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2 that's why it's appropriate, I think, to apply due  
3 process. The defendant has a liberty interest in the  
4 length of his sentence. He has a -- he has a due  
5 process interest in a fundamentally fair sentencing  
6 proceeding. And so we think due process nicely captures  
7 that interest the defendant has.

8 And so the Court has said before -- before  
9 rest, before speedy trial kicks in, due process applies.  
10 And it provides a right. And we think that after the  
11 defendant no longer has the interest protected by the  
12 Speedy Trial Clause, due process can, again, provide the  
13 proper approach.

14 If there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Rowley, you have 10 minutes remaining.

17 REBUTTAL ARGUMENT OF FRED A. ROWLEY, JR.

18 ON BEHALF OF THE PETITIONER

19 MR. ROWLEY: The standard for prejudice  
20 articulated by the United States shows well why due  
21 process protections are ill-suited to the specific  
22 interests protected by the speedy trial right. The  
23 United States suggested that the defendant would have to  
24 show that the outcome would have been different,  
25 consistent with *Lovasco*. The only form of prejudice

1 that would be cognizable under that test is an effect on  
2 the defendant's defense at sentence.

3 But as Barker illustrates, and Smith v.  
4 Hooey also illustrates, there are other forms of  
5 prejudice that are specific to the Speedy Trial Clause  
6 that may apply to a defendant and, indeed, may apply to  
7 a defendant even after they've been convicted.

8 So, for example, in Smith v. Hooey, the  
9 defendant had already been incarcerated on a prior  
10 Federal charge. That defendant's liberty interests were  
11 already impinged, and yet the Court noted that the delay  
12 from the follow-on prosecution could still prejudice  
13 him.

14 So this notion that you would apply the due  
15 process test or the Lovasco test and require a showing,  
16 an affirmative showing that the defendant would have had  
17 a different outcome at sentencing but for the delay  
18 really highlights why due process is inadequately  
19 suited.

20 Justice Kagan's question points to another  
21 anomaly in the test that has been proposed by the  
22 government because of this focus on liberty interests.  
23 And in -- in Smith v. Hooey, the defendant had  
24 already --

25 JUSTICE KENNEDY: Or I suppose if it isn't

1 liberty, it's not incorporated under the Fourteenth  
2 Amendment, anyway.

3 MR. ROWLEY: Yes, Your Honor, but -- but --

4 JUSTICE KENNEDY: I mean, the Sixth  
5 Amendment applies only to the Federal government, and  
6 it's only because of the Fourteenth Amendment liberty  
7 that it applies to the States. So liberty is involved.

8 MR. ROWLEY: Yes, Your Honor, but the -- the  
9 position that the State of Montana and the United States  
10 has taken is that at sentencing, once a defendant has  
11 been convicted, they don't have a specific liberty  
12 interest of the kind that was recognized in Barker and  
13 the kind that was recognized in Smith v. Hooy; and that  
14 is the interest in rehabilitation, in accessing  
15 rehabilitation programs that could be affected by a  
16 delay in a prosecution.

17 JUSTICE BREYER: Isn't -- his liberty is  
18 certainly affected. He's in jail. So he's sitting  
19 there in jail. Tell him you're free. I don't think he  
20 believes it.

21 MR. ROWLEY: Well --

22 JUSTICE BREYER: And -- and then the  
23 question is: Is -- at some point, is being in jail a  
24 deprivation of his liberty without due process? Because  
25 the Due Process Clause would require application of

1 sentencing under -- and when it's -- it's not due  
2 process when, say, Barker v. Wingo or some violation is  
3 violated. I don't see a problem with liberty.

4 MR. ROWLEY: Well, Your Honor, the point is  
5 simply that the Speedy Trial test that the court  
6 articulated in Barker is better suited to the specific  
7 forms of prejudice that are at issue in this case,  
8 because it addresses this concern with even a defendant  
9 who's been guilty, accessing rehabilitation programs, or  
10 the anxiety that that defendant may feel at the  
11 sentencing stage.

12 And this gets to another point that the  
13 United States made, and that is that -- that the  
14 conviction changes everything, because the concerns that  
15 the court articulated in Barker may yet be more  
16 significant at the sentencing stage, given that most  
17 convictions today result from guilty pleas.

18 And so the fact that a defendant -- their  
19 defense may be impaired by a delay in criminal  
20 proceedings, may be more significant at the sentencing  
21 stage because it may be the only place where the  
22 defendant challenges an upward adjustment or contests  
23 facts.

24 The fact that the defendant may need to  
25 access rehabilitation programs may be more pronounced at

1 sentencing because the defendant's already been  
2 convicted, they're going to serve time, and they want to  
3 get access to the programs that they'll need to get  
4 parole as soon as -- as possible.

5 So we submit that -- that Barker is the  
6 appropriate test; that if the Court agrees that  
7 Barker -- Barker's the appropriate framework, that the  
8 proper right to ground that analysis in is the Sixth  
9 Amendment and not the Due Process Clause.

10 And that is particularly so because of the  
11 antecedents of the Due Process Clause which -- which  
12 apply, not just to the -- the guilt stage of the  
13 prosecution, but also to sentencing. And why? Because  
14 at -- at common law, and at the time of the Framing --  
15 Framing, sentencing and -- and the jury verdict were so  
16 closely bound.

17 And -- and the right is rooted in this  
18 practice of circuit justices riding into the countryside  
19 and resolving cases. Not just presiding over jury  
20 trials, but resolving cases. They had the power to hear  
21 and decide those cases. Their jurisdiction was from the  
22 beginning of the prosecution through the end.

23 So we think the Sixth Amendment is the  
24 appropriate basis for this right.

25 JUSTICE ALITO: Well, at the time of the

1 adoption of the Sixth Amendment, weren't post-trial but  
2 presentencing delays fairly common?

3 MR. ROWLEY: Your Honor, the Stevens  
4 Treatise says that at the time, at common law, that  
5 sentencing took place usually -- not always --

6 JUSTICE ALITO: Usually.

7 MR. ROWLEY: Usually soon thereafter.

8 JUSTICE ALITO: But -- but not always.

9 MR. ROWLEY: That's right, Your Honor. But  
10 as a general rule, the sentencing did take place soon  
11 after the -- the jury issued its verdict, and oftentimes  
12 immediately. And the cases that we catalog in our  
13 appendix illustrate that point.

14 But it's not just that. As the Court has  
15 recognized, the sentence was usually automatic. It  
16 flowed from the jury verdict. And so --

17 JUSTICE ALITO: But that's just not true as  
18 a historical matter.

19 MR. ROWLEY: Well, it --

20 JUSTICE ALITO: It's not true as a  
21 historical matter. If you look at the -- at the first  
22 criminal provisions that were enacted by Congress, they  
23 called for a range of -- of sentences, and the -- and  
24 the sentencing judge had to select within that range.

25 MR. ROWLEY: Justice Alito --

1 JUSTICE ALITO: I'm talking about the early  
2 18th century, not when you say that it was automatic.

3 MR. ROWLEY: Your Honor, I'm referring to  
4 the observations that this Court has made in the  
5 Apprendi line of cases. And it is the early part of the  
6 18th century, because as the Court has noted -- I'm  
7 sorry -- in the early part of the 19th century, because  
8 as the Court has noted, States started to adopt statutes  
9 that gave sentencing courts more discretion. But  
10 certainly at common law, certainly at the time of the  
11 Founding, the Court noted that typically the verdict  
12 dictated the sentence. And so this right that was  
13 created --

14 JUSTICE ALITO: That just isn't true. We  
15 don't have the right to change history. It isn't true.  
16 The first -- if you look at the very first criminal  
17 provisions that were enacted by Congress, the first  
18 Congress, they were not. It was not determined at  
19 sentencing.

20 MR. ROWLEY: Your Honor, many of the -- for  
21 many crimes, serious crimes at common law, and even for  
22 some that today we would consider not so serious,  
23 usually the penalty was death. And so there was this  
24 close relationship. The Court has called it a close  
25 relationship between the verdict and sentencing.

1                   And we submit that that, together with the  
2 way that the process was consulted -- was conducted,  
3 shows that the right was created to cover the whole  
4 proceeding, through the imposition or pronouncement of  
5 sentence.

6                   If there are no further questions.

7                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 The case is submitted.

9                   (Whereupon, at 12:04 p.m., the case in the  
10 above-entitled matter was submitted.)

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