A New "Critical Stage"? Federal Pretrial Services Interviews Meet the Sixth Amendment

Cole Press*

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to be represented by counsel during all "critical stages" of his or her proceedings. In the early 1980s, Congress established federal pretrial services throughout the country to interview defendants charged in federal court to ensure that they would receive a fair and reasonable bail based upon their previous criminal history and ties to the local community. While the intended purpose of these interviews is to provide as much pertinent information as possible to the magistrate determining bail, the content of these interviews have also been used to impeach defendants during trial and/or in determining a sentence for a defendant adjudicated guilty. While many federal district courts voluntarily allow defense counsel to be present during the pretrial services interview, it is not considered a "critical stage," and thus a defendant is not guaranteed the right to counsel despite the heightened consequences of the interview.

This article proposes that the current status quo regarding pretrial services in untenable and in conflict with the Sixth Amendment right to assistance of counsel. It suggests two potential solutions to the problem. The first is to recognize that pretrial services interviews do not comport with the text and statutory history of the federal pretrial services program. The second, and preferred, solution is to assert that all pretrial services interviews are a "critical stage," and require that

DOI: https://doi.org/10.15779/Z385Q4RM7J.

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all federal district courts guarantee each defendant the right to counsel during those interviews.

INTRODUCTION

The Sixth Amendment of the Constitution provides an array of rights to criminal defendants. It guarantees, among other things, the right to a "speedy and public trial," the right to an "impartial jury,"[1] and the right for a defendant "to be confronted with the witnesses against him." Yet perhaps the most meaningful right the Sixth Amendment confers is the right to have the assistance of counsel during criminal proceedings.[2] The right to counsel is so fundamental, and so engrained in Anglo-American common law, that the Supreme Court held in *Powell v. Alabama* that withholding it during a capital case would violate the Due Process Clause.[3] That decision would presage the eventual incorporation of the Bill of Rights far before the *Palko* Court or Justice Black ever did.[4]

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1 U.S. CONST. amend. VI.

2 *Id.*

3 *See* Powell v. Alabama, 287 U.S. 45, 60–65 (1932) (tracing the right to counsel through English common law and throughout the various colonies before the ratification of the Constitution); *id.* at 71 (holding that a lack of counsel in a capital case offends due process).

4 In Palko v. Connecticut, 302 U.S. 319 (1937), the Court held that the Due Process Clause of the Fourteenth Amendment selectively incorporated certain provisions of the Bill of Rights to the states provided they were "so rooted in the traditions and conscience of our people as to be ranked as fundamental." 302 U.S. at 325. Justice Black would later advocate for the "total incorporation" of all the provisions of the Bill of Rights to the states. Although "total incorporation" has not been achieved, the vast majority of the Bill

The Court in *Powell* also recognized a "critical period" from "the time of [arraignment] until the beginning of [the] trial," in which the aid of counsel is, well, critical to formulate an adequate defense.[5] These "critical stages" have since been defined by the Court as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused."[6] The Court has found, *inter alia*, that arraignments, post-indictment interrogations, post-indictment lineups, and the entry of guilty pleas are all examples of critical stages requiring the presence of counsel.[7]

There are, however, several steps during the criminal adjudicatory process that have not been deemed critical. Accordingly, the Constitution does not guarantee a defendant the right to counsel during these steps. The Sixth Amendment right to counsel does not attach until adversarial, judicial criminal proceedings are formally initiated by indictment, information, or arraignment.[8] The Court has also held that a critical stage requires, at the very least, the presence of the accused, and a "trial-like confrontation" with the government or public prosecutor. These requirements exist because a critical stage creates an adversarial environment where a defense lawyer could be needed to guide the accused.[9] Thus, a criminal defendant does not have a Sixth Amendment right to an attorney when a witness is shown a photo array that could potentially identify the defendant,[10] during a custodial interrogation prior to an arraignment or an indictment,[11] or when the defendant offers

of Rights' provisions now apply to the states with very few exceptions. *See* McDonald v. City of Chicago, 561 U.S. 742, 761–65 (2010) (describing Justice Black's theory).

[5] *Powell*, 287 U.S. at 59. *See also* Spano v. New York, 360 U.S. 315, 325 (1959) (Douglas, J., concurring) (noting that depriving a defendant of counsel after he has been formally charged with a crime may be more damaging than depriving him of counsel during the trial itself); United States v. Wade, 388 U.S. 218, 224 (1967) (holding that "today's law enforcement machinery" creates "critical confrontations" that necessitate legal representation at pretrial proceedings as well as at trial).

[6] Bell v. Cone, 535 U.S. 685, 695–96 (2002).

[7] Missouri v. Frye, 566 U.S. 134, 140 (2012); *see also Wade*, 388 U.S. at 224 (defining a critical stage as "pretrial proceedings where the results might settle the accused's fate and the reduce the trial itself to a mere formality").

[8] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[9] United States v. Ash, 413 U.S. 300, 312 (1973). *But see id.* at 338–40 (Brennan, J., dissenting) (arguing against this "crabbed" view of the Sixth Amendment and suggesting that a critical stage occurs at any point where "what happens there may affect the whole trial") (citing Hamilton v. Alabama, 368 U.S. 52, 54 (1961)).

[10] *Id.* at 317 (finding that since the defendant is not present, and has no right to be present, there is no adversarial setting).

[11] *But cf.* Miranda v. Arizona, 384 U.S. 436, 470 (1966) (holding that the right to counsel during a custodial interrogation exists under a Fifth Amendment theory).

incriminating statements on his own initiative, either purposely or by happenstance.[12] Based upon this jurisprudence, one procedural step that takes place in the federal criminal system does not seem to fit neatly into this critical stage dichotomy: interviews conducted by federal pretrial services.

Pretrial services are not unique to the federal judiciary. Indeed, many state and local jurisdictions have developed their own pretrial services programs as part of a large-scale effort for bail reform.[13] However, the Pretrial Services Act of 1982 ("the Act"), which established pretrial services throughout every federal district in the United States, gives the federal system unique structure and powers.[14] Since its passage, the Act has created unintended Sixth Amendment implications. The Act calls for pretrial services to conduct interviews to "be used only for the purposes of bail determination and should otherwise be confidential."[15] Although the statute does provide some limited and enumerated exceptions to this confidentiality requirement,[16] several federal courts have consistently held that the Act also allows for this ostensibly confidential information to be used to impeach the defendant and/or to be used for sentencing purposes.[17] This concerning expansion of Section 3153 of the Act has added "significant consequences" to this previously simple interview, and has edged it closer to a "critical stage" as defined by Sixth Amendment jurisprudence.[18]

To analyze this rupture between Sixth Amendment jurisprudence and the increased consequences of federal pretrial services interviews, this paper will be divided into three separate sections. Part I will discuss federal pretrial services generally, describing its history and analyzing the statutes that confer and define its powers. Part II will explain how the interview process conducted by federal pretrial services is becoming more relevant in impeachment and sentencing matters, thus heightening the consequences of not providing counsel during the pretrial services

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[12] *See* Maine v. Moulton, 474 U.S. 159, 176 (1985).

[13] *Pretrial Services & Supervision*, NAT'L CTR. FOR STATE COURTS, https://www.ncsc.org/Microsites/PJCC/Home/Topics/Pretrial-Services.aspx (last visited Apr. 10, 2020). *See also, e.g.*, COLO. REV. STAT. § 16-4-106 (West 2017); MD. CODE ANN., PUB. SAFETY § 4-1104 (West 2018).

[14] Pretrial Services Act of 1982, 18 U.S.C. §§ 3152-56 (2018).

[15] 18 U.S.C. § 3153(c)(1) (2018).

[16] *See id.* § 3153(c)(3).

[17] *See* United States v. Wilson, 930 F.2d 616, 619 (8th Cir. 1991); United States v. Morrison, 778 F.3d 396, 400–01 (2d. Cir. 2015).

[18] *See* Bell v. Cone, 535 U.S. 685, 695–96 (2002).

interview. Finally, Part III will propose two separate solutions to fix the discord between federal pretrial services and the Sixth Amendment: either by amending the statute to make clear its plain meaning and original purpose, or by accepting that these interviews are "critical stages" where defendants are entitled to counsel.

I. FEDERAL PRETRIAL SERVICES: A HISTORY AND ANALYSIS

The genesis of the current pretrial services program begins with the establishment of the administrative apparatus that contains it: the U.S. Probation and Pretrial Services System. As the name suggests, the system's beginnings lie with the implementation of probation, not pretrial services. Probation developed in the states as a way to grant judges discretion in giving lesser sentences as they saw fit; the federal government was stubbornly against the concept. The Department of Justice maintained that it was an unconstitutional infringement on executive pardoning power; and in 1909, a proposed bill to create a federal probation system failed in Congress.[19] Despite this lack of a federal probation, it was common for federal district judges to "[lay] the case on file," which effectively deferred a sentence indefinitely and served as a *de facto* probation sentence.[20] The Supreme Court officially held this practice to be unconstitutional in 1916, but also explicitly suggested that a federal probation law be enacted "in the interest of the administration of the criminal law, as well as by the most obvious considerations of humanity and public well-being . . . ."[21] Congress eventually responded by enacting a probation statute in 1925, with general oversight of the program being transferred to the Administrative Office of the U.S. Courts in 1940.[22]

The pretrial services component to the U.S. Probation and Pretrial Services System arose as a distinct entity to combat another endemic issue in the American criminal justice system: bail. "Bail problems are constitutional problems," as the Eighth Amendment expressly forbids "excessive bail."[23] Bail has always existed in the federal context, as

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[19] *Probation and Pretrial Services History*, U.S. COURTS, http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history (last visited Apr. 10, 2020).

[20] *See Ex Parte* United States (*Killits* Case), 242 U.S. 27, 50 (1916).

[21] *Id*. at 51.

[22] *Probation and Pretrial Services History*, *supra* note 19.

[23] Monrad G. Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 110 (1966); *see also* U.S. CONST. amend. VIII.

federal law "unequivocally provide[s] that a person arrested for a non-capital offense shall be admitted to bail," provided the defendant gives adequate assurance that he will stand trial.[24] In the 1951 case *Stack v. Boyle*, the Supreme Court held that the Eighth Amendment's prohibition on excessive bail "must be based upon standards relevant to the purpose of assuring the presence of the defendant," thus holding that the bail amount would be flexible based upon the severity of the crime and the financial ability of the defendant.[25]

Despite the Court's holding in *Stack*, legal scholars and activists continued to express concern that too many defendants were not receiving sufficiently tailored bails, even if they were indigent and not a flight risk. Although reasonable bail should have been available to nearly all felons, studies conducted in the 1960s showed that fewer than half of defendants were able to secure their freedom.[26] The system was also rampant with abuse, from overzealous judges to unscrupulous bail bondsmen.[27] In 1964, then-Attorney General Robert F. Kennedy held the National Conference on Bail and Criminal Justice, which concluded that there were a variety of problems endemic to bail systems: namely that civil and personal liberties were infringed upon and that the cost of holding non-violent defendants was excessive. Compounding these issues was the finding that many criminal defendants could be safely released on bail with little risk of nonappearance.[28] The conclusions of the conference led Congress to pass the Bail Reform Act in 1966 and the Speedy Trial Act of 1974.[29] One of the marquee elements of the federal Speedy Trial Act was the creation of ten "demonstration" pretrial services agencies spread throughout the various federal districts.[30] Pretrial services agencies were

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[24] Stack v. Boyle, 342 U.S. 1, 4 (1951).

[25] *Id.* at 5–6. Although the Supreme Court has never expressly ruled that the Excessive Bail Clause has been incorporated, it has suggested multiple times over the years that it does apply to the states. *See* Schlib v. Kuebel, 404 U.S. 357, 365 (1971) ("[E]xcessive bail has been assumed to have application to the States through the Fourteenth Amendment."); McDonald v. City of Chicago, 561 U.S. 742, 764 n. 12 (2010) (citing *Schlib* for the proposition that it incorporated the Excessive Bail Clause); Timbs v. Indiana, 586 U.S. ___, 139 S. Ct. 682, 686-87 (2019) (implying that all of the Eighth Amendment, including the Excessive Bail Clause and Excessive Fines Clause, is incorporated).

[26] Paulsen, *supra* note 23, at 112.

[27] *Id.* at 114–15.

[28] *Probation and Pretrial Services History*, *supra* note 19.

[29] *See* The Federal Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (2018). The Federal Bail Reform Act was amended in 1984 to the modern version in use today.

[30] *Id.*

responsible for, among other things, interviewing defendants and compiling an interview report that could be used by a magistrate to determine an appropriate bail.[31] The Act allowed for the expansion of pretrial services agencies into all federal districts, which Congress eventually accomplished with the Pretrial Services Act of 1982. Shortly after pretrial services were implemented throughout the country, Congress changed bail procedures again, ordering that the courts take a defendant's potential danger to the community, along with his or her risk of nonappearance, into account when determining bail.[32]

Federal pretrial services are primarily governed by 18 U.S.C. §§ 3152–3154.[33] Section 3152 established pretrial services as an entity within the U.S. Probation and Pretrial Services System, albeit as a fully coequal branch with probation services.[34] Section 3153 concerns itself with the organization of pretrial services and, most importantly, how and where information obtained by pretrial services can be used.[35] Finally, Section 3154 enumerates the functions and powers of pretrial services and its employees.[36] Pretrial services officers are tasked with collecting information that correlates with the four factors that the Bail Reform of Act of 1984 requires for a judicial officer to determine when setting bail.[37] Although Section 3154 is the most exhaustive and detailed section relating to pretrial services, Section 3153 presents the most concerning constitutional issues.

Most of Section 3153 is relatively straightforward, but Section 3153(c) contains a variety of provisions defining the scope of

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[31] *See* 18 U.S.C. § 3154; *Probation and Pretrial Services History*, *supra* note 19.

[32] The Bail Reform Act, 18 U.S.C. §§ 3141–51 (2018); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that the Bail Reform Act is constitutional).

[33] Although §§ 3155 and 3156 are part of the statutory scheme, they only deal the compilation of an annual report (§ 3155) and define certain terms (§ 3156). As such, their language is not relevant to this analysis.

[34] 18 U.S.C. § 3152 (2018). This section also gives individual federal districts discretion as to whether they wanted the chief probation officer or an independently appointed chief pretrial services officer to supervise pretrial services.

[35] *Id.* § 3153.

[36] *Id*. § 3154. These powers range from collecting and verifying any information that could be pertinent to the potential pretrial release of a defendant, to other tasks more commonly associated with probation officers (such as monitoring the defendants and informing the court of any violations of pretrial release conditions).

[37] *Id.* § 3142(g). The four factors are: "the nature and circumstances of the offense charged," "the weight of the evidence against the person," "the history and characteristics of the person," and "the nature and seriousness of the danger to any person in the community that would be posed by the person's release."

confidentiality as it applies to information obtained by pretrial services. At first glance the statute seems simple: "information obtained over the course of performing pretrial services functions in relation to a particular accused shall be used *only* for the purposes of bail determination and shall otherwise be confidential."[38] However, the statute contains two provisions that allow for the use of this confidential information in a limited set of circumstances outside of the bail context. First, Section 3153(c)(2) lists five specific circumstances in which access to pretrial services information can be given; generally, it may only be distributed to parties directly involved in monitoring the defendant during his pretrial release such as counsel for both sides, the judge, probation officers, and other contracted officials who are essential to ensure the defendant meets the conditions of his release.[39] Second, the statute doubles down on the confidentiality of this information in Section 3153(c)(3), explicitly stating that this confidential information "is not admissible on the issue of guilt" in any criminal proceeding, but allows for a very small exception if a crime is "committed in the course of obtained pretrial release" or is related to a failure to appear in a case "with respect to which the pretrial services were provided."[40]

II. "SIGNIFICANT CONSEQUENCES": HOW INTERVIEWS CONDUCTED BY FEDERAL PRETRIAL SERVICES NOW RESEMBLE "CRITICAL STAGES"

Section 3153 appears to clearly state who has access to information obtained by pretrial services and when that information can be used. Nevertheless, it did not take long for defendants to challenge the usage of apparently confidential information collected by pretrial services. Most of these early cases arose out of the Eighth Circuit Court of Appeals; and, to this day, the Eighth Circuit has developed the largest

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[38] *Id.* § 3153(c)(1) (emphasis added).

[39] *Id.* § 3153(c)(2). The five circumstances are as follows:
"(A) by qualified persons for purposes of research related to the administration of criminal justice;
(B) by persons under contract under section 3154(4) of this title [e.g. contractors who operate facilities for the custody and/or care of defendants out on bail];
(C) by probation officers for the purpose of compiling presentence reports;
(D) insofar as such information is a pretrial diversion report, to the attorney for the accused and the attorney for the Government; and
(E) in certain limited cases, to law enforcement agencies for law enforcement purposes."

[40] *Id.* § 3153(c)(3).

body of case law regarding Section 3153.[41] While the Eighth Circuit and its sister circuits have long held that pretrial services information can be used for impeachment purposes, an increasing number of courts have also allowed this information to be used in sentencing. These developments have imbued the pretrial services interview with potentially significant consequences for the defendant, thereby conflicting with the Sixth Amendment.

The first major pretrial services case that arose out of the Eighth Circuit was *United States v. McLaughlin*.[42] Although *McLaughlin* did not directly confront Section 3153, the Court opined that the statute did not guarantee the confidentiality of a defendant's statements as well as it should.[43] During McLaughlin's cross-examination by the government at trial, McLaughlin admitted to lying to his pretrial services officer.[44] Since the cross-examination ultimately did not reveal the specific content of McLaughlin's statements to the officer, the Eighth Circuit held that this cross-examination was proper.[45] However, the court did not simply address the prosecutor's conduct without comment. The court's opinion called the use of pretrial services information "disturbing," but further hypothesized, without deciding, in dicta that "the confidentiality requirement may be transgressed when the government uses information obtained during the pretrial services interview for purposes unrelated to pretrial detention or release."[46]

Several years later, the Eighth Circuit acted contrary to its own warning when it held in *United States v. Wilson* that statements made at a pretrial services interview could be used to impeach the defendant.[47] As Section 3153(c)(3) only expressly forbids admitting pretrial services information "on the issue of guilt," the court in *Wilson* held that pretrial services information can be used to impeach a witness, since impeachment "addresses credibility and is distinct from substantive guilt evidence."[48] Although the decision acknowledged that the *McLaughlin* court had concerns about expanding the scope of Section 3153, it refused

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41 The Supreme Court has never ruled upon any questions related to Section 3153, and indeed it appears as if it has never even cited this specific provision in any of its opinions.

42 777 F.2d 388 (8th Cir. 1985).

43 *Id.* at 392.

44 *Id.* at 391–92.

45 *Id.* at 392.

46 *Id.* (refusing, notably, to "pursue whether under the statutes the information properly may be used for impeachment purposes").

47 930 F.2d at 619.

48 *Id.*

to square the tension between the two cases.[49] Since the Eighth Circuit's decision in *Wilson*, many other circuits have affirmed that information obtained during pretrial services can be used to impeach the defendant.[50]

While the Eighth Circuit initially found an impeachment exception to Section 3153, it was the Second Circuit in *United States v. Morrison* that first proposed that pretrial services information could also be used in sentencing procedures.[51] Although the Second Circuit acknowledged that the statute had strong presumptions of confidentiality, it also had numerated exceptions: specifically an exception that allowed pretrial services information to be used "by probation officers for the purpose of compiling presentence reports."[52] The court reasoned that, since district courts may use presentence reports when determining a defendant's sentence, there was an implicit exception allowing a judge to use otherwise confidential information embedded within the presentence report. In other words, the sentencing judge could use confidential statements from pretrial services interviews for the purposes of crafting an appropriate sentence.[53] Given its history of expanding the meaning of Section 3153, the Eighth Circuit recently adopted the Second Circuit's reasoning in *Morrison* while also noting that "if the government can use [pretrial service interview reports] to impeach a defendant during a criminal trial, then *a fortiori* a district court can consider them to impeach a defendant for the purposes of fixing a sentence."[54]

The circuit courts are correct that impeachment and sentencing are not directly related to "guilt," but these courts fail to appreciate the effects that widening the scope of Section 3153 could have on defendants. Courts have been reluctant to narrow the usage of impeachment, because it is a powerful tool in furthering "the goal of truth-seeking."[55] Indeed, the

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[49] *See id*.

[50] *See, e.g.*, United States v. Stevens, 935 F.2d 1380, 1393-94 (3d. Cir. 1991); United States v. Kerr, 981 F.2d 1050, 1054 n. 1 (9th Cir. 1992); United States v. Griffith, 385 F.3d 124, 126 (2d. Cir. 2004); United States v. Perez, 473 F.3d 1147, 1151 (11th Cir. 2006); United States v. De La Torre, 599 F.3d 1198, 1205 (10th Cir. 2010).

[51] 778 F.3d 396, 399-401 (2d. Cir. 2015). *See also* United States v. Caparotta, 676 F.3d 213, 218 (1st Cir. 2012) (assuming, without explicitly deciding, that a sentencing exception might exist).

[52] *Morrison*, 778 F.3d at 400 (quoting 18 U.S.C. § 3153(c)(2)(C)).

[53] *Id*; *see also id.* at 400-401 (arguing that 18 U.S.C. § 3661 also gives the district court carte blanche authority to consider any information related to the "background, character, and conduct of a person" in sentencing the defendant).

[54] United States v. Hernandez-Espinoza, 890 F.3d 743, 746–47 (8th Cir. 2018).

[55] *See* James v. Illinois, 493 U.S. 307, 313 (1990) (citing United States v. Havens, 446 U.S. 620, 626 (1980)) (describing the rationale of allowing an impeachment exception to

central purpose of impeachment is to attack a witness's credibility.[56] As the finder-of-fact, it is the jury's duty to determine which witnesses are credible and what testimony is relevant when rendering a verdict.[57] Impeachment can directly impact a jury's view of the testimony, and thus its conclusions on guilt. Likewise, a defendant's sentencing is an indescribably important event in which the ultimate fate of the defendant will be decided by the district court. The decision is largely guided by a presentence investigation report that may contain pretrial services information.[58] To argue that a determination of guilt is the only substantive consequence a defendant faces during a criminal proceeding is a gross simplification of the criminal justice system.

The potential repercussions of pretrial services interviews on credibility determinations and sentencing make pretrial services interviews a new "critical stage" under the Sixth Amendment. To illustrate these heightened stakes, consider the following hypothetical: a criminal defendant and his lawyer determine that the theory of their case requires the defendant to testify.[59] Upon cross-examination, the government attorney uses an inconsistency in a pretrial services interview, where the defendant's lawyer was not present, as the basis to impeach the defendant. Now, imagine the jury relies upon this impeachment to find the defendant not credible. Suddenly, the jury has found the principal witness for the defense—the defendant himself—untrustworthy. The jury is now much more likely, if not certain, to find the defendant guilty because of this adverse credibility finding.

While concerns about an impeachment exception affecting a defendant's trial rights has yet to be litigated, sentencing enhancements deriving from pretrial services interviews have had concrete effects on

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the exclusionary rule).

[56] *See* FED. R. EVID. 607 (stating that any party may attack any witness's credibility); FED. R. EVID. 806 (stating that a hearsay declarant's credibility may be attacked through impeachment). *Cf.* Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that if a defendant voluntarily takes the stand, the prosecution may use "the traditional truth-testing devices of the adversary process" to ensure honest testimony).

[57] *See, e.g.*, United States v. Ortiz, 362 F.3d 1274, 1279 (9th Cir. 2004) ("Whether the witnesses have testified truthfully, of course, is entirely for the jury to determine."); Bravo v. Shamailov, 221 F. Supp. 3d 413, 422 (S.D.N.Y. 2016) ("It is the jury's role to determine whether a witness is credible and to decide what weight to give that witness's testimony.").

[58] *See generally* United States v. Booker, 543 U.S. 220, 268 (2005); United States v. Irey, 612 F.3d 1160, 1184 (11th Cir. 2010) (*en banc*).

[59] *See* Rock v. Arkansas, 483 U.S. 44, 51–53 (1987) (describing the constitutional basis of the right to testify).

defendants. Section 3C1.1 of the U.S. Sentencing Guidelines enhances a sentence if a defendant "willingly obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction."[60] The notes of the sentencing guidelines and case law makes it clear that the enhancement applies in the pretrial services context.[61] There have been numerous instances in which a defendant has given false information during a pretrial services interview, resulting in their base offense level being increased by two levels and a concomitant increase in their overall sentence.[62] This sentencing enhancement has even applied in situations where the false statement was immaterial to the investigation or the criminal proceeding.[63] Many of these "false statements" were aliases given by the defendant, often because they feared that providing accurate information would complicate their immigration status.[64] While there is a need to punish defendants whose false statements undermine the judicial process, there are significant drawbacks to using information from pretrial services interviews to do so: first, the punishments can occur long after the interview itself; and second, without a lawyer, defendants may not be aware that even inconsistencies in their statements can greatly affect their actual sentence. In spite of these consequences, the legal reasoning behind the sentencing exception is rather persuasive, as there appears to be a legitimate statutory basis for

[60] UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL ("U.S.S.G.") § 3C1.1 (2018).

[61] *Id.* cmt. 4(h); *see also* United States v. Savage, 885 F.3d 212, 225 (4th Cir. 2018) (holding that providing false information during a pretrial services interview is enough to trigger the sentence enhancement).

[62] The U.S. Sentencing Commission publishes a table in which a defendant's recommended sentence can be calculated using their base offense level and criminal history category. Except for the most serious offenders, an enhancement of two points to a defendant's base offense level can dramatically increase their sentence. For example, a defendant with a base offense level of 8 and a criminal history category of I only faces a recommended sentence of 0-6 months. With the § 3C1.1 enhancement, however, his base offense level increase to a ten, and his recommended sentence doubles to 6–12 months. *See* U.S.S.G. Ch. 5, Pt. A, § 3C1.1 (2018).

[63] The guidelines even suggest that enhancement should not apply if the false statement or identification does not result in a "significant hindrance to the investigation or prosecution of the instant offense." This has been applied narrowly. *Id.* § 3C1.1, cmt. 5(a).

[64] *See, e.g.*, United States v. Sandoval, 747 F.3d 464, 468–69 (7th Cir. 2014) (finding that giving an alias was still a "material" harm to prosecution even though the defendant never attempted to flee and fully cooperated with his pretrial service conditions); United States v. Simmonds, 1 F. App'x. 229, 231 (4th Cir. 2001) (finding the same).

the exception.[65] Despite the legitimacy of this exception, it still creates potentially dire consequences for the defendant, especially when it acts in concert with the impeachment exception, which necessitates the presence of counsel.

In addition to the impeachment and sentencing exceptions, an increasingly prominent concern that has not been addressed by the courts is that pretrial services interviews may adduce adverse information related to a defendant's immigration status. Immigration proceedings, even those that lead to removal, are "purely civil actions."[66] As a result these proceedings are "not subject to the full panoply of procedural safeguards accompanying criminal trials."[67] People who are removable under the Immigration and Nationality Act can be subject to both a civil proceeding in front of an immigration court and a criminal proceeding in front of a federal district court for illegal entry.[68] The general confidentiality requirements of Section 3153 should apply to defendants with immigration-related matters, but the current interpretation of the statute provides no measure to ensure that information elicited in a pretrial services interview will not be used against the defendant in a future removal proceeding. Section 3153(c) only prevents admission of potentially incriminating information in "criminal judicial proceeding[s]."[69] In addition, Section 3153 allows for information obtained during the interview to be released to "law enforcement agencies for law enforcement purposes."[70] It is completely conceivable that Immigration and Customs Enforcement and/or U.S. Citizenship and Immigration Services would fall under this exception, giving both agencies the ability to use this information in a removal proceeding. This results in situations where the Sixth Amendment does not apply in a pretrial services interview or at an immigration proceeding,[71] even though

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[65] *See* United States v. Morrison, 778 F.3d 396, 400–01 (2d. Cir. 2015); United States v. Hernandez-Espinoza, 890 F.3d 743, 746–47 (8th Cir. 2018).

[66] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *see also* 8 U.S.C. § 1229a (2018) (describing removal proceedings in front of an immigration judge).

[67] *See* Magalles-Damian v. I.N.S., 783 F.2d 931, 933 (9th Cir. 1986) (internal citations removed).

[68] *See* 8 U.S.C. § 1325(a) (2018) (imposing civil and criminal penalties for illegally entering the United States).

[69] 18 U.S.C. § 3153(c) (2018).

[70] *Id.* § 3153(b)(E).

[71] *See* Montes-Lopez v. Holder, 694 F.3d 1085, 1088 (9th Cir. 2012) (finding that "[t]he Sixth Amendment does not apply in immigration proceedings" but that the Immigration of Nationality Act does independently give the defendant the right to counsel) (citing 8

the defendant is facing removal.[72] Although it appears that no defendant has yet to make this argument either in a federal court or in front of the Board of Immigration Appeals, that does not nullify the potential influence a pretrial services interview could have in immigration proceedings.

The above hypotheticals illustrate the danger in expanding Section 3153 beyond its enumerated exceptions. This expansion has created material consequences for what is said and done at pretrial services interviews and thus requires that the interviews be considered a critical stage under the Sixth Amendment.[73] Although the current interpretation of Section 3153 does not admit pretrial services interviews on the issue of guilt, it can indirectly influence the fact-finder's determination of guilt. Despite the potential significance of the interview, it being one of the first events a defendant will experience when facing the prospect of a federal criminal proceeding, the defendant has no constitutional right to have counsel present. Further, the interview can impact a defendant's trial strategy as defense counsel may feel compelled to advise the defendant not to testify if counsel believes that the defendant would be effectively impeached. The defendant may also be at risk of receiving a longer sentence based upon their comments during the interview. These risks originate from one event, the pretrial services interview, where the defendant has no constitutional right to counsel.

III. THE SOLUTIONS: SQUARING PRETRIAL SERVICES WITH THE SIXTH AMENDMENT

This is not to suggest that pretrial services interviews are fundamentally flawed; they remain useful, if not essential, for both the judiciary and criminal defendants. The current legal status quo of pretrial services, however, opens the door to Sixth Amendment violations. Fortunately, there are two relatively simple solutions to this problem. The first is to simply revert back to the pre-*Wilson* conception of Section 3153 which is supported by the text, meaning, and legislative history of the

U.S.C. § 1362 (2018)).

[72] Recall too that the Supreme Court has held that it is ineffective assistance of counsel if an attorney fails to inform the defendant about the potential immigration consequences of pleading guilty. Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010). Does this then create an independent Sixth Amendment problem if counsel does not inform a defendant about the immigration consequences of giving a pretrial services interview, even though counsel has no right to be at the interview itself?

[73] *See* Bell v. Cone, 535 U.S. 685, 695–96 (2002); *cf.* United States v. Ash, 413 U.S. 300, 340 (1973) (Brennan, J., dissenting).

statute itself. The downside of this solution is that it may require a congressional amendment or Supreme Court intervention to change what has admittedly been a widely-accepted interpretation of Section 3153 for nearly thirty years. The second, and more sensible, option is to recognize that the pretrial services interview is, in fact, a critical stage under the Sixth Amendment, and thus guarantee to all defendants the right to have counsel present during the interview.

A. Various Modes of Statutory Interpretation Do Not Support an Impeachment Exception in Section 3153

Starting with the Eighth Circuit's decision in *Wilson*, Section 3153 has been expanded beyond its plain meaning and purpose. The *Wilson* Court plainly divined a broader meaning of the statute, holding that "[i]mpeachment evidence addresses credibility," and therefore, "under a plain reading of the statute, the government can use pretrial services interview statements to impeach a defendant."[74] Other courts, following the Eighth Circuit's lead, have made similar arguments. The Third Circuit provides perhaps the most detailed analysis, citing congressional testimony and other provisions of the statute, and ultimately concluding that there was "no clear statutory bar to using pretrial services statements for impeachment purposes."[75] The Second Circuit, in turn, relied heavily upon the Federal Rules of Evidence to link the impeachment exception to the strong principle that relevant evidence should be admissible at trial, and that exceptions to this rule "are not to be read broadly."[76] Other circuit courts have adopted some or all of the above rationales in holding the same.[77]

These decisions, while convincing, rest on certain modes and canons of statutory interpretation to the exclusion of other, equally relevant, ones. Interpreting statutes, particularly when using canons, can be an exceedingly difficult undertaking. Canons are not mandatory rules but rather are guides meant to aid a court in "determin[ing] the Legislature's intent as embodied in particular statutory language."[78] Adding to this confusion is that canons of construction are not always

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[74] United States v. Wilson, 930 F.2d 616, 619 (8th Cir. 1991) (citing 18 U.S.C. § 3153(c)(3) (2018)).

[75] *See* United States v. Stevens, 935 F.2d 1380, 1394–95 (3d. Cir. 1991)

[76] United States v. Griffith, 385 F.3d 124, 126 (2d. Cir. 2004).

[77] *See* United States v. Perez, 473 F.3d 1147, 1151 (11th Cir. 2006); United States v. De La Torre, 599 F.3d 1198, 1205 (10th Cir. 2010).

[78] Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

conclusive and are often contradictory.[79] Judges have also endlessly debated the place of legislative history in interpreting a statute, and whether it can or should interact with canons or more textualist-based approaches of statutory interpretation.[80] Irrespective of these debates over statutory construction, the orthodox interpretation of Section 3153 is not so ironclad as the circuit courts have suggested. First, some statutory canons are simply ignored or glossed over, particularly when you read Section 3153(c)(1) and 3153(c)(3) together. Second, the legislative history of the bill, at the very least, makes it ambiguous whether an impeachment exception was meant to apply.

Although the most straightforward way of interpreting what a statute means is to simply read the text of the statute itself, statutory canons can be used to assist if the text is ambiguous.[81] The relevant text here is specifically Section 3153(c), which is divided into three paragraphs, all of which discuss the confidentiality of pretrial services information. Section 3153(c)(1) is clear on its face: "Except as provided in paragraph (2) of this subsection, information obtained in the course of performing pretrial service functions in relation to the particular accused shall be used *only for the purposes of a bail determination and shall otherwise be confidential*."[82] Quite frankly, there is no ambiguity here: the information may only be used to determine an appropriate bail, save for the enumerated exceptions set out in paragraph (2). That paragraph is also relatively clear on its face, as it lists five separate circumstances where certain persons can access pretrial services information, and all of these exceptions clearly relate to the administration of bail and pretrial release requirements.[83] Then comes the sticking point, the one clause that every circuit court has used to legitimize the impeachment exception:

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[79] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

[80] As an example of this debate, analyzing the Supreme Court case *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) is instructive. The case itself turned on the interpretation Rule 609 of the Federal Rules of Evidence. *Id.* Writing for the majority, Justice Stevens spends a large portion of the opinion analyzing the language of the Rule, citing its plain language, the historic basis for the creation of the Rules, and its legislative history. *Id.* at 511–520. Although Justice Scalia concurred in the judgment, he wrote separately specifically condemning the majority's use of legislative history in interpreting Rule 609. *Id.* at 529–30 (Scalia, J., concurring).

[81] *See* Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012).

[82] 18 U.S.C. § 3153(c)(1) (2018) (emphasis added).

[83] *Id.* § 3153(c)(2); *see also* § 3153(c)(2), *supra* note 39.

"Information made confidential under paragraph (1) of this subsection is not admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failure to appear . . . ."[84] The argument is that since there is no explicit statutory bar, the clause implies that the information may be admissible for reasons other than guilt.[85] This gives credence to the impeachment exception.

While this is a plausible interpretation of the statute, it ignores several important statutory canons that support a more natural reading of the statute: that there are no exceptions beyond the ones explicitly enumerated. The "Negative-Implication Canon" holds that when a statute expresses a list of associated items it excludes all other items not in the statute that share the same association.[86] This canon can be difficult to apply since it is to be used sparingly and only in precise contexts, yet Section 3153(c), a subsection made up of nothing but exceptions, is precisely where the canon is meant to apply.[87] Here there is a specific item, the confidential information acquired during a pretrial services interview, and the several exceptions to confidentiality laid out in paragraphs (2) and (3). Paragraph (2) relates to the administration of pretrial release and bail, allowing the information to be used by probation officers, contractors who run halfway houses, researchers, and the like.[88] Paragraph (3) is much more simply read as yet another exception, albeit one that can be used specifically for the issue of guilt.

It is a much more tortured reading to assume that paragraph (3) says that: 1) the information cannot be admitted on the issue of guilt except in these enumerated exceptions, and 2) the information is therefore also admissible for any other reason not related to guilt. This reading turns paragraph (3) from a small, enumerated exception, into an expansive, multi-part exception. This flies in the face of the clear mandate of Section

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[84] *Id.* § 3153(c)(3).

[85] *See, e.g.*, United States v. Stevens, 935 F.2d 1380, 1395 (3d. Cir. 1992).

[86] *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002). The "Negative-Implication Canon" is also known by its Latin moniker: *expressio unius est exclusion alterius*. *Id.*

[87] *See* SCALIA & GARNER, *supra* note 81, at 107; 18 U.S.C. § 3153(c) (2018).

[88] 18 U.S.C. 3153(c)(2) (2018). This also invokes the canon of *noscitur a sociis* which means that words and phrases that are placed together give each other more precise context and should be read as having similar meanings. SCALIA & GARNER, *supra* note 81, at 195. In this case, the five exceptions in Section 3153(c)(2) are clearly meant for the administration of pretrial release conditions and not for adjudicative or evidentiary purposes. *See id.*; Yates v. United States, 574 U.S. 528, 543–44 (2015).

3153(c)(1), which stresses the confidential nature of this information, and the limited instances in which it can be used. When the statute is read in total, instead of piecemeal, the information gathered by pretrial services is meant to be for one singular purpose: bail. A broad grant of confidentiality, with tightly defined and limited exceptions, protects the administration and purpose of pretrial services. If Congress wanted additional exceptions, it could have easily and explicitly listed more of them. It did not, so according to both the canons and common sense, confidentiality should be assumed instead of presuming the existence of implied exceptions to that confidentiality.

Layered on top of these interpretive concerns is whether Congress itself intended to have an impeachment exception apply. Both the Eighth Circuit in *McLaughlin* and the Third Circuit in *Stevens* cited to certain parts of the Congressional record prior to the passage of the Pretrial Services Act of 1982, yet these courts came to different conclusions as to the intent of Congress. The *McLaughlin* Court was concerned that expanding Section 3153 would undercut Congressional intent, whereas the *Stevens* Court found that the legislative history was not conclusive enough to override its reading of the text.[89] This legislative history mostly undermines the existence of an impeachment exception, but it is not overwhelmingly conclusive. The House Report on the Pretrial Services Act makes clear that the confidentiality requirement exists so that the defendant will be fully truthful with the pretrial services officer by reducing any negative consequences that could occur by being truthful.[90] Likewise, a Senate Report on the bill shows that an enumerated impeachment exception was once present in Section 3153(c)(3), but that the language was removed from the final bill that was passed.[91] Nevertheless, the House Report contains a rather cryptic sentence declaring that "the exceptions are provided to ensure that defendants cannot attempt to take advantage of the pretrial services process and then shield themselves behind the guarantee of confidentiality."[92] This may support an implicit impeachment exception, or it may further explain the enumerated guilt exception present in Section 3153(c)(3). The legislative history militates towards a non-impeachment exception interpretation,

[89] *Compare* United States v. McLaughlin, 777 F.2d 388, 392 (8th Cir. 1985), *with* United States v. Stevens, 935 F.2d 1380, 1394–95 (3d. Cir. 1992).

[90] H.R. REP. No. 97-792, at 8 (1982) (Conf. Rep.), *reprinted in* 1982 U.S.C.C.A.N. 2392, 2394.

[91] S. REP. No. 97-77, at 12 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2377, 2388.

[92] H.R. REP. No 97-792, at 9.

and, when placed properly in the context of the statutory language, raises grave doubts about the current interpretation of the statute and the validity of an implicit impeachment exception.

B. If Section 3153 Does Include an Impeachment Exception, Sixth Amendment Guarantees Must Apply

Assuming that Congress did intend for there to be an impeachment exception and/or the current interpretation of Section 3153 stands, then defendants face heightened consequences by participating in a pretrial services interview. As discussed in Part II, these consequences support the argument that pretrial services interviews are critical stages, even if Congress did not intend for them to be. If the Sixth Amendment does indeed apply to these interviews, we must ensure that counsel is provided to defendants. Failure to provide counsel, absent a knowing waiver by the defendant, would render the usage of any of that information unconstitutional.[93]

When comparing pretrial service interviews to other events that courts have held to be "critical stages," the constitutional necessity of providing counsel becomes clear. As discussed above, once the Sixth Amendment right to counsel attaches to a defendant at the beginning of a judicial criminal proceeding, that defendant is entitled to counsel not just at trial, but at any "critical confrontation" in which the defendant's substantial rights may be prejudiced without counsel.[94] These confrontations are often described as "trial-like," and for most critical stages (such as arraignments, sentencings, and various other pretrial hearings) that would be an apt description.[95] However, the Supreme Court has consistently held that other events, namely post-indictment interviews and lineups with law enforcement, are also critical stages.[96] These events can hardly be considered "trial-like," as they often lack a judicial officer or even the prosecutor, but they remain just as consequential to the defendant. Custodial interviews are inherently coercive and involve the government's "efforts to elicit information from the accused."[97] Without

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[93] *See* Moran v. Burbine, 475 U.S. 412, 428 (1986).

[94] *See* United States v. Wade, 388 U.S. 218, 227 (1967); United States v. Ash, 413 U.S. 300, 321–22 (1973) (Stewart, J., concurring); Beaty v. Stewart, 303 F.3d 975, 991–92 (9th Cir. 2002).

[95] *Ash*, 413 U.S. at 312.

[96] Patterson v. Illinois, 487 U.S. 285, 290 (1988); *Beaty*, 303 F.3d at 992.

[97] Michigan v. Jackson, 475 U.S. 625, 629 (1986), *abrogated on other grounds by* Montejo v. Louisiana, 556 U.S. 778, 797 (2009).

counsel being present, the defendant would have no advocate to challenge the methods and accuracy of the information gleaned during these stages.[98] A pretrial services interview shares many similar characteristics with a post-indictment interview with law enforcement because pretrial services officers are tasked with collecting information needed by a judicial officer to set an appropriate bail including "information relating to any danger that the release of [defendant] may pose to any other person or the community."[99] Information from both these interviews can be used to impeach the defendant during trial, increase his or her sentence, or even be used on the issue of guilt in narrow circumstances. Unlike a custodial interview with law enforcement, however, defense counsel has no right to be present to assist the defendant in understanding these consequences. Also unlike a custodial interview, the defendant has no right to remain silent, and, indeed, remaining silent has its own consequences as the court may then lack information that would allow defendant to eligible for pretrial release.

Attempts to remedy the Sixth Amendment problems with pretrial services interviews must also take into account whether the interview occurred before the initiation of the criminal adjudicatory process. In situations where a defendant is in custody before his or her arraignment or initial appearance but where no formal charging document has been filed, it is possible that a defendant would be interviewed by pretrial services before the criminal adjudicatory process has begun. It is well-settled that the Sixth Amendment right to counsel only attaches at or after "the initiation of adversarial judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[100] This is to say that a mere arrest does not automatically trigger Sixth Amendment protections; there must be a formal charge as well.[101] This fact will not affect most defendants undergoing a pretrial services interview, as they would have been formally charged before the interview would take place. Yet the possibility remains that a defendant may be arrested and given a pretrial services interview before he or she is indicted or has a preliminary hearing in front of a magistrate. Despite the

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98 *Wade*, 388 U.S. at 229–31.

99 18 U.S.C. § 3154(1) (2018); *see also id.* § 3142(g) (listing the information a judicial officer must consider, and a pretrial services officer must collect from defendant, in setting the conditions of release).

100 Kirby v. Illinois, 406 U.S. 682, 689 (1972).

101 *Id.* at 690; *contra id.* at 698–99 (Brennan, J., dissenting) (arguing that an arrest is a critical stage).

seemingly absurd result that the Sixth Amendment applies to different defendants at different times, it is settled law as to when the right to counsel attaches. The interview is very similar to a lineup in this way, a defendant would have the right to counsel post-indictment or arraignment, but not beforehand.[102] While the pretrial services interview is a critical stage, it is harder to argue that the interview itself "initiates criminal proceedings" such that the right to counsel attaches from that point onwards.[103] Therefore, the rare defendant who is interviewed before he or she is formally charged or arraigned would be subject to less constitutional protections than other defendants. This, however, is a flaw related to current Sixth Amendment precedent and does not affect the substantive evidence that suggests that a pretrial services interview is a critical stage.

It is also necessary to differentiate between a *pretrial* services interview and a *presentence* investigation interview. Both of these interviews are conducted by officers of the U.S. Probation and Pretrial Services Systems, but, as their names suggest, take place at different times. Currently, neither the pretrial interview nor the presentence interview is considered a critical stage; in fact, courts have explicitly held that presentence interviews do not meet that Sixth Amendment critical stage threshold.[104] Although legal scholars have argued that this precedent is incorrect,[105] the two interviews are clearly distinguishable because they have different implications under the Sixth Amendment. The most obvious difference is the time at which the interviews take place. Since pretrial interviews take place before any trial or determination of guilt, they easily meet the Supreme Court's requirement that a critical stage be a "pretrial proceeding."[106] There are also fewer consequences attached to a presentence interview since there has already been an adjudication of guilt prior to the interview, either by plea or by trial. Finally, although defense counsel is not necessarily present during a presentence interview, he or she has an opportunity during the sentencing hearing to challenge

[102] *See Wade*, 388 U.S. at 237.

[103] *See Kirby*, 406 U.S. at 689.

[104] *E.g.*, United States v. Jackson, 886 F.2d 838, 844–45 (7th Cir. 1989); United States v. Tisdale, 952 F.2d 934, 940 (6th Cir. 1992).

[105] *See* 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 (1993). However, some of these criticisms may hold less water since the Supreme Court held in *Booker* that the application of the sentencing guidelines are discretionary and not mandatory. United States v. Booker, 543 U.S. 220, 256–57 (2005).

[106] *Wade*, 388 U.S. at 224.

and object to any statement in the presentence investigation report, which is heavily derived from the presentence interview.[107] These differences make clear that it is possible, if not perfectly reasonable and logical, that a pretrial interview would be a critical stage whereas a presentence interview would not.

It may be a less complicated solution to turn back the clock to a pre-*Wilson* conception of Section 3153, but expanding the definition of a "critical stage" to include pretrial services interviews (including ones that take place pre-arraignment) is simply the better solution to the problem. Despite the complexities of the pretrial services interview, providing counsel during these interviews would have no effect on the efficient administration of the courts while still vindicating the rights of criminal defendants. It is estimated that about half of the district courts allow or otherwise encourage defendants to bring counsel with them to these interviews,[108] and there is no evidence this prevents the pretrial services officer from collecting the information needed.[109] Accepting the pretrial services interview as a critical stage would also preserve the impeachment exception which, as many courts noted when they found the exception, is a useful tool to encourage the truth-seeking mission of the trial courts.[110] Thus, all sides will benefit by providing counsel during these interviews. Prosecutors can continue to rely upon and use the admittedly useful impeachment exception, and defendants can be assured that their Sixth Amendment rights are being protected.

CONCLUSION

Section 3153 is an obscure portion of Title 18, but it has gradually

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[107] FED. R. CRIM. P. 32(f); *see also* Rosales-Mireles v. United States, 585 U.S. __, 138 S. Ct. 1897, 1908 (2018) (holding that errors made in presentence investigation reports are reviewed for plain error, regardless of whether counsel objected).

[108] Interview with Michael Caruso, Federal Public Defender for the Southern District of Florida, and Sowmya Bharathi, Supervisory Assistant Federal Public Defender, in Miami, Fla. (Mar. 14, 2019) (notes from interview on file with the author).

[109] *See* United States v. Caparotta, 676 F.3d 213, 215 (1st Cir. 2012). This is a fascinating case where counsel was present with the defendant during a pretrial services interview. *Id.* During the interview, Caparotta admitted to an extensive history of substance abuse which was later used to enhance his sentence (again showing the consequences of the pretrial services interview). *Id.* at 215–17. Caparotta challenged this sentence, arguing that his attorney rendered ineffective assistance by allowing him to testify to his drug use during the interview. *Id.* at 219.

[110] *See* United States v. Griffith, 385 F.3d 124, 126 (2d. Cir. 2004) ("In view of a strong principle favoring admissibility of relevant evidence at trial, we will not read the exception to admissibility in § 3153(c)(3).") (citing FED. R. EVID. 401–402).

morphed into one of the most significant and consequential statutes for the average criminal defendant. Statements made during pretrial interviews not only determine an appropriate bail amount, effectively determining whether the defendant will await trial at home or in a jail, but can also be used to impeach the defendant, expose him to future prosecution or deportation, or extend his sentence. All of these consequences await the defendant; and yet, he or she currently has no constitutional right to ensure counsel is present during the interview. Given this reality, it is crucial that the federal courts either recognize these interviews as "critical stages," and guarantee these defendants their right to access counsel during the pretrial services interview, or simply circumscribe Section 3153 so that it has essentially no significance after bail is set. Allowing the status quo to continue risks grave constitutional violations against criminal defendants and turns an integral part of the federal judiciary into merely an information-gathering arm of the prosecutor.