Betterman v. Montana and the Underenforcement of Constitutional Rights at Sentencing

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This past Term, in *Betterman v. Montana*,[1] the U.S. Supreme Court took up the question whether the Sixth Amendment's speedy trial guarantee applies to sentencing proceedings. In a unanimous opinion by Justice Ginsburg, the Court held that it does not.

Perhaps in order to achieve unanimity, *Betterman* left open important questions, which may ultimately allow defendants, at least in some situations, to demand a speedy sentencing. But, on the whole, *Betterman* represents an unfortunate example of the courts' tendency to underenforce constitutional rights at sentencing.

I. THE CASE

Brandon Betterman pled guilty to bail jumping after he failed to appear in court on domestic assault charges.[2] After pleading guilty, Betterman spent more than fourteen months in jail before he was sentenced.[3] After the sentence was imposed, Betterman appealed, arguing that the post-conviction, pre-sentencing delay violated the Speedy Trial Clause of the Sixth Amendment. The Montana Supreme Court affirmed his conviction and sentence, concluding that the Speedy Trial Clause does not apply to sentencing proceedings.[4] Because federal and state courts were split on the question whether the Speedy Trial Clause applies to sentencing, the Supreme Court granted certiorari.

The Supreme Court affirmed the judgment of the Montana Supreme Court. It held that the Speedy Trial Clause ceases to operate at the moment of conviction, and therefore does not apply to sentencing.[5] In reaching this conclusion, the Court relied mainly on the text of the Sixth Amendment and its inference that the Clause was meant to protect the presumption of innocence. According to the Court, the Clause does not apply to sentencing proceedings because the text of the Clause

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1 Betterman v. Montana, 136 S. Ct. 1609 (2016).

2 *Id.* at 1612.

3 *Id.*

4 *Id.* at 1613.

5 *Id.*

limits its scope to pre-conviction proceedings. In particular, the Court focused on the language from the Sixth Amendment that "guarantees 'the *accused*' 'the right to a speedy . . . *trial*.'"[6] As for the purpose of the Clause—to protect the presumption of innocence—the Court said, "[a]s a measure protecting the presumptively innocent, the speedy trial right—like other similarly aimed measures—loses force upon conviction."[7] Extending the Clause to sentencing proceedings is unnecessary, according to the Court, because "factual disputes, if any there be, at sentencing, do not go to the question of guilt; they are geared, instead, to ascertaining the proper sentence within boundaries set by statutory minimums and maximums."[8] Notably, the Court asserted that its decision did not render "inapplicable to sentencing" other provisions of the Sixth Amendment, such as the right to counsel, which "protect[s] interests other than the presumption of innocence."[9]

In deciding that the speedy trial right does not apply to sentencing proceedings, the Court left open two important questions. First, it explicitly "reserve[d] the question" whether the speedy trial right applies to "bifurcated proceedings in which, at the sentencing stage, facts that could increase the proscribed sentencing range are determined (*e.g.*, capital cases in which eligibility for the death penalty hinges on aggravating factor findings)."[10] Two concurring Justices—Justices Thomas and Alito—emphasized that this question remained open, stating: "[T]he Sixth Amendment's Speedy Trial Clause does not apply to sentencing proceedings, *except perhaps to bifurcated sentencing proceedings where sentencing enhancements operate as functional elements of a greater offense*."[11]

Second, the Court explicitly left open the possibility that defendants could raise due process challenges if their sentencings were unduly delayed and if that delay led to a sentencing proceeding that was not "fundamentally fair."[12]

II. THE UNDERENFORCEMENT OF RIGHTS AT SENTENCING

Constitutional rights are underenforced at sentencing.[13] Although the recent trend has been in favor of recognizing more rights at sentencing,[14] defendants

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[6] *Id.* at 1614 (quoting U.S. CONST. amend. XI and noting that emphasis has been added).

[7] *Id.*

[8] *Id.* at 1616.

[9] *Id.* at 1615 n.4.

[10] *Id.* at 1613 n.2.

[11] *Id.* at 1618 (Thomas, J., concurring) (emphasis added).

[12] "After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair. But because Betterman advanced no due process claim here, we express no opinion on how he might fare under that more pliable standard." *Id.* at 1617–18 (citation omitted).

enjoy fewer constitutional rights at sentencing than they do at the guilt phase of trial.[15] This is true for both procedural rights and substantive rights. That is to say, not only are there fewer procedural rights that a defendant can demand at sentencing—such as the right to confront witnesses—but judges can also increase sentences for reasons that appear to infringe on substantive constitutional rights. So, for example, a judge can increase a defendant's sentence for failure to express remorse, even though it would be considered a violation of First Amendment rights to make lack of remorse a crime.[16]

Betterman continues in this vein. In deciding that the speedy trial right does not apply to sentencing proceedings, the Court has added another procedural right to the list of rights that apply at trial but not at sentencing. *Betterman* thus represents another example of underenforcement of a constitutional right at sentencing.

The underenforcement of procedural rights at sentencing may be attributable to the fact that the stakes seem much lower at sentencing than at trial.[17] After all, trials exist to determine guilt or innocence. If a defendant is not guilty, then the state may not punish her. In contrast, guilt is a forgone conclusion at sentencing; the only question is how much punishment to impose. The greater procedural protections at trial are necessary in order to ensure that innocent defendants are not convicted. We ensure that innocent defendants are not convicted, in part, by resolving issues of uncertainty in defendants' favor. That is why, for example, prosecutors must prove elements of a crime beyond a reasonable doubt.[18] Erroneous decisions at sentencing are assumed to be less consequential—they go only to amount of punishment, not innocence—and thus procedural protections do not seem as necessary.[19] For this reason, prosecutors need only prove sentencing facts by a preponderance of the evidence rather than beyond a reasonable doubt.[20]

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[13] In saying that constitutional rights are "underenforced" at sentencing, I mean that the Court has "stop[ped] short of fully enforcing the Constitution" at sentencing, but that these limitations "do not mark the substantive boundaries of the Constitution." Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579, 580 (2010).

[14] Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1773–74 (2003); Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 232–33 (2014) [hereinafter Hessick & Hessick, *Procedural Rights*].

[15] *See* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 53–56 (2011) [hereinafter Hessick & Hessick, *Constitutional Rights*] (collecting procedural and substantive constitutional limits on sentencing).

[16] *Id.* at 66–70.

[17] While this may explain the underenforcement of *procedural* rights at sentencing, it does not explain the underenforcement of *substantive* rights at sentencing. For more on that topic, see Hessick & Hessick, *Constitutional Rights*, *supra* note 15.

[18] "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *In re* Winship, 397 U.S. 358, 363 (1970).

[19] Alan Michaels has made this observation:

The *Betterman* decision appears to follow this pattern. The Court justified its refusal to extend the speedy trial right at sentencing on the theory that the right protects the presumption of innocence, and that defendants who have been convicted and await sentencing are, by definition, not innocent.

But the assumption underlying the underenforcement of procedural rights at sentencing—that procedural protections are less necessary because sentencing errors are less consequential—suffers from at least three defects. First, the mere fact that a procedural protection is *less* important at sentencing does not mean that the protection is *unnecessary*. Even if a right seems less important in one situation than in another, the right still might be important enough in the latter situation to warrant protection. The right to counsel, for example, seems less important when a defendant is facing only a six month sentence than when she is facing life in prison, but the Court has said that the appointment of counsel attaches in any case involving actual imprisonment.[21]

Second, the assumption that sentencing errors are less consequential than innocence errors may not be true in all cases. Instead, the relative consequences of those errors depend in large part on the circumstances. When we think about errors in sentencing, we likely imagine a defendant who is sentenced to six years in prison, rather than five. But that assumed scenario hardly captures the range of sentencing situations and how the consequences of those situations compare to questions of innocence. Some defendants may be more concerned about receiving an excessively harsh sentence than receiving an erroneous determination of guilt.

Consider, for example, the common practice of defendants who plead guilty to low-level charges in order to avoid prolonged pre-trial detention. The prevailing conventional wisdom is that innocent defendants will plead guilty in order to receive a sentence of time served if they are denied bail and would otherwise be incarcerated while awaiting trial.[22] For those defendants, an erroneous

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> There is . . . no constitutionally mandated presumption of "sentencing innocence"; within the range of legislatively prescribed sentences for the crime, "too high" is neither better nor worse than "too low." In this vision, the defendant, by virtue of his conviction, has lost the constitutional entitlement to have errors resolved in his favor that protected him at trial.

Michaels, *supra* note 14, at 1778.

[20] *See* United States v. O'Brien, 560 U.S. 218, 224 (2010).

[21] *See* Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[22] *See, e.g.*, Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1162 (2008) (arguing that most innocent misdemeanants are better off pleading guilty in light of the costs and risks of litigation); Samuel Gross & Barbara O'Brian, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930–31 (2008) ("[I]t is entirely possible that most wrongful convictions—like 90 percent or more of all criminal convictions—are based on negotiated guilty pleas to comparatively light charges, and that the innocent defendants in those cases received little or no time in custody. If so, it may well be that a major cause of these comparatively low-level miscarriages of justice is the prospect of prolonged pretrial detention by innocent defendants who are unable to post bail." (footnote omitted)); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 (1989)

determination of guilt is preferable to more time in jail. Indeed, the very premise underlying our current system of plea bargaining is that a defendant—even an innocent defendant—would prefer to trade the possibility of an acquittal for a reduction in her criminal sentence.[23]

Even outside of the plea bargaining context, the consequences associated with sentencing can be more devastating than the consequences associated with conviction. The devastating consequences of capital sentencing decisions have led the Supreme Court to require trial-like procedures for sentencing decisions involving the death penalty.[24] The severity of the death penalty has led the Court to conclude that those sentencing decisions must be particularly reliable. The Court has grounded those decisions in the Eighth Amendment, stating that the death penalty is unusual in its severity and its finality.[25] "Death . . . differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[26]

It is, of course, a truism to state that death is different. It is, however, less obviously true that the qualitative difference between death and other punishments requires procedural protections unique to the death penalty context—that is, protections that are denied to other criminal defendants.[27] Indeed, the decisions applying the Eighth Amendment capital sentencing framework to life-without-parole sentences in recent years suggest that the Court may be increasingly receptive to arguments that constitutional protections which were once limited to capital sentencing may be necessary in noncapital proceedings.[28] And if the Court

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(explaining the "substantial incentive for a rational, innocent defendant to plead guilty" in this situation).

[23] *See, e.g.*, Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1943 (1992) (explaining why some plea bargains "will often prove attractive even to the innocent").

[24] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686–87 (1984) (observing that a capital sentencing proceeding is "like a trial in its adversarial format and in the existence of standards for decision" and thus concluding that in assessing the constitutional obligations of counsel to provide effective representation, a "capital sentencing proceeding need not be distinguished from an ordinary trial").

[25] *See* California v. Ramos, 463 U.S. 992, 998–99 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability.").

[26] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

[27] *See generally* Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599 (2001).

[28] *See* Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that the Eighth Amendment forbids the mandatory imposition of life without parole sentences on juveniles); Graham v. Florida, 560 U.S.

continues to expand its Eight Amendment holdings outside of the capital sentencing context, then the need for procedural protections at non-capital sentencing may seem more acute. After all, the text of the Eighth Amendment speaks only in terms of "cruel and unusual punishment"; it does not distinguish between death and other sentences.[29]

Third, presumably because of the consequences associated with sentencing, the Supreme Court has extended a number of the procedural rights ordinarily associated with trial to defendants in non-capital sentencing proceedings over the past several decades.[30] Take, for example, the right to counsel. When the Supreme Court first recognized the right to counsel, it did so largely because of concerns about the presumption of innocence. In both *Powell v. Alabama* and *Gideon v. Wainwright*—the two seminal cases establishing the right to the appointment of counsel for criminal defendants—the Court emphasized that, without the right to counsel "though he be not guilty, [a defendant] faces the danger of conviction because he does not know how to establish his innocence."[31]

The Supreme Court eventually extended the right to counsel to sentencing proceedings. It did so even though the defendant has already been convicted, and thus the presumption of innocence is no longer in effect. When extending the right to counsel to sentencing proceedings, the Court no longer spoke in terms of the danger of convicting an innocent defendant, but instead in terms of how an attorney would help a defendant at a sentencing proceeding. For example, in *Mempa v. Rhay*, the Court stated that "the necessity for the aid of counsel in

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48 (2010) (holding that life-without-parole sentences for juvenile defendants who committed non-homicide crimes are barred by the Eighth Amendment).

[29] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[30] *See* Michaels, *supra* note 14, at 1785 (identifying those trial rights which have been extended to sentencing proceedings and those that have not).

[31] Gideon v. Wainwright, 372 U.S. 335, 345 (1963); Powell v. Alabama, 287 U.S. 45, 69 (1932). Indeed, the concerns that the Court raised in *Powell* and then reiterated in *Gideon* seem to speak to the presumption of innocence:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil of criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 68–69.

marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."[32]

III. UNDERENFORCEMENT IN *BETTERMAN*

The *Betterman* Court purported to distinguish the right to counsel from the speedy trial right on the ground that the right to counsel "protect[s] interests other than the presumption of innocence."[33] But the speedy trial right also protects interests other than the presumption of innocence. And in failing to extend the speedy trial right to sentencing, the Court underenforced that right.

Earlier cases make clear that the Speedy Trial Clause is "essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.'"[34] Although incarceration prior to trial is not a concern for sentencing proceedings, some of the other reasons for the speedy trial right exist at sentencing. A defendant who does not know what her sentence will be is likely to experience "anxiety and concern" that is similar to (though obviously not identical to) the anxiety and concern that a defendant experiences before trial. A defendant will be anxious and concerned before trial about whether she will be acquitted or convicted. While awaiting sentencing, a defendant will be anxious about how much punishment she will receive. And for some defendants, the uncertainty about sentence will not look appreciably different than a defendant who is awaiting trial. Defendants may be able to convince a judge to impose probation, rather than a prison term, for example. Not knowing whether you will be incarcerated is not dissimilar to not knowing whether you will be convicted.

Delay between conviction and sentencing will also affect a defendant's ability to present a convincing mitigation case at sentencing. As discussed in more detail below,[35] the amount of punishment a defendant receives at sentencing often turns on factual determinations by a judge about a defendant's crime or her character. The more time that passes between conviction and sentencing, the more difficult it may be for a defendant to present evidence on those issues to the judge.

One of the principle reasons the *Betterman* Court offered in support of its decision was textual.[36] Extending the speedy trial right to sentencing seems

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[32] Mempa v. Rhay, 389 U.S. 128, 135 (1967).

[33] Betterman v. Montana, 136 S. Ct. 1609, 1615 n.4 (2016).

[34] Smith v. Hooey, 393 U.S. 374, 377–78 (1969) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966).

[35] *See infra* text accompanying notes 60–63.

[36] Betterman v. Montana, 136 S. Ct. 1609, 1614–15 (2016).

inconsistent with the text of the Sixth Amendment, which speaks in terms of the right to a speedy *trial*.[37]

But there were obvious responses to this textual issue. First, as the petitioner noted, the Founders likely assumed that sentencing proceedings occurred automatically upon conviction or within a very short time thereafter.[38] Thus, guaranteeing speedy trial doubtlessly, as a matter of established practice, also guaranteed a speedy sentencing. Second, a strict textualist reading of the Sixth Amendment also suggests that the right to counsel should terminate upon conviction. The Amendment states that "the accused shall . . . have the assistance of counsel for his defense." As the *Betterman* Court noted, the term "accused" suggests a right that applies only at trial and terminates upon conviction.[39] The term "defense" also suggests a trial right that ends upon conviction. The term "defense" is ordinarily understood to be either (a) the reason or reasons that a criminal defendant believes that the prosecutor "has no valid case" against her, or (b) the defendant's "method and strategy" for convincing the factfinder that the prosecution has no valid case against her.[40] One does not speak of a defendant's presentation at sentencing as a "defense." That is normally described as an argument for leniency, and argument for a mitigated sentence, or simply presenting a "case as to sentence."[41]

The *Betterman* Court also indicated that it was unwilling to extend the speedy trial right to sentencing because of the remedy associated with the right. "The sole remedy for a violation of the speedy trial right" is the "dismissal of the charges," and it "would be an unjustified windfall, in most cases, to remedy sentencing delay

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[37] U.S. CONST. amend. VI.

[38] Petitioner raised this historical matter with the Court. But the Court appears to have dismissed this appeal to originalism by reference to two treatises that indicated that sentencing could be postponed:

> As Betterman points out, at the founding, sentence was often imposed promptly after rendition of a verdict. Brief for Petitioner 24–26. But that was not invariably the case. For the court's "own convenience, or on cause shown, [sentence could be] postpone[d] . . . to a future day or term." 1 J. Bishop, Criminal Procedure § 1291, p. 767 (3d ed. 1880) (footnote omitted). See also 1 J. Chitty, A Practical Treatise on the Criminal Law 481 (1819) ("The sentence . . . is usually given immediately after the conviction, but the court may adjourn to another day and then give judgment.").

136 S. Ct. at 1614 n.3. How, precisely, sentencing proceedings were conducted at the Founding remains a matter of some disagreement. *See* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 131 n.183 (2006) (documenting disagreement about historical sentencing practice in early America). The Court's own opinions on this issue have been inconsistent. *See* Hessick & Hessick, *Procedural Rights*, *supra* note 14, at 230 (describing how the Court's account of historical sentencing practices "has evolved over time").

[39] 136 S. Ct. at 1614.

[40] *See defense*, BLACK'S LAW DICTIONARY 365–67 (abr. 10th ed. 2015).

[41] Mempa v. Rhay, 389 U.S. 128, 135 (1967).

by vacating validly obtained convictions."[42] But Petitioner was not seeking dismissal of charges; he instead sought a reduction of sentence.[43] Yet, the Court rejected the idea of a sentencing reduction out of hand, noting: "We have not read the Speedy Trial Clause . . . to call for a flexible or tailored remedy. Instead we have held that violation of the right demands termination of the prosecution."[44]

It is unclear why the Court's past practice in speedy trial cases must govern all future cases. Courts often use their inherent power to fashion remedies to address the precise nature of harm suffered in a particular case.[45] When a defendant is denied effective assistance of counsel at trial, the remedy is to vacate the conviction and order a new trial. But when a defendant is denied effective assistance only at sentencing, the remedy is to vacate the sentence—but not the conviction—and to remand for resentencing. Because the right to counsel has evolved to apply at sentencing, the remedy for a violation of that right has also changed depending on the nature of the rights violation. Given that the Court has, at times, been willing to create new, broader remedies,[46] the *Betterman* Court was too dismissive of the idea that it could fashion a more narrow remedy for a speedy trial violation.

IV. THE POSSIBILITY OF ENFORCEMENT IN CAPITAL SENTENCING PROCEEDINGS AND OTHER CONTEXTS

The *Betterman* Court left open the possibility that the speedy trial right might apply to certain types of sentencing proceedings. The majority opinion identified the penalty phase of capital trials, and Justice Thomas's concurrence identified proceedings for "sentencing enhancements [that] operate as functional elements of a greater offense."[47] If a future case were to extend the speedy trial right to this limited set of sentencing proceedings, then the Court would be further exacerbating a flaw in its constitutional sentencing doctrine—namely, its decision to enforce more procedural rights in mandatory sentencing systems than in discretionary sentencing systems.

At present, the Supreme Court has required different procedural rights at sentencing based on the amount of discretion that a judge enjoys.[48] If a judge has discretion over certain policy decisions associated with sentencing, then "judges,

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[42] 136 S. Ct. at 1615.

[43] *Id.* at 1615 n.6

[44] *Id.*

[45] *See generally* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996) (describing and criticizing the federal judiciary's "assertion of inherent remedial power").

[46] *See, e.g.*, *id.* at 1124–27 (describing the breadth and scope of structural injunction cases).

[47] 136 S. Ct. at 1613 n.2; *id.* at 1618 (Thomas, J., concurring).

[48] For more on this issue, see Hessick & Hessick, *Procedural Rights*, *supra* note 14.

not juries, may find the facts that affect the sentence; the government need not prove those facts beyond a reasonable doubt; defendants are not entitled to notice of the considerations that may increase their sentences; and their sentences may be increased under retroactive laws."[49] But if judges do not have that discretion—if a legislature or a sentencing commission has identified *ex ante* the findings that trigger certain sentencing consequences—then defendants have the right to have facts that increase a sentence found by a jury,[50] the right to have those facts proven beyond a reasonable doubt,[51] the right to notice of the facts that may increase their sentence,[52] and the right not to be sentenced under retroactive laws that are harsher than the ones in effect at the time of the commission of the offense.[53]

In some cases, when the Court has made the entitlement to a procedural right at sentencing dependent on the amount of a judge's sentencing discretion, it has done so without explaining how the mandatory nature of a sentencing system is relevant to the text or purpose of that constitutional provision.[54] In *Betterman*, the Court devoted a significant portion of the opinion to explaining the rationale behind the Speedy Trial Clause. But it did not explain why its reasoning might play out differently in capital sentencings or proceedings associated with statutory sentencing enhancements.

According to the *Betterman* Court, the Speedy Trial Clause exists to protect the presumption of innocence.[55] A defendant who has been found guilty is no longer entitled to that presumption. More specifically, the *Betterman* Court stated that "the major evils protected against by the speedy trial guarantee" are those that are triggered by arrest and persist until the end of trial: "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."[56]

But the Speedy Trial Clause also helps to guard against the problems associated with the passage of time that may interfere with a defendant's ability to

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[49] *Id.* at 188.

[50] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[51] *Id.*

[52] Burns v. United States, 501 U.S. 129, 134 (1991).

[53] Peugh v. United States, 133 S. Ct. 2072, 2083 (2013).

[54] *E.g.*, United States v. Booker, 543 U.S. 220, 233 (2005) (stating that the Court has "never doubted" that the right to a jury trial of sentencing facts does not apply in discretionary systems). The Court did provide an explanation in *Irizarry v. United States*, 553 U.S. 708, 713–14 (2008). But that explanation was deeply flawed. *See* Hessick & Hessick, *Procedural Rights*, *supra* note 14, at 209–14 (criticizing the analysis in *Irizarry*).

[55] *See supra* text accompanying notes 5–9.

[56] 136 S. Ct. at 1615 (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).

defend herself,[57] such as the decay of memory, the loss of evidence, and the death or disappearance of witnesses.[58] Post-conviction sentencing delay can interfere with a defendant's ability to make a persuasive case at sentencing; the loss of evidence, witnesses, and memories may prevent a defendant from presenting mitigating evidence at sentencing proceedings.

It is presumably because of these concerns that the Justices left open the possibility that the speedy trial guarantee might apply to the penalty phase of a capital trial or proceedings associated with "sentencing enhancements [that] operate as functional elements of a greater offense."[59] But those proceedings, like all sentencing proceedings, "do not go to the question of guilt; they are geared, instead, to ascertaining the proper sentence."[60] Yet this is precisely the reason the *Betterman* Court gave for not extending the speedy trial rights to sentencing more generally.

And, as with other procedural rights that the Court has made dependent upon the existence of judicial sentencing discretion, there is no sensible reason to make the speedy trial guarantee dependent upon the degree of policy authority a judge has over sentencing issues. The concern about post-conviction sentencing delay is that it will result in the loss of evidence, witnesses, and memories, and that those losses will make it more difficult for a defendant to present mitigating evidence at sentencing. Put differently, the concern is that a defendant will have more difficulty establishing a *mitigating factual record* if there is a significant delay after conviction and before sentencing. But factual findings are as important in capital punishment proceedings and proceedings involving statutory sentencing enhancements as they were in Betterman's sentencing proceeding.[61]

The differences between the sentencing proceeding that took place in *Betterman* and the sentencing proceedings in capital punishment proceedings or proceedings involving statutory sentencing enhancements have nothing to do with a defendant's ability to defend herself. Capital sentencing proceedings involve

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[57] Earlier cases make clear that the Speedy Trial Clause is "essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" Smith v. Hooey, 393 U.S. 374, 377–78 (1969) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)). *See also Betterman*, 136 S. Ct. at 1614 (noting these three concerns).

[58] 136 S. Ct. at 1615.

[59] *Id.* at 1613 n.2; *id.* 1618 (Thomas, J., concurring).

[60] *Id.* at 1616.

[61] That is because "the judge's role in factfinding . . . is the same in both mandatory and discretionary sentencing systems. In both systems, judges must make factual findings to determine what sentence to impose." Hessick & Hessick, *Procedural Rights*, *supra* note 14, at 200.

juries rather than judges.[62] But the loss of evidence, witnesses, and memories is just as problematic for both types of decision makers.

To be sure, proceedings involving statutory sentencing enhancements will involve factual questions that are specified *ex ante* rather than determined by a judge in a particular case. And the consequences of those factual questions will change the range of a defendant's punishment exposure (i.e., her statutory maximum punishment or her mandatory minimum punishment) rather than the judge's decision regarding where in a particular range to punish a defendant.[63] But these differences have nothing to do with whether the loss of evidence, witnesses, and memories will interfere with a defendant's ability to obtain a mitigated sentence. At most they will make the consequences of the defendant's inability to obtain a mitigated sentence more visible and predictable.

V. THE POSSIBILITY OF A DUE PROCESS RIGHT TO A SPEEDY SENTENCING

The ultimate effect of the *Betterman* decision remains to be seen. The Court left open the possibility that defendants could demand the right to a speedy post-conviction sentencing proceeding under a claim to due process. The idea that defendants might be able to secure certain constitutional rights at sentencing through the Due Process Clause is hardly new. For example, in reversing sentences that were based on race, courts sometimes held those sentencing factors to be impermissible under the Due Process Clause, rather than under the Equal Protection Clause.[64]

It is unclear whether defendants will fare as well under the Due Process Clause as they might have had the Court gone the other way in *Betterman*. A due process right to a speedy sentencing is likely to be case-specific. Both the majority opinion in *Betterman* and Justice Sotomayor's concurrence indicated that any due process right to a speedy sentencing is likely to turn on questions such as the reasons for delay and what prejudice the defendant suffered.[65] These sorts of vague standards may be more difficult for a defendant to enforce than bright line rules.

But it is not necessary for the Court to resort to the vague guarantees of the Due Process Clause in order to ensure that defendants are not subject to lengthy

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[62] Some non-capital proceedings also involve juries. *See* Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 314 (2003).

[63] *See* Hessick & Hessick, *Procedural Rights*, *supra* note 14, at 200 (explaining that the difference between discretionary sentencing systems and mandatory sentencing enhancements "lies in policy and application decisions").

[64] *See* Hessick & Hessick, *Constitutional Rights*, *supra* note 15, at 55.

[65] 136 S. Ct. at 1618 n.12.

presentencing delays.[66] If the *Betterman* Court had been willing to adapt a so-called trial right to the sentencing context—as it has already done with the right to counsel—then resorting to due process would be unnecessary.

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[66] Indeed, in other contexts, the Court has expressed unwillingness to use the Due Process Clause when another, more specific constitutional right "provides an explicit textual source of constitutional protection." Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 721 (2010) (plurality opinion) (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion)). *See also* Graham v. Connor, 490 U.S. 386, 395 (1989).