

SUPPLEMENTARY CASE MATERIALS: CRIMINAL PROCEDURE II (2012)

DOUBLE JEOPARDY - INSERT AT PAGE 1456, AFTER NOTE 6

RENICO v. LETT
130 S. Ct. 1855 (2010)

No. 09-338. Argued March 29, 2010--Decided May 3, 2010.

Chief Justice Roberts delivered the opinion of the Court.

I

* * *

Michigan prosecutors charged Lett with first-degree murder and possession of a firearm during the commission of a felony. His trial took place in June 1997. From jury selection to jury instructions the trial took less than nine hours, spread over six different days. *Id.*, at 209, 644 N.W.2d, at 745.

The jury's deliberations began on June 12, 1997, at 3:24 p.m., and ran that day until 4 p.m. *Id.*, at 209, n. 1, 644 N.W.2d, at 745, n. 1. After resuming its work the next morning, the jury sent the trial court a note—one of seven it sent out in its two days of deliberations—stating that the jurors had “ ‘a concern about our voice levels disturbing any other proceedings that might be going on.’ ” *Id.*, at 209, n. 2, 644 N.W.2d, at 745, n. 2. Later, the jury sent out another note, asking “ ‘What if we can't agree? [M]istrial? [R]etrial? [W]hat?’ ” *Id.*, at 209, 644 N.W.2d, at 745.

The trial transcript does not reveal whether the judge discussed the jury's query with counsel, off the record, upon receiving this last communication. *Id.*, at 209, n. 3, 644 N.W.2d, at 745, n. 3. What is clear is that at 12:45 p.m. the judge called the jury back into the courtroom, along with the prosecutor and defense counsel. Once the jury was seated, the following exchange took place:

“THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?”

“THE FOREPERSON: [Identified herself.]”

“THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?”

“THE FOREPERSON: Yes, there is.”

“THE COURT: All right. Do you believe that it is hopelessly deadlocked?”

“THE FOREPERSON: The majority of us don't believe that-

“THE COURT: (Interposing) Don't say what you're going to say, okay?

“THE FOREPERSON: Oh, I'm sorry.

“THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

“THE FOREPERSON: (No response)

“THE COURT: Yes or no?

“THE FOREPERSON: No, Judge.” Tr. in No. 96-08252 (Recorder's Court, Detroit, Mich.), pp. 319-320.

The judge then declared a mistrial, dismissed the jury, and scheduled a new trial for later that year. Neither the prosecutor nor Lett's attorney made any objection.

[Lett was convicted in the second trial with the jury deliberating 3 hours and 15 minutes]

The State appealed to the Michigan Supreme Court, which reversed the Court of Appeals. The court explained that under our decision in *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824), a defendant may be retried following the discharge of a deadlocked jury, even if the discharge occurs without the defendant's consent. *Lett*, 466 Mich., at 216-217, 644 N.W.2d, at 749. There is no Double Jeopardy Clause violation in such circumstances, it noted, so long as the trial court exercised its “ ‘sound discretion’ ” in concluding that the jury was deadlocked and thus that there was a “ ‘manifest necessity’ ” for a mistrial. *Ibid.* (quoting *Perez*, *supra*, at 580; emphasis deleted). The court further observed that, under our decision in *Arizona v. Washington*, 434 U.S. 497, 506-510, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), an appellate court must generally defer to a trial judge's determination that a deadlock has been reached. 466 Mich., at 218-222, 644 N.W.2d, at 750-752.

After setting forth the applicable law, the Michigan Supreme Court determined that the judge at Lett's first trial had not abused her discretion in declaring the mistrial. *Id.*, at 223, 644 N.W.2d, at 753. The court cited the facts that the jury “had deliberated for at least four hours following a relatively short, and far from complex, trial,” that the jury had sent out several notes, “including one that appears to indicate that its discussions may have been particularly heated,” and- “[m]ost important”-“that the jury foreperson expressly stated that the jury was not going to reach a verdict.” *Ibid.*

II

It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so-the applicable standard on direct review. The question

under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was “an unreasonable application of ... clearly established Federal law.” § 2254(d)(1).

* * *

Since *Perez*, we have clarified that the “manifest necessity” standard “cannot be interpreted literally,” and that a mistrial is appropriate when there is a “ ‘high degree’ ” of necessity. *Washington*, *supra*, at 506, 98 S.Ct. 824. The decision whether to grant a mistrial is reserved to the “broad discretion” of the trial judge, a point that “has been consistently reiterated in decisions of this Court.” *Illinois v. Somerville*, 410 U.S. 458, 462, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). See also *Gori v. United States*, 367 U.S. 364, 368, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).

In particular, “[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is ... accorded great deference by a reviewing court.” *Washington*, 434 U.S., at 510, 98 S.Ct. 824. A “mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.” *Id.*, at 509, 98 S.Ct. 824; see also *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) (deadlocked jury is the “classic example” of when the State may try the same defendant twice).

* * *

III

In light of all the foregoing, the Michigan Supreme Court's decision in this case was not unreasonable under AEDPA, and the decision of the Court of Appeals to grant Lett a writ of habeas corpus must be reversed.

The Michigan Supreme Court's adjudication involved a straightforward application of our longstanding precedents to the facts of Lett's case. The court cited our own double jeopardy cases—from *Perez* to *Washington*—elaborating upon the “manifest necessity” standard for granting a mistrial and noting the broad deference that appellate courts must give trial judges in deciding whether that standard has been met in any given case. *Lett*, 466 Mich., at 216-222, 644 N.W.2d, at 749-752. It then applied those precedents to the particular facts before it and found no abuse of discretion, especially in light of the length of deliberations after a short and uncomplicated trial, the jury notes suggesting heated discussions and asking what would happen “if we can't agree,” and—“[m]ost important”—“the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict.” *Id.*, at 223, 644 N.W.2d, at 753. In these circumstances, it was reasonable for the Michigan Supreme Court to determine that the trial judge had exercised sound discretion in declaring a mistrial.

* * *

Given the foregoing facts, the Michigan Supreme Court's decision upholding the trial judge's exercise of discretion-while not necessarily correct-was not objectively unreasonable.FN3 Not only are there a number of plausible ways to interpret the record of Lett's trial, but the standard applied by the Michigan Supreme Court-whether the judge exercised sound discretion-is a general one, to which there is no “plainly correct or incorrect” answer in this case. *Yarborough*, 541 U.S., at 664, 124 S.Ct. 2140; see also *Knowles*, *supra*, at ----, 129 S.Ct., at 1420. The Court of Appeals' ruling in Lett's favor failed to grant the Michigan courts the dual layers of deference required by AEDPA and our double jeopardy precedents.

* * *

In concluding that Lett is not entitled to a writ of habeas corpus, we do not deny that the trial judge could have been more thorough before declaring a mistrial. As the Court of Appeals pointed out, *id.*, at 427-428, she could have asked the foreperson additional followup questions, granted additional time for further deliberations, or consulted with the prosecutor and defense counsel before acting. Any of these steps would have been appropriate under the circumstances. None, however, was required-either under our double jeopardy precedents or, by extension, under AEDPA.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER joins as to Parts I and II, dissenting.

* * *

II

In addition to the remarkable “hast[e],” *Washington*, 434 U.S., at 515, n. 34, 98 S.Ct. 824, and “inexplicabl[e] abrupt[ness],” 316 Fed. Appx., at 428, with which she acted, it is remarkable what the trial judge did not do. “Never did the trial judge consider alternatives or otherwise provide evidence that she exercised sound discretion. For example, the judge did not poll the jurors, give an instruction ordering further deliberations, query defense counsel about his thoughts on continued deliberations, or indicate on the record why a mistrial declaration was necessary.” *Lett*, 466 Mich., at 227-228, 644 N.W.2d, at 755 (Cavanagh, J., dissenting). Nor did the judge invite any argument or input from the prosecutor, make any findings of fact or provide any statements illuminating her thought process, follow up on the foreperson's final response, or give any evident consideration to the ends of public justice or the balance between the defendant's rights and the State's interests. The manner in which this discharge decision was made contravened standard trial-court guidelines. The judge may not have had a constitutional obligation to take any one of the aforementioned measures, but she did

have an obligation to exercise sound discretion and thus to “assure h[er]self that the situation warrant[ed] action on h[er] part foreclosing the defendant from a potentially favorable judgment by the tribunal.” *Jorn*, 400 U.S., at 486, 91 S.Ct. 547 (plurality opinion).

Add all these factors up, and I fail to see how the trial judge exercised anything resembling “sound discretion” in declaring a mistrial, as we have defined that term. Indeed, I fail to see how a record could disclose much less evidence of sound decisionmaking. Within the realm of realistic, nonpretextual possibilities, this mistrial declaration was about as precipitate as one is liable to find. Despite the multitude of cases involving hung-jury mistrials that have arisen over the years, neither petitioner nor the Court has been able to identify any in which such abrupt judicial action has been upheld. See *Tr. of Oral Arg.* 12-15. Even the prosecutor felt compelled to acknowledge that the trial court’s decision to discharge the jury “ ‘clearly was error.’ ” 316 Fed.Appx., at 427 (quoting postconviction hearing transcript).

* * *

These reasons do not suffice to justify the mistrial order. Four hours is not a long time for jury deliberations, particularly in a first-degree murder case. Indeed, it would have been “remarkable” if the jurors “could review the testimony of all [the] witnesses in the time they were given, let alone conclude that they were deadlocked.” 507 F.Supp.2d, at 786. The jury’s note pertaining to its volume level does not necessarily indicate anything about the “heated[ness],” *Lett*, 466 Mich., at 223, 644 N.W.2d, at 753, of its discussion. “[T]here is no other suggestion in the record that such was the case, and the trial judge did not draw that conclusion.” 507 F.Supp.2d, at 786. Although it would have been preferable if *Lett* had tried to lodge an objection, defense counsel was given no meaningful opportunity to do so—the judge discharged the jury simultaneously with her mistrial order, counsel received no advance notice of either action, and he may not even have been informed of the content of the jury’s notes. See *ante*, at 1860 - 1861; 316 Fed.Appx., at 428 (“At no point before the actual declaration of the mistrial was it even mentioned on the record as a potential course of action by the court. The summary nature of the trial court’s actions ... rendered an objection both unlikely and meaningless” (internal quotation marks omitted)). Counsel’s failure to object is therefore legally irrelevant. And, as detailed above, the foreperson’s remarks were far more equivocal and ambiguous, in context, than the Michigan Supreme Court allowed.

DOUBLE JEOPARDY - INSERT AT PAGE 1158, BEFORE NOTE 1

YEAGER v. UNITED STATES
129 S. Ct. 2360 (2009)

No. 08-67. Argued March 23, 2009--Decided June 18, 2009

Justice Stevens delivered the opinion of the Court.

In *Dunn v. United States*, 284 U. S. 390, 393 (1932), the Court, speaking through Justice Holmes, held that a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict. The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not.

I

In 1997, Enron Corporation (Enron) acquired a telecommunications business that it expanded and ultimately renamed Enron Broadband Services (EBS). Petitioner F. Scott Yeager served as Senior Vice President of Strategic Development for EBS from October 1, 1998, until his employment was terminated a few months before Enron filed for bankruptcy on December 2, 2001. During his tenure, petitioner played an active role in EBS's attempt to develop a nationwide fiber-optic telecommunications system called the Enron Intelligent Network (EIN).

In the summer of 1999, Enron announced that EBS would become a "core" Enron business and a major part of its overall strategy. App. 11. Thereafter, Enron issued press releases touting the advanced capabilities of EIN and claiming that the project was "lit," "or operational. *Id.*, at 10. On January 20, 2000, at the company's annual equity analyst conference, petitioner and others allegedly made false and misleading statements about the value and performance of the EIN project. On January 21, 2000, the price of Enron stock rose from \$54 to \$67. The next day it reached \$72. At that point petitioner sold more than 100,000 shares of Enron stock that he had received as part of his compensation. During the next several months petitioner sold an additional 600,000 shares. All told, petitioner's stock sales generated more than \$54 million in proceeds and \$19 million in personal profit. As for the EIN project, its value turned out to be illusory. The "intelligent" network showcased to the public in the press releases and at the analyst conference was riddled with technological problems and never fully developed.

* * *

Count 1 of the indictment described in some detail the alleged conspiracy to commit securities fraud and wire fraud and included as overt acts the substantive offenses charged in counts 2 through 6. Count 2, the securities fraud count, alleged that petitioner made false and misleading statements at the January 20, 2000, analyst conference or that he failed to state facts necessary to prevent statements made by others from being

misleading. Counts 3 through 6 alleged that petitioner and others committed four acts of wire fraud when they issued four EBS-related press releases in 2000. Counts 27 through 46, the insider trading counts, alleged that petitioner made 20 separate sales of Enron stock "while in the possession of material non-public information regarding the technological capabilities, value, revenue and business performance of [EBS]." *Id.*, at 31. And counts 67 through 165, the money laundering counts, described 99 financial transactions involving petitioner's use of the proceeds of his sales of Enron stock, which the indictment characterized as "criminally derived property." *Id.*, at 37. To simplify our discussion, we shall refer to counts 1 through 6 as the "fraud counts" and the remaining counts as the "insider trading counts."

* * *

The jury acquitted petitioner on the fraud counts but failed to reach a verdict on the insider trading counts. The court entered judgment on the acquittals and declared a mistrial on the hung counts.

On November 9, 2005, the Government obtained a new indictment against petitioner. This "Eighth Superseding Indictment" recharged petitioner with some, but not all, of the insider trading counts on which the jury had previously hung.

* * *

Petitioner moved to dismiss all counts in the new indictment on the ground that the acquittals on the fraud counts precluded the Government from retrying him on the insider trading counts.³ He argued that the jury's acquittals had necessarily decided that he did not possess material, nonpublic information about the performance of the EIN project and its value to Enron. In petitioner's view, because re prosecution for insider trading would require the Government to prove that critical fact, the issue-preclusion component of the Double Jeopardy Clause barred a second trial of that issue and mandated dismissal of all of the insider trading counts.

The District Court denied the motion. After reviewing the trial record, the court disagreed with petitioner's reading of what the jury necessarily decided. In the court's telling, the jury likely concluded that petitioner "did not knowingly and willfully participate in the scheme to defraud described in the conspiracy, securities fraud, and wire fraud counts." 446 F. Supp. 2d 719, 735 (SD Tex. 2006). The court therefore concluded that the question whether petitioner possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution.

* * *

Based on its independent review of the record, the Court of Appeals instead concluded that "the jury must have found when it acquitted [petitioner] that [he] did not have any insider information that contradicted what was presented to the public." *Id.*, at 378. The court acknowledged that this factual determination would normally preclude the Government from retrying petitioner for insider trading or money laundering.

The court was nevertheless persuaded that a truly rational jury, having concluded that petitioner did not have any insider information, would have *acquitted* him on the insider trading counts. That the jury failed to acquit, and instead hung on those counts, was pivotal in the court's issue-preclusion analysis. Considering "the hung counts along with the acquittals," the court found it impossible "to decide with any certainty what the jury necessarily determined." *Ibid.* Relying on Circuit precedent, *United States v. Larkin*, 605 F. 2d 1360 (1979), the court concluded that the conflict between the acquittals and the hung counts barred the application of issue preclusion in this case. 521 F. 3d, at 378-379.

Several courts have taken the contrary view and have held that a jury's failure to reach a verdict on some counts should play no role in determining the preclusive effect of an acquittal. See *United States v. Ohayon*, 483 F. 3d 1281 (CA11 2007); *United States v. Romeo*, 114 F. 3d 141 (CA9 1997); *United States v. Bailin*, 977 F. 2d 270 (CA7 1992); *United States v. Frazier*, 880 F. 2d 878 (CA6 1989). Others have sided with the Court of Appeals. See *United States v. Howe*, 538 F. 3d 820 (CA8 2008); *United States v. Aguilar-Aranceta*, 957 F. 2d 18 (CA1 1992); *United States v. White*, 936 F. 2d 1326 (CA10 1991). We granted certiorari to resolve the conflict, 555 U. S. ____ (2008), and now reverse.

II

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

* * *

Our cases have recognized that the Clause embodies two vitally important interests. The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U. S. 184, 187-188 (1957); see *Benton v. Maryland*, 395 U. S. 784, 795-795 (1969); *DiFrancesco*, 449 U. S., at 127-128. The second interest is the preservation of "the finality of judgments." *Crist v. Bretz*, 437 U. S. 28, 33 (1978).

The first interest is implicated whenever the State seeks a second trial after its first attempt to obtain a conviction results in a mistrial because the jury has failed to reach a verdict. In these circumstances, however, while the defendant has an interest in avoiding multiple trials, the Clause does not prevent the Government from seeking to re prosecute. Despite the argument's textual appeal, we have held that the second trial does not place the defendant in jeopardy "twice." *Richardson v. United States*, 468 U. S. 317, 323 (1984); see 3 J. Story, Commentaries on the Constitution §1781, pp. 659-660 (1833). Instead, a jury's inability to reach a decision is the kind of "manifest necessity" that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled. See *Arizona v. Washington*, 434 U. S. 497, 505-506 (1978); *United States v. Perez*, 9 Wheat. 579, 580 (1824). The "interest in giving the prosecution one complete opportunity to convict those who have violated its

laws" justifies treating the jury's inability to reach a verdict as a nonevent that does not bar retrial. *Washington*, 434 U. S., at 509.

While the case before us involves a mistrial on the insider trading counts, the question presented cannot be resolved by asking whether the Government should be given one complete opportunity to convict petitioner on those charges. Rather, the case turns on the second interest at the core of the Clause. We must determine whether the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's finding that petitioner did not possess insider information, bars a retrial on the insider trading counts. This requires us to look beyond the Clause's prohibition on being put in jeopardy "twice"; the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts. The proper question, under the Clause's text, is whether it is appropriate to treat the insider trading charges as the "same offence" as the fraud charges. Our opinion in *Ashe v. Swenson*, 397 U. S. 436 (1970), provides the basis for our answer.

* * *

Unlike *Ashe*, the case before us today entails a trial that included multiple counts rather than a trial for a single offense. And, while *Ashe* involved an acquittal for that single offense, this case involves an acquittal on some counts and a mistrial declared on others. The reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as *Ashe*'s acquittal.

As noted above, see *supra*, at 4, the Court of Appeals reasoned that the hung counts must be considered to determine what issues the jury decided in the first trial. Viewed in isolation, the court explained, the acquittals on the fraud charges would preclude retrial because they appeared to support petitioner's argument that the jury decided he lacked insider information. 521 F. 3d, at 378. Viewed alongside the hung counts, however, the acquittals appeared less decisive. The problem, as the court saw it, was that, if "the jury found that [petitioner] did not have insider information, then the jury, acting rationally, would also have acquitted [him] of the insider trading counts." *Ibid.* The fact that the jury hung was a logical wrinkle that made it impossible for the court "to decide with any certainty what the jury necessarily determined." *Ibid.* Because petitioner failed to show what the jury decided, *id.*, at 380, the court refused to find the Government precluded from pursuing the hung counts in a new prosecution.

The Court of Appeals' issue-preclusion analysis was in error. A hung count is not a "relevant" part of the "record of [the] prior proceeding." See *Ashe*, 397 U. S., at 444 (internal quotation marks omitted). Because a jury speaks only through its verdict, its failure to reach a verdict cannot--by negative implication--yield a piece of information that helps put together the trial puzzle. A mistried count is therefore nothing like the other forms of record material that *Ashe* suggested should be part of the preclusion inquiry. *Ibid.*; see also Black's Law Dictionary 1301 (8th ed. 2004) (defining "record" as the "official report of the proceedings in a case, including the filed papers, verbatim transcript of the trial or hearing (if any), and tangible exhibits"). Unlike the pleadings, the jury charge, or the evidence introduced by the parties, there is no way to decipher what a

hung count represents. Even in the usual sense of "relevance," a hung count hardly "make[s] the existence of any fact ... more probable or less probable." Fed. Rule Evid. 401. A host of reasons--sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few--could work alone or in tandem to cause a jury to hang.⁵ To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork.⁶ Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return.

A contrary conclusion would require speculation into what transpired in the jury room. Courts properly avoid such explorations into the jury's sovereign space, see *United States v. Powell*, 469 U. S. 57, 66 (1984); Fed. Rule Evid. 606(b), and for good reason. The jury's deliberations are secret and not subject to outside examination. If there is to be an inquiry into what the jury decided, the "evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration." *Packet Co. v. Sickles*, 5 Wall. 580, 593 (1866); see also *Vaise v. Delaval*, 99 Eng. Rep. 944 (K. B. 1785) (Lord Mansfield, C. J.) (refusing to rely on juror affidavits to impeach a verdict reached by a coin flip); J. Wigmore, *Evidence* §2349, pp. 681-690, and n. 2 (McNaughton rev. ed. 1961 and Supp. 1991).

Accordingly, we hold that the consideration of hung counts has no place in the issue-preclusion analysis. Indeed, if it were relevant, the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar. To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is "based upon an egregiously erroneous foundation," *Fong Foo v. United States*, 369 U. S. 141, 143 (1962) (*per curiam*), its finality is unassailable. See, e.g., *Washington*, 434 U. S., at 503; *Sanabria v. United States*, 437 U. S. 54, 64 (1978). Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.

III

The Government relies heavily on two of our cases, *Richardson v. United States*, 468 U. S. 317, and *United States v. Powell*, 469 U. S. 57, to argue that it is entitled to retry petitioner on the insider trading counts. Neither precedent can bear the weight the Government places on it.

* * *

The Government next contends that an acquittal can never preclude retrial on a mistried count because it would impute irrationality to the jury in violation of the rule articulated in *Powell*, 469 U. S. 57. In *Powell*, the defendant was charged with various drug offenses. The jury acquitted Powell of the substantive drug charges but convicted her of using a

telephone in " 'committing and in causing and facilitating' " those same offenses. *Id.*, at 59-60. Powell attacked the verdicts on appeal as irrationally inconsistent and urged the reversal of her convictions. She insisted that "collateral estoppel should apply to verdicts rendered by a single jury, to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.*, at 64. We rejected this argument, reasoning that issue preclusion is "predicated on the assumption that the jury acted rationally." *Id.*, at 68.

Arguing that a jury that acquits on some counts while inexplicably hanging on others is not rational, the Government contends that issue preclusion is as inappropriate in this case as it was in *Powell*. There are two serious flaws in this line of reasoning. First, it takes *Powell's* treatment of inconsistent verdicts and imports it into an entirely different context involving both verdicts and seemingly inconsistent hung counts. But the situations are quite dissimilar. In *Powell*, respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent. As we explained, the jury's verdict "brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.*, at 67. By comparison, hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense. By equating them, the Government's argument fails. Second, the Government's reliance on *Powell* assumes that a mistried count can, in context, be evidence of irrationality. But, as we explained above, see *supra*, at 7-8, the fact that a jury hangs is evidence of nothing--other than, of course, that it has failed to decide anything. By relying on hung counts to question the basis of the jury's verdicts, the Government violates the very assumption of rationality it invokes for support.

At bottom, the Government misreads our cases that have rejected attempts to question the validity of a jury's verdict. In *Powell* and, before that, in *Dunn*, 284 U. S. 390, we were faced with jury verdicts that, on their face, were logically inconsistent and yet we refused to impugn the legitimacy of either verdict. In this case, there is merely a suggestion that the jury may have acted irrationally. And instead of resting that suggestion on a verdict, the Government relies on a hung count, the thinnest reed of all. If the Court in *Powell* and *Dunn* declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict, then, *a fortiori*, a potentially inconsistent hung count could not command a different result.

* * *

V

The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

Justice Scalia, with whom Justice Thomas and Justice Alito join, dissenting.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Court today holds that this proscription, as interpreted in *Ashe v. Swenson*, 397 U. S. 436 (1970), sometimes bars retrial of hung counts if the jury acquits on factually related counts.

Because that result neither accords with the original meaning of the Double Jeopardy Clause nor is required by the Court's precedents, I dissent.

I

* * *

Even if I am to adhere to *Ashe* on *stare decisis* grounds, cf. *Grady, supra*, at 528 (Scalia, J., dissenting), today's holding is an illogical extension of that case. *Ashe* held only that the Clause sometimes bars successive prosecution of facts found during "a prior proceeding." 397 U. S., at 444. But today the Court bars retrial on hung counts after what was not, under this Court's theory of "continuing jeopardy," *Justices of Boston Municipal Court v. Lydon*, 466 U. S. 294, 308 (1984), a prior proceeding but simply an earlier stage of the same proceeding.

As an historical matter, the common-law pleas could be invoked only once "there ha[d] been a conviction or an acquittal--after a complete trial." *Crist v. Bretz*, 437 U. S. 28, 33 (1978). This Court has extended the protections of the Double Jeopardy Clause by holding that jeopardy attaches earlier: at the time a jury is empanelled and sworn. *Id.*, at 38. Although one might think that this early attachment would mean that any second trial with a new jury would constitute a second jeopardy, the Court amended its innovation by holding that discharge of a deadlocked jury does not "terminat[e] the original jeopardy," *Richardson v. United States*, 468 U. S. 317, 325 (1984). Under this continuing-jeopardy principle, retrial after a jury has failed to reach a verdict is not a new trial but part of the same proceeding.²

Today's holding is inconsistent with this principle. It interprets the Double Jeopardy Clause, for the first time, to have effect internally within a single prosecution, even though the " 'criminal proceedings against [the] accused have not run their full course.' " *Lydon, supra*, at 308 (quoting *Price v. Georgia*, 398 U. S. 323, 326 (1970)). As a conceptual matter, it makes no sense to say that events occurring within a single prosecution can cause an accused to be "twice put in jeopardy." U. S. Const., Amdt. 5. And our cases, until today, have acknowledged that. Ever since *Dunn v. United States*, 284 U. S. 390, 393 (1932), we have refused to set aside convictions that were inconsistent with acquittals in the same trial; and we made clear in *United States v. Powell*, 469 U. S. 57, 64-65 (1984), that *Ashe* does not mandate a different result. There is no reason to treat perceived inconsistencies between hung counts and acquittals any differently.

Richardson accentuates the point. Under our cases, if an appellate court reverses a conviction for lack of constitutionally sufficient evidence, that determination constitutes an acquittal which, under the Double Jeopardy Clause, precludes further prosecution. *Burks v. United States*, 437 U. S. 1, 11 (1978). In *Richardson*, the defendant sought to prevent retrial after a jury failed to reach a verdict, claiming that the case should not have gone to the jury because the Government failed to present sufficient evidence. 468 U. S., at 322-323. The Court held that the Double Jeopardy Clause was inapplicable because there had not been an "event, such as an acquittal, which terminate[d] the original jeopardy." *Id.*, at 325. I do not see why the Double Jeopardy Clause effect of a jury

acquittal on a different count should be any different from the Double Jeopardy Clause effect of the prosecution's failure to present a case sufficient to go to the jury on the same count. In both cases, the predicate necessary for Double Jeopardy Clause preclusion of a new prosecution exists: in the former, the factual findings implicit in the jury's verdict of acquittal, in the latter, the State's presentation of a case so weak that it would have demanded a jury verdict of acquittal. In both cases, it seems to me, the Double Jeopardy Clause cannot be invoked because the jeopardy with respect to the retried count *has not terminated*.

The acquittals here did not, as the majority argues, "unquestionably terminat[e] [Yeager's] jeopardy with respect to the *issues* finally decided" in those counts. *Ante*, at 8 (emphasis added). Jeopardy is commenced and terminated charge by charge, not issue by issue. And if the prosecution's failure to present sufficient evidence at a first trial cannot prevent retrial on a hung count because the retrial is considered part of the same proceeding, then there is no basis for invoking *Ashe* to prevent retrial in the present case. If a conviction can stand with a contradictory acquittal when both are pronounced at the same trial, there is no reason why an acquittal should prevent the State from pressing for a contradictory conviction in the continuation of the prosecution on the hung counts.

II

* * *

Moreover, barring retrial when a jury acquits on some counts and hangs on others bears only a tenuous relationship to preserving the finality of "an issue of ultimate fact [actually] determined by a valid and final judgment." *Ashe, supra*, at 443. There is no clear, unanimous jury finding here. In the unusual situation in which a factual finding upon which an acquittal must have been based would also logically require an acquittal on the hung count, all that can be said for certain is that the conflicting dispositions are irrational--the result of "mistake, compromise, or lenity." *Powell*, 469 U. S., at 65. It is at least as likely that the irrationality consisted of failing to make the factual finding necessary to support the acquittal as it is that the irrationality consisted of failing to adhere to that factual finding with respect to the hung count. While I agree that courts should avoid speculation as to why a jury reached a particular result, *ante*, at 11, the Court's opinion steps in the wrong direction by pretending that the acquittals here mean something that they in all probability do not.³ *Powell, supra*, at 69, concluded that "the best course to take is simply to insulate jury verdicts" from review on grounds of inconsistency. In my view the same conclusion applies to claims that inconsistency will arise from proceeding to conviction on hung counts.

* * *

Until today, this Court has consistently held that retrial after a jury has been unable to reach a verdict is part of the original prosecution and that there can be no second jeopardy where there has been no second prosecution. Because I believe holding that line against this extension of *Ashe* is more consistent with the Court's cases and with the original meaning of the Double Jeopardy Clause, I would affirm the judgment.

ASSISTANCE OF COUNSEL - INSERT AT PAGE 133, END OF NOTE 5

INDIANA v. EDWARDS
128 S. Ct. 2379 (2008)

BREYER, J., delivered the opinion of the Court.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution forbids a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. See U.S. Const., Amdt. 6; *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). We conclude that the Constitution does not forbid a State so to insist.

I

In July 1999 Ahmad Edwards, the respondent, tried to steal a pair of shoes from an Indiana department store. After he was discovered, he drew a gun, fired at a store security officer, and wounded a bystander. He was caught and then charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. His mental condition subsequently became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge:

1. First Competency Hearing: **** After hearing psychiatrist and neuropsychologist witnesses (in February 2000 and again in August 2000), the court found Edwards incompetent to stand trial, and committed him to Logansport State Hospital for evaluation and treatment,
2. Second Competency Hearing: **** In March 2002, the judge held a competency hearing, considered additional psychiatric evidence, and (in April) found that Edwards, while “suffer[ing] from mental illness,” was “competent to assist his attorneys in his defense and stand trial for the charged crimes.”
3. Third Competency Hearing: **** In November 2003, the court concluded that Edwards was not then competent to stand trial and ordered his recommitment to the state hospital.
4. First Self-Representation **** About eight months after his commitment, the hospital reported that Edwards' condition had again improved to the point that he had again become competent to stand trial. And almost one year after that Edwards' trial began. Just before trial, Edwards asked to represent himself. He also asked for a continuance, which, he said, he needed in order to proceed pro se. The court refused the continuance. Edwards then proceeded to trial represented by counsel. The jury convicted him of criminal recklessness and theft but failed to reach a verdict on the charges of attempted murder and battery.
5. Second Self-Representation Request and Second Trial: **** The State decided to retry Edwards on the attempted murder and battery charges. Just before the retrial, Edwards again asked the court to permit him to represent himself. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards still suffered from schizophrenia and concluded that “[w]ith these findings, he's competent to stand trial but I'm not going

to find he's competent to defend himself.” The court denied Edwards' self-representation request. Edwards was represented by appointed counsel at his retrial. The jury convicted Edwards on both of the remaining counts.

Edwards subsequently appealed to Indiana's intermediate appellate court. He argued that the trial court's refusal to permit him to represent himself at his retrial deprived him of his constitutional right of self-representation. U.S. Const., Amdt. 6; *Faretta*, supra. The court agreed and ordered a new trial. The matter then went to the Indiana Supreme Court. That court found that “[t]he record in this case presents a substantial basis to agree with the trial court,” 866 N.E.2d 252, 260 (2007), but it nonetheless affirmed the intermediate appellate court on the belief that this Court's precedents, namely, *Faretta*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562, and *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), required the State to allow Edwards to represent himself. At Indiana's request, we agreed to consider whether the Constitution required the trial court to allow Edwards to represent himself at trial.

II

Our examination of this Court's precedents convinces us that those precedents frame the question presented, but they do not answer it. The two cases that set forth the Constitution's “mental competence” standard, *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam), and *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), specify that the Constitution does not permit trial of an individual who lacks “mental competency.” *Dusky* defines the competency standard as including both (1) “whether” the defendant has “a rational as well as factual understanding of the proceedings against him” and (2) whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” 362 U.S., at 402, 80 S.Ct. 788 (emphasis added; internal quotation marks omitted). *Drope* repeats that standard, stating that it “has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” 420 U.S., at 171, 95 S.Ct. 896 (emphasis added). Neither case considered the mental competency issue presented here, namely, the relation of the mental competence standard to the right of self-representation.

The Court's foundational “self-representation” case, *Faretta*, held that the Sixth and Fourteenth Amendments include a “constitutional right to proceed without counsel when” a criminal defendant “voluntarily and intelligently elects to do so.” 422 U.S., at 807, 95 S.Ct. 2525 (emphasis in original). The Court implied that right from: (1) a “nearly universal conviction,” made manifest in state law, that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so,” *id.*, at 817-818, 95 S.Ct. 2525; (2) Sixth Amendment language granting rights to the “accused;” (3) Sixth Amendment structure indicating that the rights it sets forth, related to the “fair administration of American justice,” are “persona[*I*]” to the accused, *id.*, at 818-821, 95 S.Ct. 2525; (4) the absence of historical examples of forced representation, *id.*, at 821-832, 95 S.Ct. 2525; and (5) “‘respect for the individual,’ ” *id.*, at 834, 95 S.Ct. 2525 (quoting *2384 *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring) (a knowing and intelligent waiver of counsel “must

be honored out of ‘that respect for the individual which is the lifeblood of the law’ ”)). Faretta does not answer the question before us both because it did not consider the problem of mental competency (cf. 422 U.S., at 835, 95 S.Ct. 2525 (Faretta was “literate, competent, and understanding”)), and because Faretta itself and later cases have made clear that the right of self-representation is not absolute. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 163, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (no right of self-representation on direct appeal in a criminal case); *McKaskle v. Wiggins*, 465 U.S. 168, 178-179, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (appointment of standby counsel over self-represented defendant's objection is permissible); *Faretta*, 422 U.S., at 835, n. 46, 95 S.Ct. 2525 (no right “to abuse the dignity of the courtroom”); *ibid.* (no right to avoid compliance with “relevant rules of procedural and substantive law”); *id.*, at 834, n. 46 (no right to “engag[e] in serious and obstructionist misconduct,” referring to *Illinois v. Allen*, *supra*). The question here concerns a mental-illness-related limitation on the scope of the self-representation right.

The sole case in which this Court considered mental competence and self-representation together, *Godinez*, *supra*, presents a question closer to that at issue here. The case focused upon a borderline-competent criminal defendant who had asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty. The state trial court had found that the defendant met Dusky's mental competence standard, that he “knowingly and intelligently” waived his right to assistance of counsel, and that he “freely and voluntarily” chose to plead guilty. 509 U.S., at 393, 113 S.Ct. 2680 (internal quotation marks omitted). ****

This Court, reversing the Court of Appeals, “reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard.” *Id.*, at 398, 113 S.Ct. 2680. The decision to plead guilty, we said, “is no more complicated than the sum total of decisions that a [represented] defendant may be called upon to make during the course of a trial.” *Ibid.* Hence “there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.” *Id.*, at 399, 113 S.Ct. 2680. ****

We concede that *Godinez* bears certain similarities with the present case. Both involve mental competence and self-representation. Both involve a defendant who wants to represent himself. Both involve a mental condition that falls in a gray area between Dusky's minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose.

We nonetheless conclude that *Godinez* does not answer the question before us now. In part that is because the Court of Appeals higher standard at issue in *Godinez* differs in a critical way from the higher standard at issue here. In *Godinez*, the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant's ability to conduct trial proceedings. To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue. ****

III

We now turn to the question presented. We assume that a criminal defendant has sufficient mental competence to stand trial (i.e., the defendant meets Dusky's standard) and that the defendant insists on representing himself during that trial. We ask whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial-on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.

Several considerations taken together lead us to conclude that the answer to this question is yes. First, the Court's precedent, while not answering the question, points slightly in the direction of our affirmative answer. *Godinez*, as we have just said, simply leaves the question open. But the Court's "mental competency" cases set forth a standard that focuses directly upon a defendant's "present ability to consult with his lawyer," *Dusky*, 362 U.S., at 402, 80 S.Ct. 788 (internal quotation marks omitted); a "capacity ... to consult with counsel," and an ability "to assist [counsel] in preparing his defense," *Drope*, 420 U.S., at 171, 95 S.Ct. 896. See *ibid.* ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial" (emphasis added)). These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.

At the same time *Faretta*, the foundational self-representation case, rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right. See 422 U.S., at 813, and n. 9, 95 S.Ct. 2525 (citing 16 state-court decisions and two secondary sources). ****

Second, the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case (set forth in Part I, *supra*) illustrates the complexity of the problem. In certain instances an individual may well be able to satisfy Dusky's mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel. See, e.g., N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge, *Adjudicative Competence: The MacArthur Studies* 103 (2002) ("Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability"). See also *McKaskle*, 465 U.S., at 174, 104 S.Ct. 944 (describing trial tasks as including organization of defense, making motions, arguing points of law,

participating in voir dire, questioning witnesses, and addressing the court and jury).

The American Psychiatric Association (APA) tells us (without dispute) in its amicus brief filed in support of neither party that “[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.” Brief for APA et al. as Amici Curiae 26. Motions and other documents that the defendant prepared in this case (one of which we include in the Appendix, *infra*) suggest to a layperson the common sense of this general conclusion.

Third, in our view, a right of self-representation at trial will not “affirm the dignity” of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. *McKaskle*, *supra*, at 176-177, 104 S.Ct. 944 (“Dignity” and “autonomy” of individual underlie self-representation right) . To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial. As Justice Brennan put it, “[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.” *Allen*, 397 U.S., at 350, 90 S.Ct. 1057 (concurring opinion). See *Martinez*, 528 U.S., at 162, 120 S.Ct. 684 (“Even at the trial level ... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer”). See also *Sell v. United States*, 539 U.S. 166, 180, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) (“[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one”).

Further, proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). An amicus brief reports one psychiatrist's reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: “[H]ow in the world can our legal system allow an insane man to defend himself?” Brief for Ohio et al. as Amici Curiae 24 (internal quotation marks omitted). See *Massey*, 348 U.S., at 108, 75 S.Ct. 145 (“No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court”). The application of *Dusky*'s basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient. At the same time, the trial judge, particularly one such as the trial judge in this case, who presided over one of *Edwards*' competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.

We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the

Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

IV

Indiana has also asked us to adopt, as a measure of a defendant's ability to conduct a trial, a more specific standard that would “deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury.” Brief for Petitioner 20 (emphasis deleted). We are sufficiently uncertain, however, as to how that particular standard would work in practice to refrain from endorsing it as a federal constitutional standard here. We need not now, and we do not, adopt it.

Indiana has also asked us to overrule *Faretta*. We decline to do so. ****

For these reasons, the judgment of the Supreme Court of Indiana is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

APPENDIX

Excerpt from respondent's filing entitled “ ‘Defendant's Version of the Instant Offense,’ ” which he had attached to his presentence investigation report:

“ ‘The appointed motion of permissive intervention filed therein the court superior on, 6-26-01 caused a stay of action and upon its expiration or thereafter three years the plan to establish a youth program to and for the coordination of aspects of law enforcement to prevent and reduce crime among young people in Indiana became a diplomatic act as under the Safe Streets Act of 1967, “A omnibuc considerate agent: I membered clients within the public and others that at/production of the courts actions showcased causes. The costs of the stay (Trial Rule 60) has a derivative property that is: my knowledged events as not unexpended to contract the membered clients is the commission of finding a facilitie for this plan or project to become organization of administrative recommendations conditioned by governors.” 866 N.E.2d, at 258, n. 4 (alterations omitted).

ASSISTANCE OF COUNSEL- INSERT AT PAGE 139, AFTER NOTE 9

GONZALEZ v. UNITED STATES
128 S. Ct. 1765 (2008)

KENNEDY, J., delivered the opinion of the Court.

If the parties consent, federal magistrate judges may preside over the voir dire and selection of prospective jurors in a felony criminal trial. *Peretz v. United States*, 501 U.S. 923, 933, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). This case presents the question whether it suffices for counsel alone to consent to the magistrate judge's role in presiding over voir dire and jury selection or whether the defendant must give his or her own consent.

Homero Gonzalez was charged in the United States District Court for the Southern District of Texas on five felony drug offense counts. He is the petitioner here. At the outset of jury selection, the parties appeared before a Magistrate Judge. The Magistrate Judge asked the attorneys to approach the bench. After they complied, the Magistrate Judge said: "I need to ask the parties at this time if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." App. 16. Petitioner's counsel responded: "Yes, your Honor, we are." *Ibid.* The Magistrate Judge asked if petitioner was present and if he needed an interpreter. Petitioner's counsel answered yes to both questions. Petitioner was not asked if he consented to the Magistrate Judge's presiding. The record does not permit us to infer this or even to infer that petitioner knew there was a right to be waived. The Magistrate Judge then supervised voir dire and jury selection. Petitioner made no objections to the Magistrate Judge's rulings or her conduct of the proceedings. A District Judge presided at the ensuing jury trial, and the jury returned a verdict of guilty on all counts.

**** We agree that there was no error and hold that petitioner's counsel had full authority to consent to the Magistrate Judge's role.

Taken together, *Gomez* [490 U.S. 858 (1989)] and *Peretz* [501 U.S. 923 (1991)] mean that "the additional duties" the statute permits the magistrate judge to undertake include presiding at voir dire and jury selection provided there is consent but not if there is an objection. We now consider whether the consent can be given by counsel acting on behalf of the client but without the client's own express consent.

At first reading it might seem that our holding here is dictated by the holding in *Peretz*. In *Peretz*, it would appear the accused was aware of the colloquy between the District Judge and defense counsel and the formal waiver before the Magistrate Judge. On this premise *Peretz* might be read narrowly to hold that a defendant may signal consent by failing to object; and indeed, the petitioner here seeks to distinguish *Peretz* on this ground. Brief for Petitioner 41-42. We decide this case, however, on the assumption that the defendant did not hear, or did not understand, the waiver discussions. This addresses what, at least in petitioner's view, *Peretz* did not. It should be noted that we do not have before us an

instance where a defendant instructs the lawyer or advises the court in an explicit, timely way that he or she demands that a district judge preside in this preliminary phase.

There are instances in federal criminal proceedings where the procedural requisites for consent are specified and a right cannot be waived except with a defendant's own informed consent. Under Federal Rule of Criminal Procedure 11(b), for example, the district court is required, as a precondition to acceptance of a guilty plea, to inform the defendant in person of the specified rights he or she may claim in a full criminal trial and then verify that the plea is voluntary by addressing the defendant. The requirement is satisfied by a colloquy between judge and defendant, reviewing all of the rights listed in Rule 11.

The controlling statute in this case has a different design, however. Title 28 U.S.C. § 636(b)(3) does not state that consent to preside over felony voir dire must be granted by following a procedure of similar clarity. As a general matter, where there is a full trial there are various points in the pretrial and trial process when rights either can be asserted or waived; and there is support in our cases for concluding that some of these rights cannot be waived absent the defendant's own consent. Whether the personal consent must be explicit and on the record or can be determined from a course of conduct may be another matter, but for now it suffices to note that we have acknowledged that some rights cannot be waived by the attorney alone. See *New York v. Hill*, 528 U.S. 110, 114-115, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000).

Citing some of our precedents on point, the Court in *Hill* gave this capsule discussion: “What suffices for waiver depends on the nature of the right at issue. ‘[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.’ *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel); *Brookhart v. Janis*, 384 U.S. 1, 7-8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. ‘Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has-and must have-full authority to manage the conduct of the trial.’ *Taylor v. Illinois*, 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is ‘deemed bound by the acts of his lawyer-agent and is considered to have “notice of all facts, notice of which can be charged upon the attorney.”’ *Link v. Wabash R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)). Thus, decisions by counsel are generally given effect as to what arguments to pursue, see *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), what evidentiary objections to raise, see *Henry v. Mississippi*, 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), and what agreements to conclude regarding the admission of evidence, see *United States v. McGill*, 11 F.3d 223, 226-227 (C.A.1 1993). Absent a demonstration of ineffectiveness, counsel's

word on such matters is the last.” *Ibid.*

The issue in *Hill* was whether the attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial pursuant to the Interstate Agreement on Detainers. The Court held that the attorney's statement, without any showing of the client's explicit consent, could waive the speedy trial right: “Scheduling matters are plainly among those for which agreement by counsel generally controls.” *Id.*, at 115, 120 S.Ct. 659.

Giving the attorney control of trial management matters is a practical necessity. “The adversary process could not function effectively if every tactical decision required client approval.” *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The presentation of a criminal defense can be a mystifying process even for wellinformed laypersons. This is one of the reasons for the right to counsel. See *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); ABA Standards for Criminal Justice, Defense Function 4-5.2, Commentary, p. 202 (3d ed. 1993) (“Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile”). Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial.

These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote. In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume. See *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); see also *Tollett v. Henderson*, 411 U.S. 258, 267-268, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); cf. ABA Standards, *supra*, at 202 (“Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client ‘plucks at the attorney's sleeve’ offering gratuitous suggestions”). To hold that every instance of waiver requires the personal consent of the client himself or herself would be impractical.

Similar to the scheduling matter in *Hill*, acceptance of a magistrate judge at the jury selection phase is a tactical decision that is well suited for the attorney's own decision. Under Rule 24 of the Federal Rules of Criminal Procedure, the presiding judge has significant discretion over the structure of voir dire. The judge may ask questions of the jury pool or, as in this case, allow the attorneys for the parties to do so. Fed. Rule Crim. Proc. 24(a); App. 20. A magistrate judge's or a district judge's particular approach to voir dire both in substance—the questions asked—and in tone—formal or informal—may be relevant in light of the attorney's own approach. The attorney may decide whether to accept the magistrate judge based in part on these factors. As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation the client might not understand at the moment and that might distract

from more pressing matters as the attorney seeks to prepare the best defense. For these reasons we conclude that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the authorization in § 636(b)(3).

Our holding is not inconsistent with reading other precedents to hold that some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right. See, e.g., *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (identifying the choices “ ‘to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal’ ” as examples (quoting *Jones*, supra, at 751, 103 S.Ct. 3308)). Petitioner argues that the decision to have a magistrate judge rather than an Article III judge preside at jury selection is a fundamental choice, cf. *Hill*, 528 U.S., at 114, 120 S.Ct. 659, or, at least, raises a question of constitutional significance so that we should interpret the Act to require an explicit personal statement of consent before the magistrate judge can proceed with jury selection.

We conclude otherwise. *****

Petitioner notes that Peretz considered supervision over entire civil and misdemeanor trials comparable to presiding over voir dire at a felony trial. 501 U.S., at 933, 111 S.Ct. 2661. It follows, he argues, that § 636(b)(3) must require, as does 18 U.S.C. § 3401(b), express personal consent by the defendant before a magistrate judge may preside over voir dire. But it is not obvious that Congress would have thought these matters required the same form of consent. Aside from the fact that the statutory text is different, there are relevant differences between presiding over a full trial and presiding over voir dire. Were petitioner correct, one would think the Act would require at least the same form of consent to authorize a magistrate judge to preside over either a civil or a misdemeanor trial (which Peretz also deemed to be of comparable importance). Our interpretation of the Act indicates otherwise. Compare § 3401(b), with *Roell v. Withrow*, 538 U.S. 580, 590, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003) (concluding that parties may authorize a full-time magistrate judge to preside over a civil trial via implied consent).

Although a criminal defendant may demand that an Article III judge preside over the selection of a jury, the choice to do so reflects considerations more significant to the realm of the attorney than to the accused. Requiring the defendant to consent to a magistrate judge only by way of an on-the-record personal statement is not dictated by precedent and would burden the trial process, with little added protection for the defendant.

Pursuant to 28 U.S.C. § 636(b)(3) a magistrate judge may preside over jury examination and jury selection only if the parties, or the attorneys for the parties, consent. Consent from an attorney will suffice. We do not have before us, and we do not address, an instance where the attorney states consent but the party by express and timely objection seeks to override his or her counsel. We need not decide, moreover, if consent may be inferred from a failure by a party and his or her attorney to object to the presiding by a magistrate judge. These issues are not presented here.

The judgment of the Court of Appeals is affirmed.

Justice SCALIA, concurring in the judgment.

I agree with the Court that no statute or rule requires that petitioner personally participate in the waiver of his right to have an Article III judge oversee voir dire. As to whether the Constitution requires that, the Court holds that it does not because it is a decision more tactical than fundamental-“more significant to the realm of the attorney than to the accused.” I agree with the Court's conclusion, but not with the tactical-vs.-fundamental test on which it is based.

Petitioner and the Government do not dispute that petitioner's counsel consented to have a magistrate judge oversee voir dire. The issue is whether that consent-consent of counsel alone-effected a valid waiver of petitioner's right to an Article III judge. It is important to bear in mind that we are not speaking here of action taken by counsel over his client's objection-which would have the effect of revoking the agency with respect to the action in question. See *Brookhart v. Janis*, 384 U.S. 1, 7-8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). There is no suggestion of that. The issue is whether consent expressed by counsel alone is ineffective simply because the defendant himself did not express to the court his consent.

*** As detailed in the margin, the decisions often cited for the principle of attorney incapacity are inapposite; except for one line of precedent, no decision of this Court holds that, as a constitutional matter, a defendant must personally waive certain of his “fundamental” rights-which typically are identified as the rights to trial, jury, and counsel. The exceptional line of precedent involves the right to counsel. See *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). But that right is essentially sui generis, since an unrepresented defendant cannot possibly waive his right to counsel except in person. Cases involving that right therefore provide no support for the principle that the Constitution sometimes forbids attorney waiver.

Since a formula repeated in dictum but never the basis for judgment is not owed stare decisis weight, see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545-546, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), our precedents have not established the rule of decision applicable in this case. I would not adopt the tactical-vs.-fundamental approach, which is vague and derives from nothing more substantial than this Court's say-so. One respected authority has noted that the approach has a “potential for uncertainty,” and that our precedents purporting to apply it “have been brief and conclusionary.” 3 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §§ 11.6(a), (c), pp. 784, 796 (3d ed.2007).

That is surely an understatement. What makes a right tactical? Depending on the circumstances, waiving any right can be a tactical decision. Even pleading guilty, which waives the right to trial, is highly tactical, since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial.

Whether a right is “fundamental” is equally mysterious. One would think that any right guaranteed by the Constitution would be fundamental. But I doubt many think that the

Sixth Amendment right to confront witnesses cannot be waived by counsel. See *Diaz v. United States*, 223 U.S. 442, 444, 452-453, 32 S.Ct. 250, 56 L.Ed. 500 (1912). Perhaps, then, specification in the Constitution is a necessary, but not sufficient, condition for “fundamental” status. But if something more is necessary, I cannot imagine what it might be. Apart from constitutional guarantee, I know of no objective criterion for ranking rights. The Court concludes that the right to have an Article III judge oversee voir dire is not a fundamental right, without answering whether it is even a constitutional right, and without explaining what makes a right fundamental in the first place. The essence of “fundamental” rights continues to elude.

I would therefore adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel. There is no basis in the Constitution, or as far as I am aware in common-law practice, for distinguishing in this regard between a criminal defendant and his authorized representative. In fact, the very notion of representative litigation suggests that the Constitution draws no distinction between them. “A prisoner ... who defends by counsel, and silently acquiesces in what they agree to, is bound as any other principal by the act of his agent.” *People v. Rathbun*, 21 Wend. 509, 543 (N.Y.Sup.Ct.1839). The Rathbun opinion, far from being the outlier view of a state court, was adopted as the common law position by eminent jurists of the 19th century, including Chief Justice Shaw of the Supreme Judicial Court of Massachusetts. See *Commonwealth v. Dailey*, 66 Mass. 80, 83 (1853) (discussing Rathbun with approval in a case involving waiver of the right to a 12-man jury).

It may well be desirable to require a defendant's personal waiver with regard to certain rights. Rule 11(c) of the Federal Rules of Criminal Procedure, for example, provides that before accepting a guilty plea the court must “address the defendant personally in open court,” advise him of the consequences of his plea, and assure that the plea is voluntary. See also Rule 10(b) (waiver of right to appear at arraignment must be in writing signed by counsel and defendant). I do not contend that the Sixth Amendment's right to assistance of counsel prohibits such requirements of personal participation, at least where they do not impair counsel's expert assistance.

Even without such rules it is certainly prudent, to forestall later challenges to counsel's conduct, for a trial court to satisfy itself of the defendant's personal consent to certain actions, such as entry of a guilty plea or waiver of jury trial, for which objective norms

GUILTY PLEAS: INSERT AT PAGE 1316, AFTER NOTE 9

PADILLA v. KENTUCKY
130 S. Ct. 1473 (2010)

No. 08–651. Argued Oct. 13, 2009--Decided March 31, 2010.

Justice Stevens delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.FN1 [FN1. Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).]

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “ ‘did not have to worry about immigration status since he had been in the country so long.’ ” 253 S.W.3d 482, 483 (Ky.2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U.S. —, 129 S.Ct. 1317, 173 L.Ed.2d 582 (2009), to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or

removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

* * *

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien shall not be deported.” *Id.*, at 890.FN3 This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was “consistently ... interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation,” *Janvier v. United States*, 793 F.2d 449, 452 (C.A.2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

* * *

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5–year period prior to 1996, *INS v. St. Cyr*, 533 U.S. 289, 296, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. FN6 See 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See § 1101(a)(43)(B); § 1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S., at 686, 104 S.Ct. 2052. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those

matters not within the sentencing authority of the state trial court. FN8 253 S.W.3d, at 483–484 (citing *Commonwealth v. Fuartado*, 170 S.W.3d 384 (2005)). In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” 253 S.W.3d, at 483. The Kentucky high court is far from alone in this view.

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty,” *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 1478–1481. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F.2d 35, 38 (C.A.D.C.1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U.S., at 322, 121 S.Ct. 2271 (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”).

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to *Padilla*'s claim.

III

* * *

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. * * * “[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients” Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14.

* * *

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable”). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of Strickland. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy Strickland's second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that Strickland applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, “counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case ...,” though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as Amicus Curiae 10.

* * *

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” *Libretti v. United States*, 516 U.S.

29, 50–51, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the Strickland analysis.” *Hill v. Lockhart*, 474 U.S. 52, 62, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (White, J., concurring in judgment).

* * *

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill*, 474 U.S., at 57, 106 S.Ct. 366; see also *Richardson*, 397 U.S., at 770–771, 90 S.Ct. 1441. The severity of deportation—“the equivalent of banishment or exile,” *Delgado v. Carmichael*, 332 U.S. 388, 390–391, 68 S.Ct. 10, 92 L.Ed. 17 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

V

* * *

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below. See *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 530, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002).

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.