

CHAPTER

6

INITIATING PROSECUTION

This chapter focuses on mechanisms used to charge defendants with offenses. Initially, police officers will use their discretion to decide when to arrest a suspect. In most jurisdictions, initial charges are filed in a complaint or information. The complaint must be supported by an affidavit that sets forth the evidence supporting the charges. Based upon this *ex parte* showing, the suspect may be held until more formal charges are filed through indictment (for a felony) or information.

Once initial charges are filed, a defendant has the right to have a judge assess whether there is probable cause for the charges. As discussed in Chapter 3, if the defendant has not been arrested with a warrant, this probable cause review must ordinarily be done within 48 hours of a defendant's arrest. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (defendant arrested without a warrant is entitled to "prompt" post-arrest assessment of probable cause by a magistrate); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (probable cause review should be conducted within 48 hours of arrest).

Assuming that there is probable cause, prosecutors have enormous discretion in deciding what charges to bring and against whom.¹ So long as there is probable cause to support the charges, prosecutors can decide how many counts to bring, the severity of the crime to charge, and which suspects to use as witnesses and which to charge as defendants. *United States v. Batchelder*, 442 U.S. 114 (1979) (prosecutors are not required to use the most lenient statute in charging a defendant).

Because of separation of powers, if judges disagree with a prosecutor's charging decision, they can decide to dismiss charges, but they cannot order prosecutors to bring other charges. As Judge Posner has stated, "A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them. Prosecutorial discretion resides in the executive, not in the judicial branch. . . ."² Although prosecutors have broad discretion in deciding what to charge, their decisions are not necessarily easy ones. Section A of this chapter discusses the complexities of the prosecutor's decision to file charges.

1. *See generally* Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 Am. J. Comp. L. 532, 533-539 (1970).

2. *United States v. Giannattasio*, 979 F.2d 98 (7th Cir. 1992).

Section B then details the constitutional, statutory and ethical limits on prosecutorial discretion. In particular, it focuses on the doctrines of selective and vindictive prosecution. Although prosecutors have broad discretion in charging cases, they cannot bring charges based upon impermissible criteria, such as race or religion. They also cannot retaliate against the defendant for the exercise of a constitutional right. Prosecutors must abide by statutory, ethical and administrative standards in making their charging decisions.

Once a decision has been made to charge a defendant, there are two primary procedures to screen which cases should be formally charged—the grand jury and the preliminary hearing. These procedures are discussed in Section C. The Fifth Amendment provides a right to grand jury indictment for federal felonies. However, because this portion of the Fifth Amendment has not been incorporated under the Fourteenth Amendment, states are not required to use grand juries. Instead, many states use another mechanism—the preliminary hearing—to screen cases. Defendants have the right to waive preliminary hearing and frequently do so when they reach an early plea bargain in the case or are not yet prepared to contest the prosecution’s case or do not want to disclose their likely defenses.

In addition, there are fairness considerations that may impact how a defendant is charged. Section D discusses the issues of severance and joinder. Courtroom efficiencies may favor the joinder of defendants or offenses for trial, but these benefits must be weighed against the concern of unduly prejudicing a defendant’s right to a fair trial.

Finally, this chapter ends with a brief word on how charges can be corrected if mistakes are found before trial. Amendments and variances are addressed in Section E of the chapter.

A. THE CHARGING DECISION

By some estimates, less than 2 percent of all crimes are actually prosecuted in the United States.³ That means that throughout the criminal justice process, both the police and prosecutors are using their discretion to decide which cases warrant prosecution. Prosecutors have this broad discretion even though they have relatively little accountability to the public. They are often guided by abstract standards like “seeking justice” or being “fair” or “neutral.” In reality, these terms are just “proxies for a constellation of other, sometimes equally vague, normative expectations about how prosecutors should make decisions.” Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wis. L. Rev. 837, 902-903.

Several factors influence the decision of whether to prosecute a case. First, there are the economic realities. There are not enough prosecutors, police, or courts to prosecute all of the crimes that are committed. For most prosecution offices, there is only one prosecutor for every 4,000 people in their district. Over half of all prosecution offices nationwide operate on a budget of

3. See Sara Sun Beale, *Essay: The Many Faces of Overcriminalization*, 54 Am. U. L. Rev. 747, 757 (2005).

\$355,000 or less.⁴ There are only 800,000 full-time sworn law enforcement officers in the United States for a population of over 300 million people. Thus, prosecutors and police must select very carefully the cases they want to prosecute.

Second, prosecutors must assess which prosecutions are likely to bring the greatest benefit to the community. Depending on community interests, prosecutors will set the priorities for their jurisdictions. In the 1980s, prosecutors launched the “war on drugs.” Today, prosecutorial priorities are also focusing on terrorism crimes and Internet violations. According to government statistics, approximately one-quarter of all felony defendants are charged with violent offenses. Those charged with murder (0.8 percent) and rape (1.8 percent) account for a small percentage of defendants overall.⁵ That means that three-quarters of defendants were charged with a nonviolent felony, with a majority of these being narcotics-related offenses. Nonviolent crimes can range from multi-million dollar fraud schemes to shoplifting offenses. Prosecution priorities may be influenced by political decisions of both the legislature and individual government officials. These individuals generally don’t want to be viewed as “soft on crime,” especially since most District Attorneys are elected officials.

Third, prosecutors must evaluate the merits and strengths of each individual case. Prosecutors only need probable cause to charge a defendant. However, they need proof beyond a reasonable doubt to succeed at trial. Typically, prosecutorial offices enjoy a conviction rate of over 90 percent because they can pick and choose the cases they prosecute. In doing so, they must consider the impact of a trial on prosecution witnesses, the strength of their evidence, the deterrence value of the case, and the harm caused by the crime.

It is not unusual for prosecutors to tack on additional charges so as to create an incentive for the defendant to cooperate and/or to plead guilty. “If the prosecutor charges five offenses instead of two, he may get the defendant to agree to plead guilty to three charges in exchange for his agreement to dismiss two, even if he would have a difficult time proving the two charges before a judge or jury.”⁶

Prosecutors will also evaluate the background of individual defendants before deciding whether to prosecute a case. More than one-third of the defendants prosecuted already have an active criminal justice status at the time of the new charged offense.⁷ Of course, with the power to individually evaluate each case comes the danger that prosecutors will use improper factors in making their decisions. Currently, one out of every three young African-American males is a defendant in the criminal justice system.⁸ Based on current rates of incarceration, an estimated 32 percent of black males will enter state or federal prison during their lifetime, compared to 17 percent of Hispanic males and 5.9 percent of white males.⁹ These statistics prompt important questions about conscious

4. See *U.S. Dep’t of Justice Statistics*, Prosecution Statistics, ojp.usdoj.gov/bjs/pros.htm (Aug. 11, 2007).

5. See *U.S. Dep’t of Justice Statistics*, Criminal Case Processing Statistics, ojp.usdoj.gov/bjs/pros.htm (Aug. 11, 2007).

6. Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecution* (Oxford University Press 2007).

7. *Id.*

8. See Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System* (Oct. 1995).

9. See *U.S. Dep’t of Justice Statistics*, Criminal Case Processing Statistics, ojp.usdoj.gov/bjs/crimoff.htm (Jan. 1, 2008).

and unconscious racial bias in policing and charging decisions.¹⁰ The Supreme Court has repeatedly stated that “prosecutorial discretion cannot be exercised on the basis of race,” *McClesky v. Kemp*, 481 U.S. 279 (1987), yet statistical studies have shown that race has an impact on how a defendant is treated by the criminal justice system. For example, according to the Baldus study cited in *McClesky v. Kemp*, “prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims.” As the dissent in that case noted, “racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.” *Id.* at 332 (Brennan, J., dissenting).

Finally, prosecutors should factor in the overall impact of their decision to prosecute or drop a case. This includes the impact on the victims, their families, law enforcement, and all members of the broader community. There are more than enough criminal codes to prosecute defendants, but prosecutors must consider whether it is in the public interest to bring a charge. Consider the following recent prosecution and whether it was a prudent exercise of prosecutorial discretion.

HEADLINE: JULY 25, 2007
INMATE CONVICTED OF INDECENT EXPOSURE

Associated Press

Terry Lee Alexander thought he was having a private moment in his jail cell. But a deputy jailer thought otherwise. Alexander, 20, was sitting on his bunk alone in his cell masturbating when a female deputy, monitoring his cell by video camera from a nearby control room, took offense. Today he’s scheduled to go to trial to fight a misdemeanor indecent exposure charge.

Taxpayers have been footing the bill — \$91.29 a day — to keep Alexander in the main jail. The grand total for Alexander’s incarceration in that case is nearly \$21,000. On top of that, the public will pay \$1,150 for his attorney.

Critics are appalled at what they call a deputy’s “moral crusade” and question the value of prosecuting such cases. “I would think [taxpayers] would be upset that this is how their money is being spent,” said Betsy Benson, a Broward assistant public defender.¹¹

Prosecutorial charging discretion can also give prosecutors considerable power to influence sentencing. Consider the next example and how the prosecutor’s power to charge controlled the judge’s sentencing decision.

10. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13 (1998).

11. In deciding whether the prosecutor used good judgment in bringing the charges, consider that all of the prospective jurors had to be asked about their attitudes toward masturbation and whether they engaged in it. See Robert Santiago, *Jury Panel Queried in Masturbation Trial*, *Miami Herald* (July 24, 2007).

HEADLINE: DECEMBER 4, 2007
MANDATORY 55-YEAR SENTENCE “EXTREME”?

Salt Lake Tribune

Lawyers for a Utah record producer serving 55 years in prison for carrying a firearm while dealing pot filed a request Monday for a resentencing, saying the punishment is “extreme” and unconstitutional.

“As a result of three sales of small amounts of marijuana to a paid informant and the suspect charging decisions by federal prosecutors, Angelos received a 55-year sentence that highlights the most unjust and arbitrary aspects of the federal criminal justice system and mandatory minimum sentencing provisions,” the motion for resentencing says.

The motion was filed in U.S. District Court in Salt Lake City, where Judge Paul Cassell reluctantly imposed the mandatory term almost four years ago. Cassell described the sentence as “unjust, cruel and irrational,” but said he had no choice under the law but to impose it.

Angelos was accused of selling eight ounces of marijuana for \$350 in each sale. At one sale, he had a gun strapped to his ankle and there were firearms in the vicinity during the other drug buys, according to court records.

Monday’s motion — filed by a team of lawyers that recently stepped into the case — says recent statistics show that the vast majority of all felony marijuana trafficking convictions result in a prison term of less than one year.

Angelos’ sentencing sparked a national debate on mandatory sentences and prompted dozens of former judges and prosecutors to join in friend-of-the-court briefs to the 10th Circuit and the U.S. Supreme Court seeking reversal of the punishment.

The charging decision is one of the most important determinations a prosecutor makes. Although police officers must decide on the spot whether to arrest someone, the prosecutor has the time and ability to do a closer evaluation of a case to determine whether charges are warranted. A decision to charge an individual means, at minimum, that individual will confront the expense and stress of facing trial. Because of the high rate of guilty pleas, the charging decision frequently predetermines the outcome of a criminal case. It vests enormous power in the hands of the prosecutor.

In addition to deciding when and whom to charge, prosecutors have the power to decide *not* to charge a case. Generally, judges do not have the power to second-guess decisions by the prosecution not to charge a case.

INMATES OF ATTICA CORRECTIONAL
FACILITY v. ROCKEFELLER

477 F.2d 375 (2d Cir. 1973)

Circuit Judge MANSFIELD delivered the opinion of the court.

This appeal raises the question of whether the federal judiciary should, at the instance of victims, compel federal and state officials to investigate and

prosecute persons who allegedly have violated certain federal and state criminal statutes. Plaintiffs are certain present and former inmates of New York State's Attica Correctional Facility [and] the mother of an inmate who was killed when Attica was retaken after the inmate uprising in September 1971. They appeal from an order of the district court dismissing their complaint. We affirm.

[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.

The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.

Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

Nor is it clear what the judiciary's role of supervision should be were it to undertake such a review. At what point would the prosecutor be entitled to call a halt to further investigation as unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled? How much judgment would the United States Attorney be allowed? What collateral factors would be permissible bases for a decision not to prosecute, e.g., the pendency of another criminal proceeding elsewhere against the same parties? With limited personnel and facilities at his disposal, what priority would the prosecutor be required to give to cases in which investigation or prosecution was directed by the court?

These difficult questions engender serious doubts as to the judiciary's capacity to review and as to the problem of arbitrariness inherent in any judicial decision to order prosecution. On balance, we believe that substitution of a court's decision to compel prosecution for the U.S. Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith would be unwise.

Generally, prosecutors have both the responsibility and discretion to file criminal charges. In some jurisdictions, private citizens can file misdemeanor complaints (with judicial approval), but the most significant charging decisions rest in the hands of prosecutors.

B. LIMITS ON PROSECUTORIAL DISCRETION

Although prosecutors enjoy broad discretion in charging cases, there are statutory, administrative, ethical, and constitutional limits on prosecutorial discretion.

1. *Statutory and Administrative Limits*

Prosecutors can only charge conduct that the legislature has designated as a crime. Each jurisdiction has governing statutes for its criminal offenses. Federal prosecutions are brought by the United States Attorney's Office or the Department of Justice. Criminal offenses are listed in the United States Code. Generally, prosecutors will have numerous charges to choose from in deciding which charges to bring. So long as the charges are supported by probable cause, it is within the prosecutor's discretion to decide whether to bring a charge with a greater or lesser potential punishment.

Local offenses are charged by State District Attorneys, City Attorneys, and State Attorneys General. The offenses they can charge are listed in the penal codes for those jurisdictions. In some cases, a crime may be charged by state prosecutors, federal prosecutors, or both. As discussed in Chapter 13, federal double jeopardy law does not bar separate sovereigns from charging the same offense. Thus, unless a state provides greater double jeopardy protection, both state and federal officials may charge a violation of law if there are applicable statutes.

Even prosecution of criminal contempt cases arising out of private disputes should be handled by public prosecutors. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the Court held that Federal Rule of Criminal Procedure 42(b) allows for the prosecution of criminal contempt, but it does not allow the victim to be the prosecutor.

The prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution. . . . A prosecutor exercises considerable discretion in [determining] which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, [require a disinterested prosecutor].

Id. at 804-805.

Prosecutors may adopt guidelines for their decisions to prosecute. For example, federal prosecutors have the U.S. Attorney's Manual that will guide their prosecutorial decisions. These guidelines typically leave a great deal of discretion for the prosecutor's decision, although they may require approval by superiors before certain types of cases are brought. However, violation of these internal guidelines does not afford the defendant grounds to contest the charges. As internal guidelines, they do not create independent rights for the defendant.

2. *Ethical Limits*

Prosecutors are also governed by ethical rules. The Supreme Court has repeatedly recognized that prosecutors have special ethical responsibilities because of the power they wield:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935).

The unique responsibilities of prosecutors are expressed in Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982): “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”

For charging decisions, ABA Standards for Criminal Justice: The Prosecution Function, Standard 3-3.9 (Discretion in the Charging Decision) provides:

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others;
- (vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages which might be involved or to a desire to enhance his or her record of conviction.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction

juries have tended to acquit persons accused of the particular criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

Prosecutors who do not honor these ethical obligations risk causing a grave injustice to others and professional consequences to themselves. One particularly notorious case involved rape charges filed against three Duke University lacrosse players by a politically ambitious prosecutor. The prosecutor, Michael Nifong, aggressively pursued charges against the players, as he ran for office. Nifong was aware of serious problems with the case. Nonetheless, he portrayed himself as the crusader for minorities and continued with the prosecution. After the defendants' reputations were tarnished, and millions of dollars were spent on their defense, North Carolina's Attorney General found that there was no evidence to support the charges and dismissed them. Michael Nifong ended up being disbarred. Nifong's case, although relatively rare, offers important lessons about the role of ethics in prosecutors' charging decisions.

HEADLINE: JUNE 18, 2007
LAWYER DISBARRED OVER LACROSSE RAPE CASE

Associated Press

RALEIGH, North Carolina: A disgraced North Carolina lawyer has been disbarred for his "selfish" rape prosecution of three lacrosse players at a top U.S. university, bringing to an end an American saga about race and class that sparked a bitter national debate.

Hours after he was found guilty of ethics violations in his prosecution of three white Duke University lacrosse players falsely accused of raping a black stripper at an off-campus house party in March last year, Durham County District Attorney Michael Nifong at the weekend surrendered his law license to the state bar and said he would waive his right to appeal.

A three-person North Carolina State Bar disciplinary panel, on the fifth day of an ethics hearing, said the evidence showed that Mr. Nifong had withheld crucial information from the students' defence lawyers and engaged in "dishonesty, fraud, deceit or misrepresentation" during his prosecution of the case.

It is the first time a sitting district attorney has been disbarred in North Carolina.

"This matter has been a fiasco. There's no doubt about it," said F. Lane Williamson, chair of the disciplinary committee. The committee said Mr. Nifong manipulated the investigation to boost his chances of winning his first election for Durham County district attorney.

Mr. Williamson specifically cited Mr. Nifong's comments in the early days of the case, which included a confident proclamation that he would not allow Durham to become known for "a bunch of lacrosse players from Duke raping a black girl." He also called the Duke lacrosse team "a bunch of hooligans."

Appointed district attorney in 2005, Mr. Nifong was in a tight race for the office when a stripper told police she had been raped at the party. "At the time he was facing a primary, and yes, he was politically naive," Mr. Williamson said.

“But we can draw no other conclusion than [that] those initial statements he made were to further his political ambitions.”

The case stirred furious debate over race, class and the privileged status of college athletes, and heightened longstanding tensions in Durham between its large working-class black population and the mostly white, mostly affluent students at the private, elite university.

During the ethics trial, Mr. Nifong acknowledged he knew there was no DNA evidence connecting Duke students Reade Seligmann and Collin Finnerty to the 28-year-old accuser when he indicted them on charges of rape, sexual offence and kidnapping. Mr. Nifong later charged Dave Evans with the same crimes.

But months later, state prosecutors concluded the players were innocent and in a blistering assessment of the case Attorney-General Roy Cooper dropped all charges in April.

“This case shows the enormous consequences of overreaching by a prosecutor,” he said. “In the rush to condemn, a community and a state lost the ability to see clearly.”

By most accounts, what happened to the prosecutor in the Nifong case was highly unusual. Prosecutors are rarely disciplined for improper charging of cases. The ABA ethical rules are only aspirational and prosecutors are rarely called upon to justify their charging decisions.

3. *Constitutional Limits*¹²

Although prosecutorial discretion is broad, it is not unlimited. Prosecutors cannot use unconstitutional motives to charge a defendant. A defendant who is prosecuted because of his race, religion, or other classification, in violation of the Fourteenth Amendment’s Equal Protection Clause, can move to dismiss for selective or discriminatory enforcement. A defendant who is prosecuted in retaliation for the defendant’s exercise of a constitutional right, such as the First Amendment right to free speech, can move to dismiss for vindictive prosecution.

12. This chapter focuses on due process and equal protection limits on prosecutorial discretion. In addition, Article I, Section 9, Clause 3 of the Constitution prohibits bills of attainder and ex post facto laws. “A *bill of attainder* is a legislative act which inflicts punishment without judicial trial and includes any legislative act which takes away the life, liberty or property of a particular named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment.” *Cummings v. Missouri*, 71 U.S. 277 (1867) (emphasis added). An *ex post facto law* is a law that punishes acts that were legal at the time they were committed. *See generally* *Calder v. Bull*, 3 Dall. 386 (1798). The prohibition on ex post facto laws also bars laws that increase the punishment of an act after it was committed or retroactively extend the statute of limitations so that a defendant can be charged with a crime. *See* *Stogner v. California*, 539 U.S. 607 (2003) (state law that sought to resurrect prosecution of child molestation cases that were otherwise time-barred violated the Ex Post Facto Clause). However, the rule does not bar the retroactive application of registration laws, such as laws requiring sex offenders to register their whereabouts. *See* *Smith v. Doe*, 538 U.S. 84 (2003). The prohibition on bills of attainder and ex post facto laws applies to the States pursuant to Article I, Section 10, Clause 1 of the federal Constitution.

a. Selective or Discriminatory Enforcement

There is a general presumption that prosecutors will exercise their discretion in good faith. However, if a defendant can show that the prosecution used an impermissible motive to prosecute, such as prosecuting a defendant because of his race or exercise of his First Amendment rights, then the prosecution can be dismissed. As the next two cases — *Wayte v. United States* and *United States v. Armstrong* — illustrate, not only has the Supreme Court set a high standard for defendants claiming selective prosecution, but it has imposed a significant burden on defendants seeking discovery to support a claim of discriminatory prosecution.

WAYTE v. UNITED STATES

470 U.S. 598 (1985)

Justice POWELL delivered the opinion of the Court.

[David Wayte was a war protestor. When he refused to register for the Selective Service System, he was warned that he could be prosecuted for violating the Military Selective Service Act. Nonetheless, Wayte continued to protest the war and refused to register. In a letter to the Selective Service System and President, Wayte stated, “I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me.” Ultimately, he was indicted. He then moved for dismissal, contending that he was “selectively prosecuted” for resisting the system. The district court granted the motion. Respondent government appealed, asserting that petitioner did not prove a prima facie case of discrimination.]

The question presented is whether a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, violates the First and Fifth Amendments.

Petitioner moved to dismiss the indictment on the ground of selective prosecution. He contended that he and the other [13] indicted nonregistrants were “vocal” opponents of the registration program who had been impermissibly targeted (out of an estimated 674,000 nonregistrants) for prosecution on the basis of their exercise of First Amendment rights.

In our criminal justice system, the Government retains “broad discretion” as to whom to prosecute. “[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to

outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not “‘unfettered.’ Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.” In particular, the decision to prosecute may not be “‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,’” including the exercise of protected statutory and constitutional rights.

It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.¹³ All petitioner has shown here is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech. Indeed, he could not have done so given the way the “beg” policy¹⁴ was carried out. The Government did not prosecute those who reported themselves but later registered. Nor did it prosecute those who protested registration but did not report themselves or were not reported by others. In fact, the Government did not even investigate those who wrote letters to Selective Service criticizing registration unless their letters stated affirmatively that they had refused to comply with the law. The Government, on the other hand, did prosecute people who reported themselves or were reported by others but who did not publicly protest. These facts demonstrate that the Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden. Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government.

Even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. The evidence he presented demonstrated only that the Government was aware that the passive enforcement policy would result in prosecution of vocal objectors and that they would probably make selective prosecution claims. As we have noted, however: “‘Discriminatory purpose’ . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” In the present case, petitioner has not shown that the Government prosecuted him because of his protest activities. Absent such a showing, his claim of selective prosecution fails.¹⁵

13. A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification. *See* *Strauder v. West Virginia*, (1880). [No such claim was presented by Wayte.] [Footnote by the Court.]

14. Pursuant to the Department of Justice “beg” policy, those referred were not immediately prosecuted. Instead, the appropriate United States Attorney was required to notify identified nonregistrants by registered mail that, unless they registered within a specified time, prosecution would be considered. In addition, an FBI agent was usually sent to interview the nonregistrant before prosecution was instituted. This effort to persuade nonregistrants to change their minds became known as the “beg” policy. [Footnote by casebook authors.]

15. Wayte also challenged his prosecution directly on First Amendment grounds. However, this claim also failed because the incidental restriction on his speech was essential to further the

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The Court decides today that petitioner “has not shown that the Government prosecuted him because of his protest activities,” and it remands to permit his prosecution to go forward. However interesting the question decided by the Court may be, it is not necessary to the disposition of this case. Instead, the issue this Court must grapple with is far less momentous but no less deserving of thoughtful treatment. What it must decide is whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution.

The District Court ordered such discovery, the Government refused to comply, and the District Court dismissed the indictment. The Court of Appeals reversed on the grounds that Wayte had failed to prevail on the merits of his selective prosecution claim, and that the discovery order was improper. If Wayte is entitled to obtain evidence currently in the Government’s possession, the Court cannot dismiss his claim on the basis of only the evidence now in the record. To prevail here, then, all that Wayte needs to show is that the District Court applied the correct legal standard and did not abuse its discretion in determining that he had made a nonfrivolous showing of selective prosecution entitling him to discovery.

There can be no doubt that Wayte has sustained his burden. Therefore, his claim cannot properly be dismissed at this stage in the litigation. I respectfully dissent from this Court’s decision to do so.

The discovery issue that Justice Marshall raised in his dissent came before the Court in *United States v. Armstrong*. There the Court dealt with an issue much more common in selective prosecution cases; namely, when do racial disparities in prosecutions constitute selective/discriminatory prosecution?

UNITED STATES v. ARMSTRONG

517 U.S. 456 (1996)

Chief Justice REHNQUIST delivered the opinion of the Court.

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same and federal firearms offenses. In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a “Paralegal Specialist,” employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the

government’s legitimate interest in having people comply with the registration laws. [Footnote by casebook authors.]

affidavit was that, in every one of the 24 [narcotics] cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a “study” listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.

The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation “that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them.”

A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.

A selective-prosecution claim asks a court to exercise judicial power over a “special province” of the Executive. The Attorney General and United States Attorneys retain “broad discretion” to enforce the Nation’s criminal laws. *Wayte v. United States* (1985). They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, § 3. As a result, “the presumption of regularity supports” their prosecutorial decisions and, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes* (1978).

Of course, a prosecutor’s discretion is “subject to constitutional constraints.” One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment is that the decision whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” A defendant may demonstrate that the administration of a criminal law is “directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive” that the system of prosecution amounts to “a practical denial” of equal protection of the law. *Yick Wo v. Hopkins* (1886).

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present “clear evidence to the contrary.” The requirements for a selective-prosecution claim draw on “ordinary equal protection standards.” The claimant must demonstrate that the federal prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.” To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

The similarly situated requirement does not make a selective-prosecution claim impossible to prove. In *Hunter*, we invalidated a state law disenfranchising persons convicted of crimes involving moral turpitude. Our holding was consistent with ordinary equal protection principles, including the similarly situated requirement. There was convincing direct evidence that the State had enacted the provision for the purpose of disenfranchising blacks and indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites: Blacks were “by even the most modest estimates at

least 1.7 times as likely as whites to suffer disfranchisement under” the law in question.

Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant’s claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors’ resources and may disclose the Government’s prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like “colorable basis,” “substantial threshold showing,” “substantial and concrete basis,” or “reasonable likelihood.” However, the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it. The Courts of Appeals “require some evidence tending to show the existence of the essential elements of the defense,” discriminatory effect and discriminatory intent.

In this case we consider what evidence constitutes “some evidence tending to show the existence” of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. We think it was mistaken in this view. The Court of Appeals reached its decision in part because it started “with the presumption that people of all races commit all types of crimes — not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group.” It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, 93.4% of convicted LSD dealers were white, and 91% of those convicted for pornography or prostitution were white. Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

The Court of Appeals also expressed concern about the “evidentiary obstacles defendants face.” But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold — a credible showing of different treatment of similarly situated persons — adequately balances the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.

In the case before us, respondents’ “study” did not constitute “some evidence tending to show the existence of the essential elements of” a selective-prosecution claim. The study failed to identify individuals who were not black and could have

been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

Justice STEVENS, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. For that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled.

The United States Attorney is a member and an officer of the bar of that District Court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a District Judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern. I agree with the Court that Rule 16 of the Federal Rules of Criminal Procedure is not the source of the District Court's power to make the necessary inquiry. I disagree, however, with its implicit assumption that a different, relatively rigid rule needs to be crafted to regulate the use of this seldom-exercised inherent judicial power.

The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine. Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine.

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the Federal Government.

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. Those figures represent a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing.¹⁶

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

The problem of racial disparity in prosecutions continues to be significant. While the legal standard requires that defendants show intentional discrimination, critics charge that unintentional discrimination poses significant challenges. Every day, prosecutors may make decisions that unintentionally discriminate. “This discriminatory impact may occur because of unconscious racism — a phenomenon that plays a powerful role in so many discretionary decisions in the criminal process — and because the lack of power and disadvantaged circumstances of so many African-American defendants and victims make it more likely that prosecutors will treat them less well than whites.”¹⁷ Nonetheless, under the Court’s equal protection standards, only the most egregious situations of discrimination are likely to meet legal standards for selective prosecution motions.

b. Vindictive Prosecution

A prosecutor’s decision to increase the number or severity of charges against a defendant may also be challenged as violating due process if it penalizes a defendant’s exercise of constitutional or statutory rights. The mere increase in charges does not satisfy the standard. Rather, a defendant must show actual vindictiveness.

Pretrial decisions by prosecutors are generally not considered to be vindictive. For example, there is no presumption of vindictiveness when a prosecutor threatens to increase charges if a defendant does not accept a plea offer. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Such threats are accepted as part of the plea bargaining process. Likewise, there is no presumption of vindictiveness when additional charges are added after a defendant requests a jury trial. *See United States v. Goodwin*, 457 U.S. 368 (1982).

However, there are certain situations, especially when a defendant is reindicted, where the court is willing to presume vindictiveness. The Court discussed the issue of vindictive prosecution in *Blackledge v. Perry*.

16. It took many years to reform the laws applicable to crack and powder cocaine offenses. In 2007, the U.S. Sentencing Commission finally amended the crack cocaine guidelines. The Commission eliminated the 100-to-1 ratio that used to punish crack cocaine offenders more harshly than those violating laws with commensurate amounts of powder cocaine. *See Report to the Congress: Cocaine and Federal Sentencing Policy 8* (2007), available at http://www.ussc.gov/r_congress/cocaine207.pdf. [Footnote by casebook authors.]

17. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13 (1998).

BLACKLEDGE v. PERRY*417 U.S. 21 (1974)*

Justice STEWART delivered the opinion of the Court.

[Perry was an inmate in a North Carolina prison where he got into a fight with another inmate. Perry was charged with misdemeanor assault with a deadly weapon. After he was convicted by a lower trial court, he exercised his statutory right to appeal his conviction and seek a trial de novo before a higher court. While that appeal was pending, the prosecutor obtained an indictment charging Perry with felony assault with intent to kill. Perry claimed vindictive prosecution.]

[Perry] urges that the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment. Perry's due process arguments are derived substantially from *North Carolina v. Pearce* and its progeny. In *Pearce*, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy or Due Process Clause, we emphasized that "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." Because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record.

[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals — by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy — the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." We think it

clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.¹⁸

It is rare for a vindictive trial motion to be granted. Most cases are not like *Blackledge* and judges do not assume that the prosecutor had an impermissible motive for enhancing charges. Rather, judges generally give wide latitude to prosecutors to reevaluate their charging decisions. Thus, in *United States v. Goodwin*, 457 U.S. 368 (1982), the Court held that there is no presumption of vindictiveness if the prosecution increases charges pretrial because they have the right to reevaluate their case as they prepare for trial. Accordingly, there is also no violation of a defendant's rights when a prosecutor threatens to add more charges during plea bargain negotiations. Moreover, even in the post-trial context, a claim of vindictiveness is easily rebutted if prosecutors can show that new evidence or a reevaluation of the case justified the imposition of the new charges. Lower courts continue to limit the impact of *Blackledge* by finding that it does not apply when a prosecutor escalates charges following a mistrial or files additional charges after an acquittal.¹⁹

C. FORMAL CHARGING MECHANISMS

American courts rely on two different mechanisms to screen cases before they are set for trial and to formalize the charges the defendant will face. Both the grand jury and preliminary hearing are designed to protect citizens from unjust prosecutions, but they use very different procedures to accomplish this goal.

18. In its decision, the Court noted that a claim of prosecutorial vindictiveness would be overcome if the State could show "that it was impossible to proceed on the more serious charge at the outset" because, for example, the victim did not die until after the initial charges were brought. See *Diaz v. United States*, 223 U.S. 442 (1912). However, the prosecution in *Blackledge* had made no attempt to rebut the claim of vindictiveness. [Footnote by casebook authors.]

19. For a discussion of cases limiting the doctrine of vindictive prosecution, see C. Peter Erlinder & David C. Thomas, *Prohibiting Prosecutorial Vindictiveness While Protecting Prosecutorial Discretion: Toward a Principled Resolution of a Due Process Dilemma*, 76 J. Crim. L. & C. 341 (1985); Barbara A. Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 Iowa L. Rev. 127 (1983).

1. *The Grand Jury*

The modern grand jury descends from the English grand jury used more than 800 years ago.²⁰ The grand jury consisted of a group of citizens who would act as a buffer between the Crown and the accused. Acting in secrecy, the grand jury would decide when individuals should be charged with crimes. American colonists adopted the grand jury as part of the common law system. In the famous Zenger case, a grand jury refused to indict newspaper publisher John Peter Zenger for libel after he criticized the Governor of New York, although the grand jurors themselves were threatened with incarceration.

The right to a grand jury was incorporated into the Fifth Amendment. It provides that, except in military cases, “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.” Presentments, which were charges initiated by the grand jury, are no longer used. However, grand jury indictments are still the primary mechanism for bringing federal charges.

The right to an indictment only applies to “infamous crimes.” A crime is “infamous” if it can result in imprisonment in a penitentiary or hard labor. *Ex parte Wilson*, 114 U.S. 417 (1885). Thus, federal felony charges are brought by way of indictment. Misdemeanor charges can be filed directly by the prosecutor by information.

The right to a grand jury indictment only applies to federal prosecutions. In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court held that the right to a grand jury is not incorporated under the Fourteenth Amendment. Thus, states are free to bring charges for serious crimes without using a grand jury, or by using a grand jury that has different procedures from a federal grand jury. Only about one-third of the states have grand juries, and some states use their grand juries primarily to conduct civil investigations of government agencies.

While the primary function of a grand jury is to screen cases and decide which should be indicted, the grand jury also performs an important investigative role. The grand jury has the power to subpoena witnesses and documents. It is an effective tool for prosecutors because they can conduct their investigations in secret without the defense being present.

Pursuant to Federal Rule of Criminal Procedure 6(a), 23 citizens sit on a grand jury. They are selected from a cross-section of the community. Grand jurors typically serve for 6 months, although their service can extend for as long as 18 months. If a grand jury refuses to issue an indictment, prosecutors can re-present the same case to another grand jury.

Although the grand jury is considered to be an independent screening body, the reality is that the grand jury is directed in its operations by the prosecutor. Prosecutors suggest what cases the grand jury should investigate, prepare the subpoenas for their signature, draft the indictments, and advise the grand jurors of the law. It is therefore extremely rare for a grand jury to refuse to issue an indictment requested by a prosecutor. If the grand jury refuses to indict, it issues a “no bill.” However, many people perceive the modern grand jury as nothing more than a “rubber stamp” for prosecutors.

20. For a summary of the history and purpose of the grand jury, see *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005).

Grand jurors do not have the power to bring charges without the agreement of the prosecutor. If the grand jury returns an indictment, and the prosecution disagrees with its decision, it may refuse to sign the indictment or issue a *nolle prosequi* that dismisses the charges. There have been situations of “runaway” grand juries, but courts have held that grand jurors do not have independent power to bring a prosecution.²¹

A defendant can waive grand jury indictment and opt to have the prosecution file formal charges by information. Fed. R. Crim. P. 7(b). Waiver of indictment often signals that a defendant is cooperating in the government’s investigation.

a. Operation of the Grand Jury

Grand jury operations are an *ex parte* process. Only the prosecutor is represented in grand jury proceedings. During the typical grand jury proceeding, the prosecutor calls and examines witnesses before the grand jury. Then, if the prosecutor wants to secure an indictment, the prosecutor presents a typed indictment to the grand jury, instructs them on the applicable law, and steps out when the grand jurors are asked to deliberate to determine whether there is probable cause to support the charges.

Neither the defendant nor his counsel has the right to be present in the grand jury. There is also no judge present for grand jury proceedings. The grand jury is considered to be an independent body that investigates and screens cases.

Individuals who are the focus of a grand jury investigation are typically referred to as “targets” of the grand jury. It is rare, although not prohibited, for the target of a grand jury to be called as a witness in the grand jury because an individual has the Fifth Amendment right to refuse to testify before the grand jury.

Some prosecutors also refer to “subjects” of a grand jury investigation. A subject is also a person who may be charged with a crime, but is not as likely to be indicted as the identified “target” of the investigation. Prosecutors are not required to tell individuals that they are the target or suspect of a grand jury investigation. Moreover, because of secrecy rules, Department of Justice guidelines advise prosecutors not to confirm an ongoing grand jury investigation.

Grand jury transcripts remain secret until ordered released by the court. In federal court, the testimony of a grand jury witness is not discoverable unless that witness testifies at trial or the requesting party shows a particularized need for release of the transcript. Fed. R. Crim. P. 6(e). Some states routinely release grand jury transcripts to the public once a case has been indicted.

Violations of grand jury procedures generally become moot once the defendant is convicted. For example, in *United States v. Mechanik*, 475 U.S. 66 (1986), the prosecution arguably violated Federal Rule of Criminal Procedure 6(d) by having two witnesses testify at once before the grand jury. The Supreme Court held that while such a procedural error could influence a

21. The most infamous case of a runaway grand jury involved an investigation of Rockwell International for operating its Rocky Flats nuclear-weapons plant in a manner that included dumping nuclear waste into the environment. The prosecutor declined to sign a grand jury indictment against Rockwell, instead reaching a financial settlement with the company. Incensed by the prosecutor’s refusal, the grand jurors tried to bring charges on their own, but the court refused to intervene in the prosecutor’s decision. See Jim Hughes, *Grand Jurors Hope to Go Public and Ask Congress to Decide in Rocky Flats Case*, Denver Post B-04 (March 14, 2004).

grand jury to indict the defendant, once the petit jury returned a guilty verdict, there was proof beyond a reasonable doubt that such charges were warranted. Thus, any error in the grand jury proceeding was harmless.

Moreover, even if a defendant raises a claim of grand jury error before a case is tried, grand jury violations are not grounds for dismissing an indictment absent a showing of prejudice. Thus, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the district court found a variety of alleged violations of grand jury procedures, including unauthorized disclosures of grand jury materials to civil government employees and improper disclosure of the targets of the grand jury. Nonetheless, the Supreme Court held that dismissal is still not a proper remedy unless the defendant can demonstrate prejudice from the violations. Writing for the majority, Justice Kennedy stated: “We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury’s decision to indict.”

b. Screening Function of Grand Jury

The role of the grand jury is to screen cases before defendants are required to stand trial. Yet, it is not bound by the same rules of evidence and procedure that will govern the trial jury’s decision. In light of the next two cases, how effectively do you believe the grand jury screens cases before trial?

COSTELLO v. UNITED STATES

350 U.S. 359 (1956)

Justice BLACK delivered the opinion of the Court.

We granted certiorari in this case to consider a single question: “May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?”

Petitioner, Frank Costello, was indicted for willfully attempting to evade payment of income taxes. Petitioner promptly filed a motion for inspection of the minutes of the grand jury and for a dismissal of the indictment. His motion was based on an affidavit stating that he was firmly convinced there could have been no legal or competent evidence before the grand jury which indicted him since he had reported all his income and paid all taxes due. The motion was denied. At the trial which followed the Government offered evidence designed to show increases in Costello’s net worth in an attempt to prove that he had received more income during the years in question than he had reported. To establish its case the Government called and examined 144 witnesses and introduced 368 exhibits. All of the testimony and documents related to business transactions and expenditures by petitioner and his wife. The prosecution concluded its case by calling three government agents. Their investigations had produced the evidence used against petitioner at the trial. They were allowed to summarize the vast amount of evidence already heard and to introduce computations showing, if correct, that

petitioner and his wife had received far greater income than they had reported. We have held such summarizations admissible in a “net worth” case like this.

Counsel for petitioner asked each government witness at the trial whether he had appeared before the grand jury which returned the indictment. This cross-examination developed the fact that the three investigating officers had been the only witnesses before the grand jury. After the Government concluded its case, petitioner again moved to dismiss the indictment on the ground that the only evidence before the grand jury was “hearsay,” since the three officers had no firsthand knowledge of the transactions upon which their computations were based. Nevertheless the trial court again refused to dismiss the indictment, and petitioner was convicted. The Court of Appeals affirmed, holding that the indictment was valid even though the sole evidence before the grand jury was hearsay. Petitioner here urges: (1) that an indictment based solely on hearsay evidence violates that part of the Fifth Amendment providing that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” and (2) that if the Fifth Amendment does not invalidate an indictment based solely on hearsay we should now lay down such a rule for the guidance of federal courts.

The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.

In *Holt v. United States*, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. The Court refused to hold that such an indictment should be quashed. If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

In order for grand juries to be more exacting in their screening of cases, states can mandate that only admissible evidence may be presented to the grand jury to establish grounds for an indictment. *See, e.g.*, Cal. Penal Code § 939.6(b). Yet, as *Costello* discussed, there is no constitutional bar to having a grand jury consider hearsay evidence in deciding whether to indict. Moreover, grand jurors can also hear evidence that would be excludable by a motion to suppress. In *United States v. Calandra*, 414 U.S. 338 (1974), the Supreme Court held that illegally seized evidence can also be used in a grand jury proceeding.

Not only is the grand jury not required to consider only admissible evidence, it is not, as the next case demonstrates, required to consider defense evidence that could be presented at trial. The grand jury is not an adversarial proceeding. It is a modest screening mechanism to ensure that cases that do proceed to trial are supported by probable cause.

UNITED STATES v. WILLIAMS

504 U.S. 36 (1992)

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether a district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury “substantial exculpatory evidence” in its possession.

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts “may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress,” he argues that imposition of [a] disclosure rule is supported by the courts’ “supervisory power.” We think not. *Bank of Nova Scotia v. United States* (1988) makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those “few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.”²² We did not hold in *Bank*

22. These rules are those set forth in Federal Rule of Criminal Procedure 6 in the Statutory Supplement, including rules on grand jury secrecy and the persons who may be present during grand jury deliberations. [Footnote by casebook authors.]

of *Nova Scotia*, however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of prescribing those standards of prosecutorial conduct in the first instance—just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves.

“Rooted in long centuries of Anglo-American history,” the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It “is a constitutional fixture in its own right.” In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.

The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised. “Unlike [a] court, whose jurisdiction is predicated upon a specific case or controversy, the grand jury ‘can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.’” It need not identify the offender it suspects, or even “the precise nature of the offense” it is investigating. The grand jury requires no authorization from its constituting court to initiate an investigation, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge.

We have insisted that the grand jury remain “free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.” Recognizing this tradition of independence, we have said that the Fifth Amendment's “constitutional guarantee presupposes an investigative body ‘acting independently of either prosecuting attorney or judge’ . . .”

We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. And although “the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee” against self-incrimination, our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination “is nevertheless valid.”

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.

Respondent makes a generalized appeal to functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, i.e., bringing to trial those who may be justly accused and shielding

the innocent from unfounded accusation and prosecution. We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented.

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done — rather than requiring the prosecutor to say what he knows in defense of the target of the investigation — is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would have to be passed on to the grand jury — unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure.

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the grand jury itself chooses to hear no more evidence than that which suffices to convince it an indictment is proper. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution." We reject the attempt to convert a non-existent duty of the grand jury itself into an obligation of the prosecutor.

[I]n *Costello v. United States*, we held that "it would run counter to the whole history of the grand jury institution" to permit an indictment to be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury." It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading." Our words in *Costello* bear repeating: Review of facially valid indictments on such grounds "would run counter to the whole history of the grand jury institution[,] [and] neither justice nor the concept of a fair trial requires [it]."

[R]espondent argues that a rule requiring the prosecutor to disclose exculpatory evidence to the grand jury would, by removing from the docket unjustified prosecutions, save valuable judicial time. That depends, we suppose, upon what the ratio would turn out to be between unjustified prosecutions eliminated and grand jury indictments challenged — for the latter as well as the former consume "valuable judicial time." We need not pursue the matter; if there is an advantage to the proposal, Congress is free to prescribe it. For the reasons set forth above, however, we conclude that courts have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, and with whom Justice THOMAS joins in part, dissenting.

Like the Hydra slain by Hercules, prosecutorial misconduct has many heads. [T]he prosecutor has [a] duty to refrain from improper methods calculated to produce a wrongful indictment. Indeed, the prosecutor's duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury. "The costs of continued unchecked prosecutorial misconduct" before the grand jury are particularly substantial because there:

the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

The ex parte character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States "in a criminal prosecution is not that it shall win a case, but that justice shall be done."

We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a "protector of citizens against arbitrary and oppressive governmental action."

It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor—on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity, rely.

Unlike the Court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated—no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury—simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings. Such a sharp break with the traditional role of the federal judiciary is unprecedented, unwarranted, and unwise. Unrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods.

c. Grand Jury Reform

There continue to be calls for grand jury reform, but these generally go unheeded by Congress and the Supreme Court. The ABA Criminal Justice Section Committee on the Grand Jury has proposed the following reforms:

- (1) Witnesses before the grand jury be afforded the right to be accompanied by counsel in the grand jury room;
- (2) Prosecutors be required to advise the grand jury of any known exculpatory information;
- (3) Prosecutors not be permitted to present to the grand jury evidence that would be inadmissible at trial;
- (4) Targets of a grand jury investigation be given the right to testify;
- (5) Grand jury witnesses be provided with transcripts of their own testimony; and
- (6) Grand juries not name persons in an indictment as an unindicted co-conspirator.

Thus far, these reforms have not been adopted in federal court; the Supreme Court's holding in *United States v. Mandujano*, 425 U.S. 564 (1976) — that a grand jury witness has no constitutional right to have counsel present during grand jury proceedings — remains in effect.

2. Preliminary Hearing

Another mechanism available to screen cases is the preliminary hearing. In federal court, preliminary hearings are governed by Federal Rule of Criminal Procedure 5.1 and are only used to hold a defendant until an indictment can be obtained.

However, states routinely rely on preliminary hearings in lieu of or in addition to grand jury proceedings. Approximately two-thirds of the states permit felony prosecutions to be initiated by information or indictment. Once the magistrate or judge finds probable cause, the defendant is “bound over” for trial on charges filed by the prosecutor in an information.

A preliminary hearing is fundamentally different from a grand jury proceeding. Preliminary hearings are more akin to “mini-trials.” A judge presides over the preliminary hearing; it is an adversarial process. The defendant has the right to be present and to be represented by counsel. *Coleman v. Alabama*, 399 U.S. 1 (1970). Preliminary hearings are generally open to the public. The prosecution bears the burden at a preliminary hearing to present probable cause supporting the charges.

Different states use different evidentiary standards for preliminary hearings, depending on how exacting they want the case screening procedure to be. If a state wants a screening process that will authorize charges only when there is a strong chance of conviction at trial, it requires that the evidence at the preliminary hearing meet the same evidentiary standards it will have to meet for trial. Hearsay evidence is not allowed. However, many states view the preliminary hearing as a more modest check on prosecutorial discretion. In those venues, hearsay evidence may be presented at the preliminary hearing and the defense has a more limited opportunity to cross-examine the

prosecution's witnesses. *See also* Fed. R. Evid. 1101(d)(3) (rules of evidence do not apply to federal preliminary hearings).

Following a preliminary hearing, the court's decision to bind a defendant over for trial generally triggers a more intense effort at plea negotiations. Having seen a preview of the prosecution's case, defense counsel are in a better position to assess a defendant's case than counsel might be if the defendant was indicted in secret by the grand jury.

If a magistrate refuses to bind over a defendant for trial, prosecutors may present their case to the grand jury or move to dismiss it and refile before a different judge. Any errors at the preliminary hearing are generally considered harmless once the defendant is tried and convicted.

In addition to screening cases for trial, a preliminary hearing is also crucial to preserving evidence for trial. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that testimonial hearsay statements cannot be presented at trial unless the declarant is unavailable and the defendant has had the opportunity to cross-examine the declarant before the statement is introduced. Thus, if a witness provides a formal statement before trial, but then does not appear to testify, that statement cannot be used as evidence unless the defendant had an opportunity to cross-examine the victim regarding the statement. A preliminary hearing can provide the means to preserve that witness's testimony for trial by giving the defendant a pretrial opportunity to cross-examine the witness. Although the Supreme Court has held that the Sixth Amendment Confrontation Clause is a trial right and does not apply to the preliminary hearing, *see* *Goldsby v. United States*, 160 U.S. 70 (1895), states now provide defendants the right to cross-examine pursuant to local or state rule.

D. SEVERANCE AND JOINDER

One of the decisions a prosecutor must make in deciding how to charge a case is whether to join charges and defendants for trial. Prosecutors generally favor trying defendants together. As Justice Scalia wrote in *Richardson v. Marsh*, 481 U.S. 200 (1987), there are advantages in joining defendants:

Joint trials play a vital role in the criminal justice system. It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Yet, there are also downsides to trying defendants together. Defendants may be tainted by the evidence against their codefendants. The mere fact that the

defendants are charged together, or are facing multiple counts, can suggest to the jury that each defendant was part of a larger criminal scheme.

1. Federal Rules of Criminal Procedure 8 and 14

Federal Rules of Criminal Procedure 8 and 14 govern the issues of joinder and severance of criminal cases in federal court. Rule 8(a) permits the joinder of offenses that “are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” Rule 8(b) permits two or more defendants to be charged together if they have participated in the same act or transaction, or in the same series of acts or transactions. The defendants may be charged in one or more counts together. All defendants need not be charged in each count.

Rule 14 provides relief from prejudicial joinder. “If the joinder of offenses or defendants in an indictment, or information, or a consolidation for trial, appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.”

2. Irreconcilable Conflicts and Bruton Problems

There are two common grounds offered in support of a defendant’s motion to sever defendants who have been joined for trial: (1) fingerprinting at trial by one defendant against another; and (2) introduction of confessions that implicate codefendants in a manner that violates the codefendant’s right of confrontation. Generally, courts will not sever a case unless the conflict between defendants is irreconcilable.

a. Conflicting Defenses

ZAFIRO v. UNITED STATES

506 U.S. 534 (1993)

Justice O’CONNOR delivered the opinion of the Court.

Rule 8(b) of the Federal Rules of Criminal Procedure provides that defendants may be charged together “if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” Rule 14 of the Rules, in turn, permits a district court to grant a severance of defendants if “it appears that a defendant or the government is prejudiced by a joinder.” In this case, we consider whether Rule 14 requires severance as a matter of law when codefendants present “mutually antagonistic defenses.”

Gloria Zafiro, Jose Martinez, Salvador Garcia, and Alfonso Soto were accused of distributing illegal drugs in the Chicago area, operating primarily out of Soto’s bungalow in Chicago and Zafiro’s apartment in Cicero, a nearby suburb. One day, Government agents observed Garcia and Soto place a large box in

Soto's car and drive from Soto's bungalow to Zafiro's apartment. The agents followed the two as they carried the box up the stairs. When the agents identified themselves, Garcia and Soto dropped the box and ran into the apartment. The agents entered the apartment in pursuit and found the four petitioners in the living room. The dropped box contained 55 pounds of cocaine.

The four petitioners were indicted and brought to trial together. At various points during the proceeding, Garcia and Soto moved for severance, arguing that their defenses were mutually antagonistic. Soto testified that he knew nothing about the drug conspiracy. He claimed that Garcia had asked him for a box, which he gave Garcia, and that he (Soto) did not know its contents until they were arrested. Garcia did not testify, but his lawyer argued that Garcia was innocent: The box belonged to Soto and Garcia was ignorant of its contents.

Zafiro and Martinez also repeatedly moved for severance on the ground that their defenses were mutually antagonistic. Zafiro testified that she was merely Martinez's girlfriend and knew nothing of the conspiracy. She claimed that Martinez stayed in her apartment occasionally, kept some clothes there, and gave her small amounts of money. Although she allowed Martinez to store a suitcase in her closet, she testified, she had no idea that the suitcase contained illegal drugs. Like Garcia, Martinez did not testify. But his lawyer argued that Martinez was only visiting his girlfriend and had no idea that she was involved in distributing drugs.

The District Court denied the motions for severance. The jury convicted all four petitioners of conspiring to possess cocaine, heroin, and marijuana with the intent to distribute. Petitioners appealed their convictions.

Rule 8(b) states that "two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials "play a vital role in the criminal justice system." *Richardson v. Marsh* (1987). They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." For these reasons, we repeatedly have approved of joint trials. But Rule 14 recognizes that joinder, even when proper under Rule 8(b), may prejudice either a defendant or the Government. Thus, the Rule provides: "If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

In interpreting Rule 14, the Courts of Appeals frequently have expressed the view that "mutually antagonistic" or "irreconcilable" defenses may be so prejudicial in some circumstances as to mandate severance. Notwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses.

Nevertheless, petitioners urge us to adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses. We decline to do so. Mutually antagonistic defenses are not prejudicial per se. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.

We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. [For example,] evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. *See* *Bruton v. United States* (1968). The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.

Turning to the facts of this case, we note that petitioners do not articulate any specific instances of prejudice. Instead they contend that the very nature of their defenses, without more, prejudiced them. Their theory is that when two defendants both claim they are innocent and each accuses the other of the crime, a jury will conclude (1) that both defendants are lying and convict them both on that basis, or (2) that at least one of the two must be guilty without regard to whether the Government has proved its case beyond a reasonable doubt.

As to the first contention, it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. As to the second contention, the short answer is that petitioners' scenario simply did not occur here. The Government argued that all four petitioners were guilty and offered sufficient evidence as to all four petitioners; the jury in turn found all four petitioners guilty of various offenses. Moreover, even if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and "juries are presumed to follow their instructions."

Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts. Because petitioners have not shown that their joint trial subjected them to any legally cognizable prejudice, we conclude that the District Court did not abuse its discretion in denying petitioners' motions to sever.

Justice STEVENS, concurring in the judgment.

When two people are apprehended in possession of a container filled with narcotics, it is probable that they both know what is inside. The inference of knowledge is heightened when, as in this case, both people flee when confronted by police officers, or both people occupy the premises in which the container is found. At the same time, however, it remains entirely possible that one person did not have such knowledge. That, of course, is the argument made by each of the defendants in this case: that he or she did not know what was in the crucial box or suitcase.

Most important here, it is also possible that both persons lacked knowledge of the contents of the relevant container. Moreover, that hypothesis is compatible with individual defenses of lack of knowledge. There is no logical inconsistency between a version of events in which one person is ignorant, and a version in which the other is ignorant; unlikely as it may seem, it is at least theoretically possible that both versions are true, in that both persons are ignorant. In other

words, dual ignorance defenses do not necessarily translate into “mutually antagonistic” defenses, as that term is used in reviewing severance motions, because acceptance of one defense does not necessarily preclude acceptance of the other and acquittal of the codefendant.

I agree with the Court that a “bright-line rule, mandating severance whenever codefendants have conflicting defenses” is unwarranted. [But] I think district courts must retain their traditional discretion to consider severance whenever mutually antagonistic defenses are presented. Accordingly, I would refrain from announcing a preference for joint trials, or any general rule that might be construed as a limit on that discretion.

b. *Bruton* Problems

As noted in *Zafiro*, there are situations where the introduction of a confession by one defendant may implicate a codefendant and poses a Confrontation Clause problem because the codefendant has not had an opportunity to cross-examine the defendant on his confession. This is known as a *Bruton* problem. While the confessing defendant’s statement may be admissible against the defendant who confessed, introducing the statement would violate the codefendant’s right of confrontation because he has never had an opportunity to cross-examine the defendant who implicated him. In such situations, either the prosecution must redact the statement so that it does not implicate any codefendants or bring two separate trials.

BRUTON v. UNITED STATES

391 U.S. 123 (1968)

Justice BRENNAN delivered the opinion of the Court.

This case presents the question whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant’s confession inculcating the defendant had to be disregarded in determining his guilt or innocence.

A joint trial of petitioner and one Evans resulted in the conviction of both by a jury on a federal charge of armed postal robbery. A postal inspector testified that Evans orally confessed to him that Evans and petitioner committed the armed robbery. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner’s guilt, admission of Evans’ confession in this joint trial violated petitioner’s right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule [our prior decision in] *Delli Paoli* and reverse.

The basic premise of *Delli Paoli* was that it is “reasonably possible for the jury to follow” sufficiently clear instructions to disregard the confessor’s extrajudicial statement that his codefendant participated with him in committing the crime. If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause. But since *Delli Paoli* was

decided this Court has effectively repudiated its basic premise. “It is impossible realistically to suppose that when the twelve good men and women [have a defendant’s confession in the privacy of the jury room, they will not use it to implicate the codefendant].”

Those who have defended reliance on the limiting instruction in this area have cited several reasons in support. Judge Learned Hand, a particularly severe critic of the proposition that juries could be counted on to disregard inadmissible hearsay, . . . [called the] limiting instruction, . . . a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else.” Judge Hand referred to the instruction as a “placebo,” medically defined as “a medicinal lie.” Judge Jerome Frank suggested that its legal equivalent “is a kind of ‘judicial lie.’”

Another reason cited in defense of *Delli Paoli* is the justification for joint trials in general, the argument being that the benefits of joint proceedings should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant. Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. But the answer to this argument was cogently stated by Judge Lehman in *People v. Fisher*:

We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them. . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.

Despite the concededly clear instructions to the jury to disregard Evans’ inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner’s constitutional right of cross-examination.

Justice WHITE, dissenting.

I dissent from this excessively rigid rule. There is nothing in this record to suggest that the jury did not follow the trial judge’s instructions. There has been no new learning since *Delli Paoli* indicating that juries are less reliable than they were considered in that case to be. There is nothing in the prior decisions of this Court which supports this new constitutional rule.

The Court concedes that there are many instances in which reliance on limiting instructions is justified, The Court asserts, however, that the hazards to the defendant of permitting the jury to hear a codefendant’s confession implicating him are so severe that we must assume the jury’s inability to heed a limiting instruction. There are good reasons, however, for distinguishing the codefendant’s confession from that of the defendant himself and for trusting in the jury’s ability to disregard the former when instructed to do so.

First, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it

relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession.

The rule which the Court announces today will severely limit the circumstances in which defendants may be tried together for a crime which they are both charged with committing. Unquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bringing those accused of crime to trial. This much the Court concedes. It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.

In view of the practical difficulties of separate trials and their potential unfairness, I am disappointed that the Court has not spelled out how the federal courts might conduct their business consistent with today's opinion. I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. Effective deletion will probably require not only omission of all direct and indirect inculpatations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government. If deletion is not feasible, then the Government will have to choose either not to use the confession at all or to try the defendants separately. To save time, money, and effort, the Government might best seek a ruling at the earliest possible stage of the trial proceedings as to whether the confession is admissible once offending portions are deleted. Oral statements, such as that involved in the present case, will present special problems, for there is a risk that the witness in testifying will inadvertently exceed permissible limits. Except for recommending that caution be used with regard to such oral statements, it is difficult to anticipate the issues which will arise in concrete factual situations.

As Justice White predicted, courts have had to fashion other alternatives to the *Bruton* problem. Prosecutors have a few options:

- (1) They can agree to separate trials for the defendants;
- (2) They can try the defendants jointly but forgo use of the confession; or
- (3) They can redact the confession to remove all references to the existence of a non-confessing defendant.

In redacting the confession, prosecutors must be careful to ensure that a non-testifying codefendant's confession still cannot be construed as implicating the defendant. In the next two cases, *Richardson v. Marsh*, 481 U.S. 200 (1987) and *Gray v. Maryland*, 523 U.S. 185 (1998), the Court provided guidance as to what kinds of redacted confessions interfere with a codefendant's Sixth Amendment confrontation rights.

481 U.S. 200 (1987)

Justice SCALIA delivered the opinion of the Court.

In *Bruton v. United States* (1968), we held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. Today we consider whether *Bruton* requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial.

I

Respondent Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her 4-year-old son, Koran, and her aunt, Ollie Scott. Respondent and Williams were tried jointly, over her objection. (Martin was a fugitive at the time of trial.) At the trial, Knighton testified as follows: On the evening of October 29, 1978, she and her son were at Scott's home when respondent and her boyfriend Martin visited. After a brief conversation in the living room, respondent announced that she had come to "pick up something" from Scott and rose from the couch. Martin then pulled out a gun, pointed it at Scott and the Knightons, and said that "someone had gotten killed and [Scott] knew something about it." Respondent immediately walked to the front door and peered out the peephole. The doorbell rang, respondent opened the door, and Williams walked in, carrying a gun. As Williams passed respondent, he asked, "Where's the money?" Martin forced Scott upstairs, and Williams went into the kitchen, leaving respondent alone with the Knightons. Knighton and her son attempted to flee, but respondent grabbed Knighton and held her until Williams returned. Williams ordered the Knightons to lie on the floor and then went upstairs to assist Martin. Respondent, again left alone with the Knightons, stood by the front door and occasionally peered out the peephole. A few minutes later, Martin, Williams, and Scott came down the stairs, and Martin handed a paper grocery bag to respondent. Martin and Williams then forced Scott and the Knightons into the basement, where Martin shot them. Only Cynthia Knighton survived.

In addition to Knighton's testimony, the State introduced (over respondent's objection) a confession given by Williams to the police shortly after his arrest. The confession was redacted to omit all reference to respondent—indeed, to omit all indication that anyone other than Martin and Williams participated in the crime. At the time the confession was admitted, the jury was admonished not to use it in any way against respondent. Williams did not testify.

During his closing argument, the prosecutor admonished the jury not to use Williams' confession against respondent. After closing arguments, the judge again instructed the jury that Williams' confession was not to be considered against respondent. The jury convicted respondent of two counts of felony murder in the perpetration of an armed robbery and one count of assault with intent to commit murder.

Respondent then filed a petition for a writ of habeas corpus. She alleged that introduction of Williams' confession at the joint trial had violated her rights under the Confrontation Clause.

II

The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." The right of confrontation includes the right to cross-examine witnesses. Therefore, where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand.

Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions which we have applied in many varying contexts. In *Bruton*, however, we recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant.

There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of *Bruton*, involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, the calculus changes when confessions that do not name the defendant are at issue. While we continue to apply *Bruton* where we have found that its rationale validly applies, we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Compare the type of redacted confession approved by the Supreme Court in *Richardson v. Marsh* with the redacted confession rejected by the Court in the next case of *Gray v. Maryland*.

GRAY v. MARYLAND*523 U.S. 185 (1998)*

Justice BREYER delivered the opinion of the Court.

The issue in this case concerns the application of *Bruton v. United States* (1968). The case before us differs from *Bruton* in that the prosecution here redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word "deleted." We must decide whether these substitutions make a significant legal difference. We hold that they do not and that *Bruton's* protective rule applies.

I

In 1993, Stacy Williams died after a severe beating. Anthony Bell gave a confession, to the Baltimore City police, in which he said that he (Bell), Kevin Gray, and Jacquin "Tank" Vanlandingham had participated in the beating that resulted in Williams' death. Vanlandingham later died. A Maryland grand jury indicted Bell and Gray for murder. The State of Maryland tried them jointly.

The trial judge, after denying Gray's motion for a separate trial, permitted the State to introduce Bell's confession into evidence at trial. But the judge ordered the confession redacted. Consequently, the police detective who read the confession into evidence said the word "deleted" or "deletion" whenever Gray's name or Vanlandingham's name appeared. Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, "after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" The officer responded, "That's correct."

When instructing the jury, the trial judge specified that the confession was evidence only against Bell; the instructions said that the jury should not use the confession as evidence against Gray. The jury convicted both Bell and Gray. Gray appealed.

We granted certiorari in order to consider *Bruton's* application to a redaction that replaces a name with an obvious blank space or symbol or word such as "deleted."

II

In deciding whether *Bruton's* protective rule applies to the redacted confession before us, we must consider both *Bruton*, and a later case, *Richardson v. Marsh* (1987), which limited *Bruton's* scope.

Bruton, as we have said, involved two defendants—Evans and Bruton—tried jointly for robbery. Evans did not testify, but the Government introduced into evidence Evans' confession, which stated that both he (Evans) and Bruton together had committed the robbery. The trial judge told the jury it could consider the confession as evidence only against Evans, not against Bruton.

This Court held that, despite the limiting instruction, the introduction of Evans' out-of-court confession at Bruton's trial had violated Bruton's right, protected by the Sixth Amendment, to cross-examine witnesses. [The Court said that]

there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

In *Richardson v. Marsh*, the Court considered a redacted confession. The case involved a joint murder trial of Marsh and Williams. The State had redacted the confession of one defendant, Williams, so as to “omit all reference” to his codefendant, Marsh — “indeed, to omit all indication that anyone other than . . . Williams” and a third person had “participated in the crime.” The trial court also instructed the jury not to consider the confession against Marsh. As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat of a car while they traveled to the victim’s house. The redacted confession contained no indication that Marsh — or any other person — was in the car.

The Court held that this redacted confession fell outside *Bruton*’s scope and was admissible (with appropriate limiting instructions) at the joint trial. The Court added: “We express no opinion on the admissibility of a confession in which the defendant’s name has been replaced with a symbol or neutral pronoun.”

III

[U]nlike *Richardson*’s redacted confession, this confession refers directly to the “existence” of the nonconfessing defendant. The State has simply replaced the nonconfessing defendant’s name with a kind of symbol, namely the word “deleted” or a blank space set off by commas. We therefore must decide a question that *Richardson* left open, namely whether redaction that replaces a defendant’s name with an obvious indication of deletion, such as a blank space, the word “deleted,” or a similar symbol, still falls within *Bruton*’s protective rule. We hold that it does.

Redactions that simply replace a name with an obvious blank space or a word such as “deleted” or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*’s unredacted statements that, in our view, the law must require the same result.

For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly link the defendant to the deleted name, as it did in this case by asking whether Gray was arrested on the basis of information in Bell’s confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads “I, Bob Smith, along with Sam Jones, robbed the bank.” To replace the words “Sam Jones” with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase “I, Bob Smith, along with, robbed the bank,” refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes

to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

IV

For these reasons, we hold that the confession here at issue, which substituted blanks and the word "delete" for the respondent's proper name, falls within the class of statements to which *Bruton's* protections apply.

Justice SCALIA, with whom Chief Justice REHNQUIST, Justice KENNEDY and Justice THOMAS join, dissenting.

We declined in *Richardson* . . . to extend *Bruton* to confessions that incriminate only by inference from other evidence. When incrimination is inferential, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." Today the Court struggles to decide whether a confession redacted to omit the defendant's name is incriminating on its face or by inference. The Court should have stopped with its concession: the statement "Me, deleted, deleted, and a few other guys" does not facially incriminate anyone but the speaker.

The Court's extension of *Bruton* to name-redacted confessions "as a class" will seriously compromise "society's compelling interest in finding, convicting, and punishing those who violate the law."

The United States Constitution guarantees, not a perfect system of criminal justice (as to which there can be considerable disagreement), but a minimum standard of fairness.

E. AMENDMENTS AND VARIANCES

Not all mistakes in the charges against a defendant will result in dismissal of a case. Federal Rule of Criminal Procedure 7(c) does not require that formal, legal language be used in an indictment. Rather, an indictment is sufficient if it is "a plain, concise, and definite written statement of the essential facts constituting the offense charged." The indictment or information need only inform a defendant of the charge the defendant must defend and provide sufficient detail that the defendant can raise a double jeopardy objection to a future prosecution for the same offense. *See Hamling v. United States*, 418 U.S. 87 (1974).

A defendant may request a *bill of particulars* to ascertain more details regarding the charged offense. The court has discretion pursuant to Federal Rule of Criminal Procedure 7(e) to grant a bill of particulars. Alternatively, the prosecution may provide such information through discovery. See Chapter 8 *infra*.

Defendants may challenge indictments on *duplicity* grounds if they charge two or more distinct offenses in a single count of the indictment. Generally, duplicity is not fatal to an indictment. The government can correct the problem by selecting a single basis upon which it will try the case.

Defendants may also challenge an indictment because a single offense is charged in multiple counts of an indictment. The simple solution to the problem of *multiplicity* is for the court to order the government to elect which count it will use and dismiss the remaining counts.

If there is a defect in an indictment, the prosecutor may seek to re-present the case to the grand jury for a *superseding indictment*. There is no limit on the number of times a prosecutor can return to the grand jury for a superseding indictment. If the original grand jury is no longer available, the prosecutor can re-present the case in summary fashion to a new grand jury. Superseding indictments are typically used to add new defendants or charges to an indictment, or to correct errors before trial.

Indictments can also be *amended* to correct obvious clerical errors or delete surplusage from the indictment. However, it is improper to substantively amend an indictment because a defendant in federal court has a Fifth Amendment right to be tried only for those offenses charged by the grand jury. *See* *Stirone v. United States*, 361 U.S. 212 (1960).

A *variance* occurs when the evidence at trial proves facts other than those alleged in the indictment. For example, there may be a variance in the time of the crime charged or the number of conspiracies. If a defendant can demonstrate prejudice from a variance, the conviction cannot stand.

