, the *Ritchie* Court held that "compulsory process provides no greater protections than the due process clause,"³⁶ and then held that the defendant had a limited right of access to the records but that due process would be satisfied by *in camera* inspection of the records (for inconsistencies with the victim's trial testimony) rather than by turning them over to the defense.

In *Ritchie*, the Court again assumed that once it had been determined that the defendant's right to compulsory process has been violated, his conviction must be reversed.³⁷ The issues in the case, however, were whether the "Compulsory Process Clause guarantees the right to discover the *identity* of the witnesses or to require the

³⁵ 480 U.S. 39 (1987) (cited in Jonakait, *supra* note 1, at 722).

³⁶ *Ritchie*, 480 U.S. at 56.

³⁷ Thus, in *Ritchie*, the Court notes that, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of *favorable* witnesses at trial and the right to put before the jury evidence that might influence the determination of guilt." *Id.* at 56 (emphasis added). The Court cited with approval cases such as *Webb v. Texas*, 409 U.S. 95 (1972), and *Washington v. Texas*, 388 U.S. 14 (1967), in which convictions were reversed for violation of the compulsory process right (called a "due process" violation in *Webb*), without regard to any consideration of whether the trial was otherwise fair. *Ritchie*, 480 U.S. at n.13.

government to produce exculpatory evidence."³⁸ These issues, the Court concluded, and the dissent did not disagree, were matters for due process analysis.

Professor Jonakait points to the comment that compulsory process provides no greater protection than due process as further establishing the conflation of due process and Sixth Amendment rights.³⁹ But this misses the point. Since the compulsory process right is a relative one, the issue in each case is necessarily going to be whether the particular evidence that the defendant sought was "material" to his case, as the Court held.⁴⁰ Thus, Professor Jonakait is correct that the Court employed a due process approach, but incorrect in asserting that this represents a departure from the way such cases have been, and, by their nature must be, decided. Again, nothing in *Ritchie* suggests that, had a defendant been denied material evidence necessary to prove his case, reversal of his conviction would depend upon the overall fairness of the trial. The question of whether the concept of "compulsory process" included discovering the identity of potential exculpatory witnesses and the propriety of the procedures adopted by the trial judge in this case, naturally lend themselves to a "fundamental fairness" analysis.

The other major case offered by Professor Jonakait to support his thesis is *Strickland v. Washington*⁴¹ which, he argues "[p]rovides a prime example of the Court's standards depriving the Sixth Amendment of separate meaning."⁴² But *Strickland* also does not do what Jonakait claims.

The Sixth Amendment guarantees the defendant the "right to . . . Assistance of Counsel for his defence."⁴³ Nowhere in *Strickland*, or in its companion cases, *United States v. Cronin*,⁴⁴ did the Court suggest that a defendant who is *denied* legal representation will nevertheless have his conviction affirmed if his trial was "fundamentally fair." This approach, previously adopted in *Betts v. Brady*,⁴⁵ has since been overruled in *Gideon v. Wainwright*.⁴⁶ Contrary to Profes-

³⁸ *Ritchie*, 480 U.S. at 56. The Court noted that the Clause may require the production of [exculpatory] evidence. *Id.*

³⁹ *Id.*

⁴⁰ In fact, while Professor Jonakait decries the decision in *Ritchie*, the Court's finding that the state had a "compelling interest" in the confidentiality of the records, 480 U.S. at 60, is just the sort of "strict scrutiny" analysis that Professor Jonakait urges. Jonakait, *supra* note 1, at 729.

⁴¹ 466 U.S. 668 (1984).

⁴² Jonakait, *supra* note 1, at 716.

⁴³ U.S. CONST. amend. VI.

⁴⁴ 466 U.S. 648 (1984).

⁴⁵ 316 U.S. 455 (1942).

⁴⁶ 372 U.S. 335 (1963).

sor Jonakait's claim,⁴⁷ neither *Strickland*, *Cronic* nor any other case reinstates the *Betts* standard.

In *Strickland*⁴⁸ and *Cronic*,⁴⁹ the Court extended *Gideon* by holding that the Sixth Amendment required not merely the participation of counsel for the defendant, but also the derivative right to counsel's effective assistance. These cases enunciate the standards used in determining whether effective assistance was rendered. And, as with the other derivative rights, an inquiry into counsel's "effectiveness" requires a due process balancing approach—i.e., what level of "effectiveness is the defendant due.

Strickland holds that in cases of "actual or constructive denial of counsel," prejudice is assumed.⁵⁰ Thus, a defendant who is actually or constructively denied assistance of counsel will have his conviction reversed, regardless of any attempt by the state to show that the trial was fair.⁵¹ Contrary to Professor Jonakait's claim, the Court still gives effect to the literal command of the Sixth Amendment.

Strickland goes on to hold that, if there is a conflict-free and unimpeded counsel, then the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in order to succeed in a claim that counsel was constitutionally "ineffective."⁵² In holding this, the Court was not interpreting the Sixth Amendment right to counsel; it was interpreting the derivative right created by the Court itself to *effective assistance*. As to these standards, neither the Court, nor concurring Justice Brennan, made any mention of a return to pre-*Gideon* standards. Justice Brennan opined:

[T]hese standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of

⁴⁷ "Mu'Min applied the same standard as had the *Betts* Court." Jonakait, *supra* note 1, at 716. Under Jonakait's interpretation of *Strickland*, "[t]he specific right of the Sixth [Amendment], then, gives an accused nothing not already granted in the general provision of due process." *Id.* at 717.

⁴⁸ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁴⁹ *United States v. Cronic*, 466 U.S. 648, 654 (1984).

⁵⁰ *Strickland*, 466 U.S. at 692. In cases of conflict of interest, prejudice will also be presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (citation omitted).

⁵¹ The *Strickland* Court went on to say that a conflict of interest that "adversely affected [defense counsel's] performance" would also lead to reversal, regardless of the fairness of the trial. *Id.*

⁵² *Id.* at 694.

situations giving rise to claims of this kind.⁵³

Only Justice Marshall dissented from this opinion, but unlike Professor Jonakait, he, too, agreed that *Strickland* was an exercise in “develop[ing] standards for distinguishing effective from inadequate assistance [of counsel],” rather than a reinstatement of the *Betts v. Brady* due process analysis.⁵⁴

Justice Marshall did argue that, under the majority’s holding, “the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after trial in which he was represented by a manifestly ineffective attorney.”⁵⁵ While this statement is true, it is only a criticism of the particular approach adopted by the majority, namely the “result of the trial would have been different” prong, not a claim that the effect of the majority’s ruling would be a return to *Betts*.⁵⁶

It would, indeed, be inconsistent with “incorporation” for the Court to modify *de facto*, the terms of the Sixth Amendment by adopting procedures that would make it impossible for a defendant to win a Sixth Amendment claim unless he could show that his trial was unfair. Professor Jonakait accuses the Court of adopting such procedures, but he cites no examples. On the contrary, the Court continues to enforce absolutely the positive commands of the Sixth Amendment, as applied to the states through the Fourteenth Amendment. Thus, all defendants⁵⁷ are entitled to counsel, jury

⁵³ *Id.* at 703. (Brennan, J., concurring in part and dissenting in part). Professors Saltzburg and Capra characterize *Strickland* similarly to Justice Brennan:

At last the Supreme Court has set forth a test for assessing adequacy of counsel. It appears that the Court adopted a middle ground between presuming that lawyer errors require reversal of convictions (absent some overwhelming showing of harmlessness), which would have called into question many convictions and placed a heavy burden on the government to support convictions tainted in any way by lawyer mistakes, and requiring defendants to show with some degree of certainty that they would have received a more favorable judgment but for the mistakes of counsel, which would have resulted in defendant’s bearing an exceptionally difficult burden.

STEPHEN SALTZBURG & DANIEL CAPRA, *AMERICAN CRIMINAL PROCEDURE* 1040 (4th ed. 1992). For adverse comment on *Strickland*, see VIVIAN BERGER, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986).

Two years after *Strickland*, the Court showed that the case had teeth when it reversed a conviction for the failure of defense counsel to file a motion to suppress evidence because of his misapprehension of the law of discovery of inculpatory materials. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

⁵⁴ *Strickland*, 466 U.S. at 707 (Marshall, J., dissenting). Justice Brennan joined the opinion but dissented from the judgment because of his views on the death penalty. *Id.* at 701.

⁵⁵ 466 U.S. at 711 (Marshall, J., dissenting).

⁵⁶ *Id.* at 710-11.

⁵⁷ There are certain exceptions for minor cases not criticized by Professor Jonakait. See, e.g., *Scott v. Illinois*, 440 U.S. 367 (1979) (counsel only required if defendant may be

trial, impartial juries, speedy trial,⁵⁸ confrontation of witnesses,⁵⁹ among other rights. Indeed, the Court has even included an unenumerated right of defendants to testify within the Sixth Amendment, and reversed a conviction for its violation.⁶⁰ In no case has the Court conceded that one of these rights has been violated and still upheld the conviction on the ground that overall, the defendant received a fair trial.⁶¹

What Jonakait perceives as a retreat to due process standards is actually the Court taking the absolute constitutional guarantees for granted. The cases that come before the Court today present issues involving derivative rights—to *effective* assistance of counsel, to compel production of *particular* arguably inadmissible or irrelevant evidence, to ferret out possible bias by asking potential jurors *certain* questions on *voir dire*, among other rights. Such assertions of derivative rights necessarily require that the Court engage in a due process balancing approach, while it stands ready to reverse automatically any conviction in which textual guarantees of the Sixth Amendment have been violated. One could well argue that in cases addressing these derivative rights, the Court has struck the balance too far in favor of the government. Perhaps this is Professor Jonakait's real gripe. But to argue that these cases have "deprive[d]

imprisoned); *Baldwin v. New York*, 399 U.S. 66 (1970) (jury trial not required for offenses in which less than six months imprisonment is authorized).

⁵⁸ Professor Jonakait concedes that "[t]he Court has not employed what is essentially a due process test for the speedy trial right because the Court has recognized that this Sixth Amendment guarantee serves important goals other than impairment of the defense." Jonakait, *supra* note 1, at 723 n.40 (citing *United States v. McDonald*, 456 U.S. 1 (1982)).

⁵⁹ In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Court held that it was not necessary to decide whether having witnesses testify behind a screen violated the defendant's due process right to a fair trial, since it did violate his Sixth Amendment right to confront his accuser. See also *Maryland v. Craig*, 497 U.S. 836 (1990), in which the Court held that the right of confrontation was not violated by allowing victims in a child molestation case to testify and be cross-examined in a room separate from the defendant, with the testimony transmitted to the courtroom via closed-circuit television. One could argue, as did Justice Scalia in his dissent, that the Court "failed . . . conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Id.* at 860 (Scalia, J., dissenting). But once again, this decision is based, not on a conclusion by the Court that an otherwise fair trial will overcome Confrontation Clause violations, but that the Confrontation Clause was not violated by the procedures in question.

⁶⁰ *Rock v. Arkansas*, 483 U.S. 44 (1987).

⁶¹ See also *Penson v. Ohio*, 488 U.S. 75 (1988) (no showing of prejudice is required for an ineffective assistance of counsel claim to succeed if appellate counsel has withdrawn without filing a statement of reasons why he believed the defendant's claims on appeal were frivolous); *Burch v. Louisiana*, 441 U.S. 130 (1979) (reversing a conviction based on a 5-1 jury vote as violative of the jury trial without considering whether the trial was "fair").

Sixth Amendment guarantees of any independent meaning and made them superfluous⁶² is simply wrong.⁶³

⁶² Jonakait, *supra* note 1, at 713.

⁶³ For example, in *Betts v. Brady*, 316 U.S. 455 (1941), the petitioner, a farmhand of "little education" and no money, was tried for robbery without a lawyer, convicted and sentenced to eight years imprisonment. Certainly, today's Court would reverse this conviction, regardless of whether the trial seemed otherwise "fair."