UNITED STATES V. WASHINGTON: WHY COUNSEL'S ADVICE AND PRESENCE AT PRESENTENCE INTERVIEWS IS NECESSARY TO PREVENT SENTENCING SUICIDE

INTRODUCTION

Courts have long agreed that to ensure a fair and just judicial system, defendants have a right to counsel in certain criminal proceedings.[1] However, courts have struggled to form a consensus over the exact proceedings to which this right attaches.[2] Before the implementation of the United States Sentencing Guidelines (Guidelines), courts did not consider presentence interviews a "critical" stage requiring a right to counsel.[3] The Guidelines expanded the influence that a presentence report plays in a defendant's sentence and likewise expanded the influence of probation officers as authors of the report.[4] Although courts maintain that routine presentence interviews conducted under the Guidelines are not a "critical stage" under Sixth Amendment jurisprudence,[5] some courts have argued that the stage requires constitutional protection because of the increased potential for prejudice, as well as the ability of counsel's presence at the presentence interview to avoid or mitigate that prejudice.[6]

The Tenth Circuit has held that a Sixth Amendment right to counsel does not apply to presentence interviews with probation officers.[7] However, recently the Tenth Circuit re-examined the issue in *United States v. Washington*,[8] and held that while defendants do not have the right to counsel's presence at a presentence interview with a probation officer, they do have the right to counsel's advice about the nature, purpose, and legal consequences of the interview.[9] In doing so, the Tenth Circuit acknowledged the importance of the proceeding, but refused to extend

1. Powell v. Alabama, 287 U.S. 45, 60–61 (1932).

2. *See, e.g.*, Megan E. Burns, Note, *The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure*, 34 WM. & MARY L. REV. 527, 550–54 (1993); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1679–81 (2003).

3. *See, e.g.*, Burns, *supra* note 2, at 530 (citing Brown v. Butler, 811 F.2d 938, 941 (5th Cir. 1987); Baumann v. United States, 692 F.2d 565, 578 (9th Cir. 1982)).

4. Metzger, *supra* note 2, at 1672.

5. *See, e.g.*, United States v. Tyler, 281 F.3d 84, 96 (3d Cir. 2002) ("[N]o court has found the Sixth Amendment right to counsel applies to routine presentence interviews.").

6. *See* 2 WAYNE R. LAFAVE ET AL., *When the Right to Counsel Begins*, *in* CRIM. PROC. § 6.4(e) nn.106–09 (3d ed. 2011).

7. United States v. Gordon, 4 F.3d 1567, 1571–72 (10th Cir. 1993); United States v. Smith, 929 F.2d 1453, 1458 (10th Cir. 1991); United States v. Rogers, 921 F.2d 975, 981–82 (10th Cir. 1990).

8. 619 F.3d 1252, 1263 (10th Cir. 2010).

9. *Id.* at 1261.

the constitutional guarantee and instead created an unworkable rule that fails to protect the Sixth Amendment right to counsel.

When conducted pursuant to the Guidelines, presentence interviews with probation officers are a "critical" stage under Sixth Amendment jurisprudence. This is due to the grave potential for prejudice that is inherent in presentence hearings with a probation officer and the ability of counsel's presence to mitigate or avoid the prejudice.[10] Too often, unrepresented defendants commit sentencing suicide[11] by making unnecessary admissions during a presentence interview that result in additional months or years added to their sentence.[12] Counsel's presence at, in addition to advice about, a presentence interview, is necessary to protect against the potential for prejudice.[13] If counsel is absent from the interview, it is difficult for a defendant to meaningfully challenge findings in a presentence report. Counsel's presence at a presentence interview would significantly reduce the likelihood that a defendant would make such unnecessary and incriminating admissions.[14]

Part I of this Comment discusses the historical evolution of the Sixth Amendment right to counsel, including the right to effective counsel. It also examines changes in sentencing after the Guidelines were adopted and provides an overview of previous decisions concerning the critical nature of presentence interviews. Part II of this Comment describes the majority and dissenting opinions in *Washington*, which both advocate for the Tenth Circuit to re-examine *United States v. Gordon*.[15] Part III analyzes why the Tenth Circuit's holding created an unworkable rule that fails to protect the Sixth Amendment right to counsel and argues that presentence interviews with probation officers are a "critical" stage of criminal proceedings under Sixth Amendment jurisprudence.

I. BACKGROUND

A. Right to Counsel Doctrine

The right to counsel was constitutionalized in the Sixth Amendment to the United States Constitution, which provides that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[16] However, belief in the rights guaranteed by the Sixth Amendment predated the constitutional amendment.[17] Since first settling

10. Metzger, *supra* note 2, at 1676–80.

11. *See In re* Carter, 848 A.2d 281, 296 (Vt. 2004) ("The facts of this case are a clear example of the importance of the presentence investigation and a criminal defendant's participation in the development of the report. It is not an overstatement to say that petitioner committed sentencing suicide in his [presentence] interview.").

12. *See* Metzger, *supra* note 2, at 1679.

13. *Id.*

14. *Id.* at 1678.

15. 4 F.3d 1567 (10th Cir. 1993).

16. U.S. CONST. amend. VI.

17. *See* Powell v. Alabama, 287 U.S. 45, 60–65 (1932).

in this country, Americans have rejected the English system that prohibited the assistance of counsel in most criminal cases.[18] Instead, early American colonists adopted protections to ensure defendants procedural fairness in criminal proceedings.[19] Colonists recognized that "if a defendant were forced to stand alone against the state, his case was foredoomed,"[20] and this view is reflected in the right to counsel guaranteed in the Sixth Amendment.[21] The Framers sought to level the playing field between an experienced and powerful prosecutor[22] and a criminal defendant who lacks the "skill in arguing the law or in coping with an intricate procedural system."[23]

In *Powell v. Alabama*,[24] the Supreme Court held that the defendants, nine young African American men accused of rape, were deprived of their right to a fair trial "in any substantial sense," because the defendants' counsel lacked the opportunity to investigate or prepare for the trial.[25] Justice Sutherland's opinion in *Powell* was the foundation of the Supreme Court's Sixth Amendment right to counsel doctrine.[26]

> 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 for his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[27]

Although *Powell*'s holding was limited to capital cases with an indigent defendant who lacks the ability to defend himself,[28] the Supreme Court has continued to refine and re-examine the guarantee in light of

18. *Id.* at 64–65.

19. *Id.* ("[I]n at least twelve of the thirteen colonies the rule of the English common law . . . had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions . . . ."); Metzger, *supra* note 2, at 1638–39 (discussing methods colonies used to secure the right to counsel, including by constitutional protection and right-to-counsel legislation).

20. United States v. Wade, 388 U.S. 218, 224 (1967).

21. Metzger, *supra* note 2, at 1640.

22. *Id.* at 1639–40.

23. United States v. Ash, 413 U.S. 300, 307 (1973).

24. 287 U.S. 45 (1932).

25. *Id.* at 57–58.

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense.

26. Burns, *supra* note 2, at 533.

27. *Powell*, 287 U.S. at 69.

28. *Id.* at 71 (describing the defendant as "incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like").

"changing patterns of criminal procedure and investigation."[29] The Sixth Amendment right to counsel is an evolving doctrine,[30] and in expanding it, the Supreme Court uses a "real-world," factual assessment of the criminal proceeding asserted to be unfair.[31] Under this assessment, the Supreme Court expands the right "only when new contexts appear presenting the same dangers that gave birth initially to the right itself."[32] The Supreme Court has expanded the Sixth Amendment right to counsel to all criminal prosecutions where imprisonment may result.[33] Additionally, the Court has expanded the right to counsel to include proceedings both before and after the actual trial,[34] recognizing that the right to effective assistance at trial is meaningless if that right is limited only to the formal trial.[35] Now, the Sixth Amendment right to counsel exists at all "critical" stages of a criminal prosecution.[36]

The Supreme Court has announced several elements that must be present in a "critical" stage: (1) the stage must occur after the initiation of adversarial proceedings; (2) the defendant must confront an adversary;[37] and (3) the presence of counsel must be necessary to preserve the defendant's right to a fair trial.[38] To satisfy the third element, there must

29. *See, e.g.*, United States v. Ash, 413 U.S. 300, 310 (1973).

30. *See* United States v. Wade, 388 U.S. 218, 224 (1967) (noting the differences in "today's law enforcement machinery" compared to the lack of organized police forces when the Bill of Rights was adopted).

31. *See Ash*, 413 U.S. at 313 ("This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.").

32. *Id.* at 311.

33. Scott v. Illinois, 440 U.S. 367, 373 (1979); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

34. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 401 (1977) (postindictment interrogation); Coleman v. Alabama, 399 U.S. 1, 9 (1970) (preliminary hearing); Mempa v. Rhay, 389 U.S. 128, 137 (1967) (sentencing); *Wade*, 388 U.S. at 237 (1967) (pretrial lineups); Hamilton v. Alabama, 368 U.S. 52, 53 (1961) (arraignment).

35. *Ash*, 413 U.S. at 310.

36. *Wade*, 388 U.S. at 224 ("[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings.").

37. *Ash*, 413 U.S. at 310; Kirby v. Illinois, 406 U.S. 682, 688–90 (1972).

> The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby, 406 U.S. at 689–690.

38. *Wade*, 388 U.S. at 226–27 ("In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . .").

be "potential substantial prejudice" in the stage and counsel's presence would help the defendant mitigate or avoid the prejudice.[39]

B. Right to Effective Counsel

Although the *Powell* Court intimated that the right to counsel included a right to "effective" counsel,[40] the right to challenge the quality of counsel's assistance was not formally recognized until thirty years after the Supreme Court's decision in *Powell*.[41] In *McMann v. Richardson*,[42] the Supreme Court affirmatively stated, "the right to counsel is the right to the effective assistance of counsel."[43] In *Strickland v. Washington*,[44] the Supreme Court acknowledged that effective assistance is necessary to ensure that criminal proceedings produce a just result[45] and announced standards for determining whether counsel's assistance amounts to constitutionally deficient performance requiring the judgment's reversal.[46] Under *Strickland*, a defendant must show that counsel's performance fell below the "objective standard of reasonableness,"[47] meaning below the range of "professionally competent assistance."[48] Counsel's performance is measured against "prevailing professional norms."[49] Additionally, a defendant must also "show that the deficient performance prejudiced the defense."[50] The prejudice element requires a showing of reasonable probability that but for counsel's deficient performance, the proceeding's result would have been different.[51] Courts presume that counsel's conduct is reasonable and afford considerable deference when scrutinizing such conduct.[52] However, a lawyer's mere presence at trial is insufficient to satisfy the Sixth Amendment guarantee of effective counsel.[53]

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39. *Id.* at 227 (analyzing "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice").

40. Powell v. Alabama, 278 U.S. 45, 71 (1932) (describing the court's duty to give "*effective* aid in the preparation and trial of the case" (emphasis added)).

41. Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 629 (1986) ("[B]y 1964, the right to effective assistance in the qualitative sense was firmly imbedded in case law." (citing Ion R. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 289–91 (1964))).

42. 397 U.S. 759 (1970).

43. *Id.* at 771 n.14.

44. 466 U.S. 668 (1984).

45. *Id.* at 685–86.

46. *Id.* at 687.

47. *Id.* at 688.

48. *Id.* at 690.

49. *Id.* at 688.

50. *Id.* at 687.

51. *Id.* at 694.

52. *Id.* at 689 ("Judicial scrutiny of counsel's performance must be highly deferential.").

53. *Id.* at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.").

1. Sentencing

By the end of the twentieth century, the federal criminal justice system experienced significant changes, including the adoption of mandatory minimum sentences and the Guidelines.[54] Mandatory minimum sentencing requires that courts impose specific mandatory terms of incarceration when a defendant is convicted of a crime that carries a mandatory sentence.[55] In 1984, Congress enacted mandatory sentencing, prescribing mandatory sentences for certain drug- and gun-related offenses.[56] Since the enactment of mandatory sentencing, Congress has expanded the number of charges that carry mandatory sentences.[57]

Also in 1984, Congress passed the Sentencing Reform Act,[58] which established the United States Sentencing Commission to generate an effective and fair sentencing system that would better combat crime by ensuring "honesty," "reasonable uniformity" and "proportionality" in sentencing.[59] The Sentencing Commission developed and adopted the Guidelines, and on November 1, 1987, the Commission's Guidelines went into effect, introducing determinate sentencing to the federal system.[60]

The prior system of indeterminate sentencing gave judges considerable discretion to impose tailored sentences based on a variety of factors, including the defendant's background and likelihood of rehabilitation.[61] Both mandatory sentencing and the Guidelines sought to remedy criticisms that the old indeterminate sentencing scheme gave judges too much discretion, creating disparate sentences for similar offenses, and focusing too much on rehabilitating defendants without any means of knowing whether a defendant was effectively rehabilitated.[62] Under that system, judges were only bound by maximum sentences,[63] and the presentence investigation report was merely a supplement used by the judge in determining a sentence.[64] Judges were not required to rely on information contained in the report, and, if the defendant gave consent,

54. *See* Metzger, *supra* note 2, at 1657–58.
55. *Id.* at 1658.
56. *Id.*
57. *Id.*
58. 28 U.S.C. § 994 (2006).
59. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpart 1 (2004) (Original Introduction to the Guidelines Manual).
60. *Id.* at subpart 2 ("[T]he guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date."); *see also* Metzger, *supra* note 2, at 1659.
61. Burns, *supra* note 2, at 537–39.
62. *See id.* at 539; *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 84 (2003).
63. *See* Burns, *supra* note 2, at 537 (citing Keith A. Findley & Meredith Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 840 (1989)).
64. *Id.* (citing Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988)).

the judge could impose a sentence without a presentence report.[65] The report contained both parties' accounts of the crime, as well as a psychological profile of the defendant and information about the defendant's background, such as family and education.[66]

In contrast, the Guidelines impose fixed sentencing ranges, which are calculated according to specific instructions and based on the defendant's offense level and criminal history.[67] Offense level is calculated by determining the appropriate Guideline section and the base offense level within that section[68] and then by taking into consideration the severity of the offense and offender conduct.[69] The Guidelines only allow for certain adjustments.[70] Although the Supreme Court has held that the Guidelines are merely advisory,[71] in practice, federal judges have continued to view the Guidelines as authoritative, and rarely select a sentence that falls outside the Guideline's prescribed range.[72] Judges must make additional fact-finding to justify a sentence ordered outside of the Guideline's range,[73] so despite the "advisory nature" of the recommendation, "[f]rom a practical standpoint, district judges must give considerable weight to presentence reports; the system could not function efficiently otherwise."[74]

Under the Guidelines, "[t]he probation officer must conduct a presentence investigation and submit a report to the court before it imposes a sentence."[75] The presentence report is now mandatory and, unlike the reports taken under the indeterminate sentencing scheme, it contains minimal information regarding the defendant's background.[76] Furthermore, the report only contains a single version of the facts, which the

65. *Id.*

66. *Id.* (citing Findley & Ross, *supra* note 63, at 841).

67. Metzger, *supra* note 2, at 1659.

68. Burns, *supra* note 2, at 542.

69. Metzger, *supra* note 2, at 1659.

70. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004); *see also id.* at § 3A1–3C1 (describing adjustments based on actual relevant conduct, including: harm to the victim, the defendant's role in the offense, obstruction of justice by the defendant, whether the defendant has accepted personal responsibility, acts in furtherance of the offense, and other criminal activity related to other charges).

71. *See* Booker v. United States, 543 U.S. 200, 246 (2005) (Breyer, J., dissenting in part).

72. Steven G. Kalar & Jon M. Sands, *(Not So) Lovely Rita: A Non-Binding Presumption, for Non-Binding Guidelines, for Our Non-Binding Constitution*, 31 CHAMPION 32, 36 (2007).

73. *Id.* ("[A] trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range . . . ." (quoting Rita v. United States, 551 U.S. 338, 391 (2007))).

74. United States v. Herrera-Figueroa, 918 F.2d 1430, 1435 (9th Cir. 1990) (discussing the substantial role that presentence interviews will continue to play in determining a defendant's sentence).

75. U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (Presentence Report (Policy Statement)); *see also id.* at § 1B1.1 (Application Instructions).

76. Burns, *supra* note 2, at 543–44.

probation officer arrives at based on both parties' accounts.[77] The probation officer then calculates the defendant's base offense level and criminal history category to arrive at the applicable sentencing range recommendation and then provides the recommendation in a report to the court.[78] Under the Guidelines, judges rely heavily on the presentence report's sentencing recommendation, in part because of the complexity of the Guidelines,[79] and in part because of the additional fact-finding required to justify a sentence ordered outside of the Guideline's range.[80]

2. The Debate over Whether a Right to Counsel Exists at a Presentence Interview

Courts generally agreed that under the old indeterminate sentencing system, presentence interviews were not a "critical" stage within Sixth Amendment jurisprudence.[81] Under the Guidelines, no federal court has affirmatively applied a Sixth Amendment right to counsel to a routine, non-capital presentence interview.[82] However, the issue is not settled, as some courts have expressed the view that presentence interviews conducted under the Guidelines have become a "critical" stage under Sixth Amendment jurisprudence.[83] The Ninth Circuit has held that a Sixth Amendment right to counsel exists at a presentence interview in a capital case.[84]

Primarily basing their decisions on the non-adversarial role of the probation officer, the Fourth,[85] Fifth,[86] Sixth,[87] Seventh,[88] Ninth,[89] and

77. *Id.* at 544 (citing Susan K. Grunin & Jud Watkins, *The Investigative Role of the United States Probation Officer Under Sentencing Guidelines*, 51 FED. PROBATION 43, 44 (1987)).

78. *Id.*

79. *Id.*; *see also infra* Part III.B.

80. *See supra* note 73 and accompanying text.

81. *See, e.g.*, Burns, *supra* note 2, at 530 (citing Brown v. Butler, 811 F.2d 938, 941 (5th Cir. 1987); Baumann v. United States, 692 F.2d 565, 578 (9th Cir. 1982)).

82. *See* United States v. Tyler, 281 F.3d 84, 96 (3d Cir. 2002) ("[N]o court has found the Sixth Amendment right to counsel applies to routine presentence interviews."); *see also* United States v. Gordon, 4 F.3d 1567, 1571 (10th Cir. 1993) ("Of the circuits that have directly addressed the issue, all have held that a criminal defendant does not enjoy a Sixth Amendment right to counsel at the presentence interview state. No circuit has explicitly adopted the contrary position."). *But see In re* Carter, 848 A.2d. 281, 301 (Vt. 2004) (declaring that a Sixth Amendment right to counsel applies to presentence interviews with probation officers).

83. *See* LAFAVE ET AL., *supra* note 6, § 6.4(e) nn.106–09.

84. Hoffman v. Arave, 236 F.3d 523, 540 (9th Cir. 2001).

85. *See* United States v. Dingle, Nos. 90-5083, 90-5084, 1991 WL 217017, at *3 (4th Cir. Oct. 28, 1991); United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991); United States v. Hicks, 948 F.3d 877, 885–86 (4th Cir. 1991).

86. *See* United States v. Woods, 907 F.2d 1540, 1543 (5th Cir. 1990); Brown v. Butler, 811 F.2d 938, 941 (5th Cir. 1987).

87. *See* United States v. Tisdale, 952 F.2d 934, 939–40 (6th Cir. 1992).

88. *See* United States v. Jackson, 886 F.2d 838, 844 (7th Cir. 1989) ("A federal probation officer is an extension of the court and not an agent of the government. The probation officer does not have an adversarial role in the sentencing proceedings.").

89. *See* United States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir. 1985); Baumann v. United States, 692 F.2d 565, 578 (9th Cir. 1982).

Tenth[90] Circuits have all held that no constitutional right to counsel exists at routine, presentence interviews in non-capital cases.[91] For example, the Seventh Circuit held in *United States v. Jackson*,[92] decided after the adoption of the Guidelines, that no Sixth Amendment right to counsel exists at a presentence interview because that interview is not adversarial in nature, and therefore is not a "critical stage of the prosecution" in which the defendant confronts the prosecutor or an agent of the prosecutor.[93] Many cases after *Jackson* adopted this reasoning.[94]

Despite the fact that no federal court has applied a Sixth Amendment right to counsel to presentence interviews, several circuits have acknowledged the increased importance of the presentence interviews under the Guidelines.[95] Still, these circuits declined to acknowledge a constitutional right to counsel. The Ninth Circuit previously held that a right to counsel did not exist at a non-capital presentence interview,[96] but it has more recently exercised its supervisory power to require that probation officers permit attorneys to attend the presentence interview.[97] The Sixth Circuit,[98] agreeing with the Ninth Circuit's solution, also declined to extend the constitutional right.

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90. *See* United States v. Gordon, 4 F.3d 1567, 1571–72 (10th Cir. 1993) ("Because the probation officer does not act on behalf of the government, we join those circuits that have concluded that the presentence interview is not a critical stage of the proceeding within the meaning of the Sixth Amendment." (citing *Tisdale*, 952 F.2d at 939–40; *Jackson*, 886 F.2d at 843–44)); United States v. Smith, 929 F.2d 1453, 1458 (10th Cir. 1991); United States v. Rogers, 921 F.2d 975, 979–82 (10th Cir. 1990).

91. The Eleventh Circuit has not yet ruled directly on the issue. *See* United States v. Simpson, 904 F.2d 607, 611 (11th Cir. 1990) ("[T]hree circuits have rejected this argument on the ground that a presentence interview by a probation officer is not a critical stage of the criminal proceedings at which the Sixth Amendment ensures representation.").

92. 886 F.2d 838 (7th Cir. 1989).

93. *Id.* at 843.

94. *See, e.g.*, *Rogers*, 912 F.2d at 979–81; *Tisdale*, 952 F.2d at 940 ("We agree with the prevailing analysis and, in particular, with Judge Kanne's well-reasoned opinion in *United States v. Jackson*."); United States v. Dingle, Nos. 90-5083, 90-5084, 1991 WL 217017, at *3 (4th Cir. Oct. 28, 1991); *see also* Burns, *supra* note 2, at 553 (describing how other circuits have addressed the issue of whether a presentence interview is a critical stage requiring the right to counsel by adopting *Jackson*'s reasoning).

95. The First, Second, Third, and Sixth Circuits have expressed an inclination to apply a right to counsel to presentence interviews with probation officers, but have not directly ruled on the issue. *See, e.g.*, United States v. Tyler, 281 F.3d 84, 98 (3d Cir. 2002); United States v. Ocasio-Rivera, 991 F.2d 1, 3 n.3 (1st Cir. 1993) (declining to rule on the constitutional issue because it was not timely raised, but opting to "leave the question open"); United States v. Cortes, 922 F.2d 123, 127 (2d Cir. 1990) (noting that, although under the Guidelines a "presentence interview may now be a 'critical stage' of the proceedings necessitating the participation of counsel, . . . [w]e need not decide this issue . . . because . . . Cortes's right was not violated"); United States v. Saenz, 915 F.2d 1046, 1048–49 (6th Cir. 1990) ("[W]e would be inclined to reject the view of some courts that a defendant's Sixth Amendment right to counsel at his sentencing does not extend to the presentence interview because the interview is not a critical stage of a criminal proceeding. . . . However, we need not finally decide this issue because . . . the defendant's right was not violated in the instant case.").

96. *See, e.g.*, United States v. Gonzalez–Mares, 752 F.2d 1485, 1489 (9th Cir. 1985); Baumann v. United States, 692 F.2d 565, 578 (9th Cir. 1982).

97. United States v. Herrera-Figueroa, 918 F.2d 1430, 1433 (9th Cir. 1990).

98. *Tisdale*, 952 F.2d at 939–40.

The Tenth Circuit, in *United States v. Gordon*, "join[ed] those circuits that have concluded that the presentence interview is not a critical stage of the proceeding within the meaning of the Sixth Amendment."[99] The defendant in *Gordon* alleged that due to his counsel's ineffective assistance at the presentence interview, he attempted to minimize his role in the offense, and therefore did not receive the two-level downward adjustment for acceptance of responsibility.[100] The court reasoned that a presentence interview with a probation officer is not a critical stage under Sixth Amendment jurisprudence because probation officers have "no adversarial role in the sentencing proceedings; rather, the officer acts as a neutral information gatherer for the judge."[101] The court noted that while the Guidelines have changed the sentencing process, the Guidelines have not changed the probation officer's role as a non-adversarial agent of the court.[102]

It was against this backdrop that Mr. Washington appealed to the Tenth Circuit in *United States v. Washington*, alleging that his trial counsel was constitutionally deficient for his failure to sufficiently advise Mr. Washington about the nature and purpose of the presentence interview.[103]

II. *UNITED STATES V. WASHINGTON*

A. Procedural Posture

In May 1991, a jury convicted Mr. Patrick E. Washington on three counts of possessing and distributing 61.98 grams of cocaine base, a violation of 21 U.S.C. § 831(a)(1).[104] Mr. Washington had retained attorney Gary Long, II, to represent him throughout the trial.[105]

Mr. Long was not present at Mr. Washington's presentence interview with the probation officer and did not advise Mr. Washington about the purpose of the interview or the potential legal consequences of the report that it generates.[106] At the presentence interview, Mr. Washington admitted to an increased drug distribution sales pattern of cocaine base.[107] Because of this incriminating admission, and additional information from a confidential government informant who reported that Mr. Washington possessed and distributed additional cocaine base, the proba-

99. 4 F.3d 1567, 1572 (10th Cir. 1993) (citing *Tisdale*, 952 F.2d at 939–40; United States v. Jackson, 886 F.2d 838, 845 (7th Cir. 1998)).

100. *Id.* at 1571 (noting the defendant claimed his counsel failed to inform of his Fifth Amendment privilege against self-incrimination during his presentence interview with a probation officer).

101. *Id.* at 1571–72 (citing *Jackson*, 886 F.2d at 844).

102. *Id.* at 1572.

103. 619 F.3d 1252, 1253 (10th Cir. 2010).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (noting Mr. Washington admitted to distributing between 0.5 and 1.0 kilograms of cocaine base every three weeks during three months in 1990).

tion officer's presentence report recommended a base offense level significantly higher than it would have been without the incriminating admissions.[108] The district court relied on the presentence report and agreed with the probation officer's base offense level recommendation.[109] The court also imposed two two-level enhancements[110] and sentenced Mr. Washington to a total of 120 years.[111]

Mr. Washington appealed his conviction and sentence to the Tenth Circuit Court of Appeals with the assistance of a public defender.[112] Mr. Long failed to properly prosecute the appeal and was disbarred, during the course of the appeal, from practicing before the Tenth Circuit.[113] The Tenth Circuit affirmed Mr. Washington's conviction and sentence.[114]

In 1994, Mr. Washington filed the first in a series of post-conviction motions seeking various types of relief from the district court's judgment.[115] Mr. Washington's last motion, a *pro se* § 2255 habeas motion, alleged that his sentence was improper due to Mr. Long's deficient performance.[116] Mr. Washington claimed that Mr. Long's performance was constitutionally deficient when he advised Mr. Washington to proceed to trial rather than accept a plea deal for a ten-year sentence.[117] In 2008, the district court appointed Mr. Schweiker as counsel to represent Mr. Washington.[118] The district court then held an evidentiary hearing on Mr.

108. *Id.* at 1253–54 (stating that the probation officer added an additional 2.5 kilograms of cocaine base attributable to Mr. Washington because of his admissions at the presentence hearing, and then added the additional 4 kilograms of cocaine base because of the informant's statement, for a total distribution of 6.5 kilograms of cocaine base, and therefore recommended an applicable base offense level of 40 pursuant to the USSG).

109. *Id.* at 1254.

110. *Id.* (noting that one enhancement was for obstruction of justice—before trial, Mr. Washington attempted to kill the informant—and one was for Mr. Washington's role in the offense as a leader or organizer of a group with more than five participants).

111. *Id.* ("The district court sentenced Mr. Washington to three forty-year terms of imprisonment to be served consecutively . . . .").

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The district court recharacterized Mr. Washington's first post-conviction motion, seeking information under the Freedom of Information Act, 5 U.S.C § 552, as a habeas petition pursuant to 18 U.S.C. § 2255, and then denied it. *Id.* In 1997, Mr. Washington filed a § 2255 motion, which the district court treated as a request to file a second or successive § 2255 motion and transferred it to the Tenth Circuit, who denied authorization. *Id.* Then, Mr. Washington filed a Rule 60(b)(6) motion seeking relief from the district court's recharacterization of his first post-conviction motion, which the district court denied, and the Tenth Circuit vacated and denied authorization to file. *Id.* In 2002, Mr. Washington filed a motion seeking a sentence reduction due to amendments to the sentencing guidelines. *Id.* The district court granted Mr. Washington's motion and reduced his sentence to thirty years for each count, served concurrently. *Id.* Mr. Washington renewed his Rule 60(b)(5) motion seeking relief from the district court's recharacterization of his first post-conviction motion, which the district court denied for failure to meet the statutory requirements. *Id.* at 1255. The Tenth Circuit reversed and remanded, permitting Mr. Washington to start anew and file a § 2255 motion because its recharacterization of his first post-conviction motion as a § 2255 motion prevented Mr. Washington from attacking his convictions and sentences. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

Washington's § 2255 motion.[119] During that hearing, Mr. Schweiker alleged ineffective assistance of counsel for Mr. Long's failure to accompany Mr. Washington to the presentence interview or advise Mr. Washington of the consequence of the interview.[120] Despite objections from the government as to the claim's untimeliness, the district court issued an order allowing Mr. Washington to proceed with his new ineffective assistance of counsel claim.[121] The court held a second evidentiary hearing on Mr. Washington's § 2255 claim and, in November 2008, issued an order denying Mr. Washington's ineffective assistance of counsel claims as to the plea deal and presentence interview.[122] In denying Washington's ineffective assistance of counsel claim, the district court said it was inclined to grant the motion because "the consequences of [the presentence] meeting had more impact on the defendant's sentence than the trial itself"[123] and because of Mr. Long's "complete lack of understanding of the federal sentencing structure."[124] The district court ultimately upheld *Gordon* while suggesting the need to re-examine its holding.[125]

Mr. Washington appealed the district court's decision.[126] The Tenth Circuit granted Mr. Washington a Certificate of Appealability (COA) and expanded the COA's scope after oral arguments to allow Mr. Washington to proceed on the second question presented in his brief.[127] The Tenth Circuit considered two contentions raised by Mr. Washington: (1) whether Mr. Washington's trial counsel was constitutionally deficient for failing to properly advise Mr. Washington about the government's plea offer; and (2) whether Mr. Washington's trial counsel's representation was constitutionally deficient for his failure to understand the importance of relevant conduct on Mr. Washington's potential sentence and for his failure to advise Mr. Washington about the nature and purpose of the presentence interview.[128] The court also asked the parties to address whether Mr. Washington was prejudiced by Mr. Long's performance.[129]

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1258 (alteration in original) (quoting District Court Order at 35–36 n.4, United States v. Washington (D. Colo. Nov. 5, 2008)).
124. *Id.* at 1257 (quoting District Court Order, *supra* note 123, at 35–36 n.4).
125. *Id.* at 1257 ("[G]iven the clarity of the Tenth Circuit Court's pronouncement in *Gordon*, this court cannot in good faith distinguish the facts to reach a different result. With respect, perhaps it may be time to reexamine *Gordon*." (quoting District Court Order, *supra* note 123, at 35–36 n.4)).
126. *Id.* at 1256.
127. *Id.*
128. *Id.* at 1256–57.
129. *Id.* at 1256.

B. The Tenth Circuit's Decision

1. Majority Opinion

In a 2-1 decision, the Tenth Circuit reversed and remanded the district court's order denying Mr. Washington's § 2255 motion.[130] The Tenth Circuit agreed with the district court that Mr. Washington failed to show that Mr. Long's performance was constitutionally deficient for improperly advising Mr. Washington about the government's plea offer.[131] However, the Tenth Circuit agreed with Mr. Washington that Mr. Long's performance was constitutionally deficient under *Strickland v. Washington* when Mr. Long failed to understand the basic mechanics of the sentencing guidelines and failed to advise Mr. Washington about the purpose and legal significance of the presentence interview.[132] Further, the court found that Mr. Washington was prejudiced by this deficient conduct because it was reasonably probable that, but for Mr. Long's deficient performance, Mr. Washington would have received a lower sentence.[133]

The Tenth Circuit acknowledged the district court opinion, which stated an "inclination," but inability to grant Mr. Washington's motion because of *Gordon*.[134] The majority distinguished *Gordon* from *Washington*, holding that *Gordon* dealt with counsel's miscalculation of the impact of relevant conduct on defendant's sentence, while the present case dealt with counsel's failure to inform Mr. Washington about the impact of relevant conduct on his sentence.[135] Disagreeing with the district court's interpretation of *Gordon*,[136] the Tenth Circuit held that failure to "understand the mechanics of the sentencing guidelines," unlike ordinary errors in applying sentencing guidelines, may rise to the level of constitutionally deficient performance.[137]

The court reasoned that "[e]ven though the Court has limited the necessity for counsel's *presence* as the spokesman for the defendant to critical stages where defendant's expert adversary is present, the Constitution's guarantee of counsel's guiding hand and advice regarding every

130. *Id.* at 1263.

131. *Id.* at 1256–57 (noting that Mr. Washington failed to show that his counsel's allegedly deficient performance prejudiced him because there was ample support in the record for the district court's finding that the government never made a firm plea offer).

132. *Id.* at 1253.

133. *Id.* at 1263 (noting that without Mr. Washington's voluntary admissions during his presentence interview, he would have qualified for the 2004 Crack Cocaine Amendment, resulting in a two-level downward adjustment).

134. *Id.* at 1257 (citing United States v. Gordon, 4 F.3d 1567, 1571–72 (10th Cir. 1993)).

135. *Id.* at 1258–59 (arguing that *Gordon* merely held that counsel's performance cannot be constitutionally deficient in miscalculating the impact of relevant conduct upon sentencing).

136. The district court interpreted *Gordon* as foreclosing the possibility that counsel's failure to understand the basic structure of the sentencing guidelines could rise to the level of constitutionally deficient under *Strickland v. Washington*. *See id.*

137. *Id.* at 1259 (citing United States v. Contreras-Castellanos, 191 F. App'x 773, 776 n.1 (10th Cir. 2006)).

step of his defense proceedings remains intact."[138] Accordingly, the court held that while Mr. Washington did not have a right to the presence of counsel at the presentence hearing, he had a right to counsel's advice about the purpose of the presentence interview and the potential impact of statements made about relevant conduct.[139]

2. Dissent

Judge Tacha dissented in part, and argued that *Gordon* foreclosed Mr. Washington's claim because in that case the court held that a "presentence interview is not a critical stage of the [criminal] proceeding within the meaning of the Sixth Amendment."[140] Judge Tacha further argued that the majority's attempt to attach this holding solely to the "precise moment of the presentence interview" itself, and not to the advice from counsel before the presentence interview, creates an arbitrary distinction.[141] Judge Tacha concluded by remarking, "the propriety of [*Gordon*'s] holding may be worthy of review."[142]

III. ANALYSIS

Although *Washington*'s holding recognizes the increased importance and the potential for prejudice of presentence interviews under the Guidelines, in refusing to overturn *Gordon*, the court failed to adequately protect defendants' Sixth Amendment right to counsel. Furthermore, *Washington*'s holding created an unworkable rule that fails to ensure the long sought-after fairness in judicial proceedings. Under the Guidelines, presentence interviews with probation officers are a "critical" stage under Sixth Amendment jurisprudence. As such, the Tenth Circuit should overturn *Gordon* and extend the Sixth Amendment right to counsel to presentence interviews with probation officers.

A. Implications of United States v. Washington*—An Unworkable Rule that Fails to Protect a Defendant's Sixth Amendment Right to Counsel*

The Tenth Circuit has held that in non-critical stages of criminal proceedings, the Sixth Amendment does not guarantee criminal defendants a right to counsel's presence.[143] However, in *Washington*, the court held that the Sixth Amendment does guarantee criminal defendants a right to counsel's guidance and advice at every stage of the proceeding,[144] including "counsel's advice regarding the impact of the relevant

138. *Id.* at 1260 (citations omitted).
139. *Id.*
140. *Id.* at 1263 (Tacha, J., dissenting in part) (alteration in original) (quoting United States v. Gordon, 4 F.3d 1567, 1572 (10th Cir. 1993)) (internal quotation marks omitted).
141. *Id.*
142. *Id.* at 1264.
143. *Gordon*, 4 F.3d at 1571–72; United States v. Smith, 929 F.2d 1453, 1458 (10th Cir. 1991); United States. v. Rogers, 921 F.2d 975, 981–82 (10th Cir. 1990).
144. *Washington*, 619 F.3d at 1260.

conduct on the sentencing process, as well as the nature and purpose of the presentence interview."[145]

Washington's holding places the Tenth Circuit into the category of courts that have acknowledged the increased importance of presentence interviews with probation officers under the Guidelines, but have declined to extend the Sixth Amendment right to counsel's presence at the proceeding, and in doing so, fall short of protecting defendants' constitutional right to counsel.[146] Both *United States v. Herrera-Figueroa*,[147] where the Ninth Circuit exercised its supervisory power to require that probation officers permit attorneys to attend the presentence interview,[148] and *United States v. Tisdale*,[149] where the Sixth Circuit agreed with the Ninth Circuit's solution,[150] illustrate this short-coming. The courts' reasoning—that because defense counsel is permitted at the presentence interview, it is unlikely that issues would arise from counsel's failure to attend[151]—fails to adequately protect defendants' right to counsel because "extending the courtesy to counsel does nothing to extend a right or even a voice to the truly interested party, the defendant."[152] Similarly, *Washington*'s holding fails to adequately protect a criminal defendant's Sixth Amendment right to counsel because counsel's guidance and advice before a presentence interview, in addition to counsel's presence at the interview itself, are necessary to ensure the integrity of criminal proceedings.

The Tenth Circuit's holding in *Washington* will be challenging to administer. This is because the rule only works retrospectively, and because it will be difficult to determine whether counsel's advice was sufficient. Courts will only be able to apply *Washington*'s holding after a criminal defendant challenges his counsel's assistance as to a completed stage in the criminal proceeding.[153] A court will then have to undergo a retrospective inquiry into whether the defendant received sufficient guidance and advice about that stage,[154] a determination that will be more challenging than merely identifying whether counsel was present at a stage.

145. *Id.* at 1261.
146. *See supra* notes 95–98 and accompanying text.
147. 918 F.2d 1430 (9th Cir. 1990).
148. *Id.* at 1433.
149. 952 F.2d 934 (6th Cir. 1992).
150. *Id.* at 939–40 ("[R]equiring probation officers to honor a defendant's request that his attorney be permitted to accompany him to the presentence interview will do much to ensure fairness at a minimal cost to the system." (quoting *Herrara-Figueroa*, 918 F.2d at 1434) (internal quotation marks omitted)).
151. *Id.*
152. Metzger, *supra* note 2, at 1681.
153. *See* United States v. Washington, 619 F.3d 1252, 1254–55 (10th Cir. 2010) (describing the process of Mr. Washington's post-conviction motions).
154. *See, e.g.*, *id.* at 1259.

Administered pursuant to the Guidelines, presentence interviews with a probation officer are a critical stage under the Sixth Amendment.[155] The Tenth Circuit's refusal to extend the right to counsel to this increasingly important stage of criminal proceedings undermines the protections guaranteed by the Sixth Amendment which seek to preserve the integrity of the judicial process,[156] and undoes the consistency and fairness sought by the enactment of the Guidelines.[157] Both the majority and the dissent called for *Gordon*'s re-examination, and the Tenth Circuit should heed these calls[158] and extend the Sixth Amendment right to counsel to both the presentence interview and to counsel's advice before the interview.

B. *Presentence Interviews Are a Critical Stage of Criminal Proceedings Under Sixth Amendment Jurisprudence*

A presentence interview with a probation officer is a critical stage under Sixth Amendment jurisprudence because: (1) it occurs after the initiation of adversarial proceedings; (2) the defendant confronts an adversary; (3) substantial prejudice is inherent in presentence interviews conducted under the Guidelines; and (4) counsel's presence at the stage would help the defendant mitigate or avoid the prejudice. Indeed, the adoption of the Guidelines has created "new contexts . . . presenting the same dangers that gave birth initially to the right itself."[159] For example, the same characteristics the Court relied on in holding that pretrial lineups and sentencing are critical stages under the meaning of the Sixth Amendment are present in presentence interviews with probation officers.

In *United States v. Wade*,[160] the Supreme Court expanded the right to counsel to pretrial lineups after determining that counsel's presence was necessary to preserve the defendant's right to a fair trial.[161] In reaching this decision, the Court noted the prejudice that inheres to pretrial lineups because pretrial lineups are "riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[162] Additionally, the Court noted that the absence of counsel would undermine the defense's ability to meaningfully cross-examine

155. *Id.* at 1258; Metzger, *supra* note 2, at 1676–77.

156. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

157. *See* Burns, *supra* note 2, at 568–69.

158. *See Washington*, 619 F.3d at 1257 ("[P]erhaps it may be time to reexamine *Gordon*." (quoting District Court Order, *supra* note 123, at 35–36 n. 4)); *see also id.* at 1264 (Tacha, J., dissenting) (noting that the "continued propriety of [*Gordon's*] holding may be worthy of review").

159. United States v. Ash, 413 U.S. 300, 311 (1973).

160. 388 U.S. 218 (1967).

161. *Id.* at 227.

162. *Id.* at 228–29 (describing the numerous instances of misidentification and the potential for biased identification because of the manner in which the prosecution presents the accused in a pretrial line-up).

witnesses and provide effective assistance at the trial itself.[163] Further, the Court considered as relevant the inability to cure potential prejudice that exists in pretrial lineups. The Court noted that the defendant's "inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."[164] Lastly, the Court noted the ability of counsel's presence at a pretrial line-up to avoid such prejudice.[165]

Similarly, in *Mempa v. Rhay*,[166] the Supreme Court expanded the right to counsel to federal sentencing.[167] In defining sentencing as a "critical" stage, the Court was persuaded by the potential prejudice that is inherent in sentencing, noting the extreme influence the sentencing judge's recommendation has in determining the defendant's ultimate sentence.[168] Additionally, the Court considered as relevant the inability to cure prejudice: an unrepresented defendant will lose certain rights, such as the right to appeal, if not exercised at sentencing, and an unrepresented defendant will be unaware of opportunities to cure defects.[169]

Presentence interviews with probation officers are a "critical" stage under Sixth Amendment jurisprudence. First, presentence interviews occur after the initiation of formal adversary proceedings.[170] Presentence interviews occur after the trial's completion and before the court imposes its sentence.[171]

Secondly, in presentence interviews, the defendant confronts an adversary. The Guidelines have changed the role of probation officers,[172] shifting probation officers away from their non-adversarial role.[173] The expanded discretion afforded to probation officers contributes to the adversarial nature of presentence interviews.[174] Probation officers have been called the "guardians of the guidelines" because of their role in collecting the relevant factual information relating to the sentencing range, and in making sentencing recommendations to the judge.[175] Probation officers are required to make subjective determinations to arrive at a sin-

163. *Id.* at 230–32.
164. *Id.* at 231–32.
165. *Id.* at 236.
166. 389 U.S. 128 (1967).
167. *See id.* at 137.
168. *See id.* at 134–35.
169. *Id.* at 136.
170. *See* Metzger, *supra* note 2, at 1668 (describing various points where adversary proceedings commence: formal charge, preliminary hearing, indictment, information, or arraignment).
171. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.1(a) (2004).
172. *See supra* Part I.C.
173. *See* Metzger, *supra* note 2, at 1675.
174. *See id.*; *see also* Burns, *supra* note 2, at 544.
175. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1721–22 (1992) (internal quotation marks omitted); *see also* Metzger, *supra* note 2, at 1673.

gle version of facts to include in the presentence report, and then use that determination to recommend a sentencing range.[176] It is widely known that the judgment calls that probation officers must make may be influenced by the general attitude of the defendant.[177] Accordingly, crucial sentencing decisions previously made by judges acting under their experience and training in the law are now left to the discretion of probation officers.[178] Even one "single finding by the probation officer can significantly affect the ultimate sentencing range."[179]

Despite numerous cases holding that a presentence interview is not a "critical" stage due to the probation officer's neutrality as an agent of the court, rather than an arm of the prosecution,[180] an examination of presentence interviews compels the opposite conclusion.[181] Critics of the view that probation officers are neutral agents contend that probation officers' bias and familiarity with the prosecution have led to too many instances of upward adjustments in sentencing.[182] Although the Guidelines permit a downward departure for acceptance of responsibility,[183] most of the adjustments provided for in the Guidelines are upward departures.[184] Because of this, the majority of questions probation officers ask a defendant at a presentence interview only can have an adverse impact on the defendant, dictating the probation officer's role not as a "neutral fact gatherer," but rather as an adversary.[185] The probation officer's role as an adversary is underscored by the practice of probation officers sitting at the prosecutor's table in court, giving the impression that the probation officer is a "surrogate prosecutor[].'"[186] When taken together, these

176. *See, e.g.*, United States v. Saenz, 915 F.2d 1046, 1048 n.2 (6th Cir. 1990) ("The probation officer's recommendations, which are based on his exercise of his judgment, become the point of departure for disputes concerning the underlying facts of an offense as well as sentencing determinations . . . ."); Burns, *supra* note 2, at 544; Donald A. Purdy, Jr. & Gustavo A. Gelpi, *Federal Sentencing Advocacy: Tips for Beginning Practitioners*, 11 CRIM. JUST. 26, 30 (1997) ("[E]xplain to your client the probation officer's role as a key player in the sentencing process and that the probation officer's perceptions of the client during the presentence interview may ultimately result in a given recommendation to the court . . . .").

177. *See, e.g.*, Purdy & Gelpi, *supra* note 176, at 30 ("Instruct your client to always be courteous towards the [probation] officer.").

178. *See* Burns, *supra* note 2, at 545 ("[U]nder the Guidelines . . . many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers . . . ." (quoting United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part))).

179. United States v. Herrera-Figueroa, 918 F.2d 1430, 1434 (9th Cir. 1990).

180. *See supra* notes 82–90 and accompanying text.

181. *See* Metzger, *supra* note 2, at 1673; Burns, *supra* note 2, at 561 (discussing the "faulty assumption that probation officers do not operate as adversaries").

182. *See* Burns, *supra* note 2, at 562–65.

183. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2004) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

184. Burns, *supra* note 2, at 564 (citing U.S. SENTENCING GUIDELINES MANUAL ch. 3).

185. *Id.*

186. United States v. Turner, 203 F.3d 1010, 1014 (7th Cir. 2000) (suggesting that a separate table could be placed in the courtroom to ensure the probation officer appears equally available to the judge and both parties).

circumstances suggest that probation officers are part of the prosecution team.[187]

Third, substantial prejudice is inherent in presentence interviews conducted under the Guidelines because of (1) the increased importance of presentence interview; (2) the technical complexity of the Guidelines; (3) the trial-like nature of presentence interviews; and (4) the inability to cure potential prejudice.

1. Increased Importance

Under the Guidelines, presentence interviews have an expanded importance. The probation officer uses the interview to create a presentence report, which plays a central role in determining a defendant's sentence. Additionally, judges are increasingly relying on the substance and recommendations contained in the report.[188] Further, the presentence report continues to impact the defendant after sentencing.[189] For example, the Bureau of Prisons relies on the presentence report for many of its decisions.[190] Also, the presentence report is required to be part of the record on appeal.[191]

2. Technical Complexity

Additionally, the technical complexity present in the Guidelines increases the likelihood that an unrepresented defendant will commit sentencing suicide, and make unnecessary admissions that can result in upward adjustments to his sentence. An unrepresented defendant is unlikely to understand the implications of his admissions at a presentence interview,[192] which can result in upward variations of months or years in the defendant's sentence.[193] The technical complexity of the Guidelines can be illustrated by providing a few examples of how a defendant's admissions, non-admissions, or conduct during a presentence interview can have a significant effect on the defendant's sentence.

For example, during a presentence interview with a probation officer, if a defendant provides "materially false information to a probation officer in respect to a presentence or other investigation for the court,"

187. *See* Burns, *supra* note 2, at 561–64.

188. *See id*. at 545.

189. *See* THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING & PRACTICE § 6A1.1 cmt. 3 (2012 ed.)

190. *See id.* (explaining the Bureau of Prisons' reliance on the presentence report as the key and sometimes exclusive source of information about the defendant for decisions such as a defendant's assignment to a correctional facility, assessment of the incarceration fee, and eligibility for early release from a drug treatment program).

191. *See* Metzger, *supra* note 2, at 1676 (citing 18 U.S.C. § 3742(d)(2) (2003)).

192. *See id.* at 1679 ("[A] defendant's 'casual, ill-considered or inaccurate answers, offered [at the presentence interview] without a full understanding of the potential consequences, may result in a substantial increase in the recommended period of incarceration.'" (quoting United States v. Herrera-Figueroa, 918 F.2d 1430, 1436 (9th Cir. 1990))).

193. Burns, *supra* note 2, at 528.

the defendant can receive an increase in the offense level by two levels for obstructing or impeding the administration of justice.[194] Two Ninth Circuit cases demonstrate the gravity of a defendant's admission during a presentence interview, in which a mischaracterization of the defendant's criminal record to a probation officer resulted in the two-level increase for obstruction of justice.[195]

Additionally, in arriving at a sentencing recommendation, a probation officer may consider criminal conduct for which the defendant has not been convicted.[196] The Guidelines give the court considerable discretion to "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."[197] Accordingly, an unrepresented criminal defendant may admit, as Mr. Washington did, to crimes for which he was not convicted, and such admissions may result in an increase in his sentencing recommendation. Furthermore, an unrepresented defendant may admit to other background information relating to the character and conduct of the defendant that can influence the probation officer's sentencing recommendation.

3. Trial-Like Nature

Furthermore, the "trial-like" nature of the presentence interview supports the conclusion that the presentence interview, upon which the result of the sentencing proceeding truly rests, is a critical stage requiring counsel.[198] Because of the potential harm resulting from the presentence interview, defense attorneys are often encouraged to treat a presentence interview as if it were a trial.[199] The defense attorney has two weeks to object to the probation officer's presentence report, and the court will resolve any remaining dispute by hearing arguments from both parties.[200] Such hearings often turn on the word of one party against the other, and, unfortunately, the court's familiarity with the probation officer as an

194. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. 4(H) (2011).

195. *Herrera-Figueroa*, 918 F.2d at 1435 (citing United States v. Christman, 894 F.2d 339, 342 (9th Cir. 1990); United States v. Baker, 894 F.2d 1083, 1084 (9th Cir. 1990) (noting that the defendant received a two-point increase in offense level for mischaracterizing his record even though the probation officer had access to the defendant's record while the defendant did not)).

196. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. 1 (2010) ("The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.").

197. *See id.* § 1B1.4 (2004).

198. *See* United States v. Ash, 413 U.S. 300, 314 (1973).

199. *See* Purdy & Gelpi, *supra* note 176, at 29 ("[C]onduct yourself as a professional in your dealings with the probation officer . . .; convey an image of informed, prepared professionalism, and supply written documentation of your position on guideline application (and dispute resolution) with proposed findings of fact and conclusions of law.").

200. Metzger, *supra* note 2, at 1674–75.

agent of the court can lead the court to credit the probation officer's testimony.[201]

4. Inability to Cure Defects

Lastly, the "irrevocable consequences" of admissions made and conduct at a presentence interview further add support to the critical nature of this stage of proceedings.[202] It is difficult for defendants to challenge the contents of the presentence report,[203] increasing the potential for prejudice in presentence interviews. In *United States v. Ash*,[204] the Supreme Court emphasized as important the extent to which an opportunity exists to "cure defects" caused by counsel's absence.[205] A defense attorney who was not present at the presentence interview will have a difficult time successfully challenging information contained in the presentence report at a hearing, given the deference to probation officers' testimony.[206] Additionally, because probation officers often make subjective determinations in the presentence report, it is difficult for a defense attorney who was not present at the interview to effectively challenge these determinations.[207] The inability to cure defects caused by the absence of counsel at a presentence interview illustrates why merely extending the right to counsel's advice before the interview, as the Tenth Circuit did in *Washington*, fails to adequately remedy the possibility of prejudice inherent in presentence interviews.

Fourth, the ability of counsel's presence at the presentence interviews to help the defendant mitigate or avoid the prejudice illustrates the critical nature of the proceeding. The presence of counsel at a presentence interview can significantly reduce the risk of the defendant committing sentencing suicide,[208] or prejudicing himself by making statements or acting in a manner that leads to upward adjustments in the sentencing range. Case law demonstrates that "an uncounselled defendant runs the risk of unwittingly increasing his or her sentence."[209] *Washington* illustrates this point effectively. It is difficult to imagine that with

201. *Id.* at 1678, 1696 (questioning "how counsel could effectively rebut claims about statements her client made, or the demeanor her client had, at a presentence interview that counsel did not attend").

202. *Id.* at 1663.

203. *See id.* at 1674.

204. 413 U.S. 300 (1973).

205. *Id.* at 315–16 (noting that if such an opportunity to cure defects caused by counsel's absence exists, despite the fact that the risks inherent in a particular confrontation will still remain, the stage is not critical).

206. Metzger, *supra* note 2, at 1696.

207. *Id.* at 1678 n.275 (discussing the difficulty that a defense attorney, who was not present at a presentence interview, will have in effectively cross-examining the probation officer to undermine his description of facts or conduct included in the report).

208. *In re* Carter, 848 A.2d 281, 296 (Vt. 2004) (discussing petitioner's statements at his presentence interview where "in a single paragraph he ensured that he would spend virtually all of his adult life in jail").

209. *Id.* at 298; *see also* United States v. Herrera-Figueroa, 918 F.2d 1430, 1434 (9th Cir. 1990).

counsel present at his presentence interview, Mr. Washington would have admitted to his previous drug dealing. Indeed, Washington "had absolutely nothing to gain and a great deal to lose by volunteering the information."[210]

CONCLUSION

The Sixth Amendment right to counsel is an evolving doctrine, and the changes in federal sentencing due to the adoption of the Guidelines compel the right to counsel be expanded to presentence interviews with probation officers. In *Washington*, the Tenth Circuit recognized the importance of presentence interviews and the potential for prejudice inherent in post-Guideline presentence interviews. However, in refusing to overturn *Gordon*, the court created an unworkable rule that fails to ensure the long sought-after fairness in judicial proceedings and fails to adequately protect defendants' Sixth Amendment right to counsel.

Elizabeth Phillips[*]

210. United States v. Washington, 619 F.3d 1252, 1257 (2010) (quoting District Court Order, *supra* note 123, at 32).

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