An Introduction to Fifty Years of *Gideon*

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INTRODUCTION

Two years ago, the *Iowa Law Review* marked the twenty-fifth anniversary of *Batson v. Kentucky*'s landmark ban on race-based peremptory jury challenges with a remarkable symposium issue.[1] Shortly thereafter, while teaching criminal procedure, I reached the right to counsel chapter, which opens with the Supreme Court's ruling in *Gideon v. Wainwright*.[2] The realization that *Gideon* would arrive at the half-century milestone brought inspiration. Surely, *Gideon* had also earned a scholarly event commemorating its special anniversary.

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1. *See* 97 IOWA L. REV. 1393, 1393–1744 (2012).
2. Gideon v. Wainwright, 372 U.S. 335 (1963).

Fortunately, Dean Gail Agrawal was more than supportive. She enthusiastically urged me to follow through. Gail's unflagging encouragement doubled my determination. Once the *Iowa Law Review* editors eagerly jumped on board, agreeing to sponsor the celebration, the dream of this symposium became a certainty. That certainty took flight this past October when the *Review* hosted a gathering of right-to-counsel scholars. This volume is the tangible fruit of the provocative presentations at that assembly.

The Supreme Court's fifty-year-old decision in *Gideon v. Wainwright* is an icon in the annals of constitutional criminal procedure that has weathered the test of time. It is among a small number of Warren Court rulings in that field widely known to lawyers, law students, and, indeed, to many outside the legal profession and academy. *Gideon* has become an integral part of our national fabric. I have devoted considerable scholarly attention to the right to the assistance of counsel that is *Gideon*'s foundation. It is with enormous pleasure that I pen this introduction to the symposium celebrating its golden anniversary.

The goal here is to set the stage for the insightful reflections of the symposium participants. Although *Gideon* inspired this symposium, we did not limit submissions to the topic at the core of *Gideon*—appointed counsel for indigent defendants. Instead, we entertained proposals pertaining to any facet of the right to legal assistance. Readers will learn many and varied lessons about that fundamental guarantee. Several pieces do center around issues raised by *Gideon*'s extension of appointed assistance. A number of others focus on questions generated by the significant ruling in *Strickland v. Washington*, more than two decades later.[3] *Strickland* explained that the right to counsel encompasses an entitlement to effective assistance and announced a doctrinal framework for assessing constitutional efficacy. This introduction addresses those two basic topics: an indigent defendant's right to state-funded legal aid and every accused's entitlement to effective counsel. First, it summarizes the law prior to *Gideon*, highlights the ruling in *Gideon*, and sketches the post-*Gideon* developments regarding appointed counsel. Next, it turns to the pre-*Strickland* law, describes the *Strickland* opinion, and recounts the evolution of ineffectiveness doctrine for the past thirty years.

I. *GIDEON V. WAINWRIGHT*: INDIGENTS' CONSTITUTIONAL ENTITLEMENT TO APPOINTED LEGAL ASSISTANCE

Gideon is unquestionably the most renowned and significant Supreme Court decision regarding the government's obligation to ensure that criminal defendants financially unable to retain lawyers have access to legal assistance, but it was not the first such ruling. Over three decades before

3. Strickland v. Washington, 466 U.S. 668 (1984).

Gideon, the Justices issued an oft-quoted opinion in *Powell v. Alabama*, emphasizing the vital nature of the counsel entitlement and ruling that the Due Process Clause guaranteed state-funded counsel for at least some indigent state defendants.[4] Not long thereafter, and fully twenty-five years before *Gideon*, the Court unanimously held, in *Johnson v. Zerbst*, that the express Sixth Amendment right to assistance includes a general promise of appointed counsel for indigent defendants in federal trials.[5] Four years later, the Justices ruled that the due process entitlement to appointed assistance in state courts was not as broad. According to *Betts v. Brady*, the Fourteenth Amendment required a state to furnish counsel *only* when it would have been fundamentally unfair to try an accused without assistance, and determinations of entitlement were to be made case-by-case based on a variety of factors that dictated whether an accused could receive a fair trial without a lawyer's aid.[6] For the next two decades, although *Betts* theoretically ruled the state roost, its force steadily waned.[7]

In 1963, indigent, pro se Clarence Gideon brought his case to the Supreme Court's doorstep, complaining that Florida should have provided him with a lawyer during his prosecution for breaking into a poolroom.[8] The Court's resolution of his claim altered the course of legal history. Without dissent, the Justices overruled *Betts*, in essence extending to state trials the categorical federal court mandate of appointed counsel.[9] As landmarks go, *Gideon* is terse. The opinion spans a mere ten pages in the United States Reports. The Court reasoned that *Betts* had asked the right question for deciding whether a Bill of Rights guarantee was "made obligatory upon the States,"—whether it is "fundamental and essential to a fair trial."[10] The *Betts* Court, however, was "wrong . . . in concluding that . . . . appointment of counsel is not a fundamental right, essential to a fair trial."[11] Because "in our

4. Powell v. Alabama, 287 U.S. 45, 71 (1932). Because the Sixth Amendment, like the other provisions of the Bill of Rights, constrains only the federal government, any right for state defendants must be rooted in the Fourteenth Amendment's assurance of due process. *Powell* can be read narrowly, as recognizing a limited right in the context of the unique circumstances of that case, or broadly, as recognizing a general right in all capital prosecutions. *See* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 25 (2002).

5. Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

6. Betts v. Brady, 316 U.S. 455, 462–73 (1942).

7. *See Gideon*, 372 U.S. at 350–51 (Harlan, J., concurring). In 1954, the Court ruled that the right to *retained* counsel in state court, unlike the right to appointed counsel, was unlimited—i.e., it did not depend on whether trial without counsel would be unfair. *See* Chandler v. Fretag, 348 U.S. 3, 10 (1954).

8. *Gideon*, 372 U.S. at 336–37.

9. *Id.* at 345.

10. *Id.* at 342 (internal quotation marks omitted).

11. *Id.* at 342–44 (internal quotation marks omitted). Justice Black's majority opinion concluded that *Betts* had erroneously retracted a promise of assistance made in earlier decisions. *See id.* at 343–44. Justice Harlan asserted that the majority unfairly characterized *Betts*.

adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, *cannot be assured a fair trial unless counsel is provided for him*," counsel is "fundamental and essential to fair trials."[12] According to Justice Black, this was "an obvious truth."[13] The "noble ideal[s] [of fairness and equality] cannot be realized if [a] poor [person] has to face [charges] without a lawyer to assist him."[14]

Gideon has a prominent and distinctive place in the pantheon of legendary Warren Court criminal procedure rulings. Unlike many of its revolutionary brethren, it was neither controversial nor divisive. Instead, despite its intrusion on state prerogatives and finances, *Gideon* was widely perceived as a wise decision.[15] I turn now to post-*Gideon* developments in the appointed assistance realm.

A. APPOINTED ASSISTANCE FOR AND AT TRIAL

Although both *Johnson v. Zerbst* and *Gideon v. Wainwright* involved felony prosecutions, in neither opinion did the Justices specifically limit the right to appointed assistance to those charged with felonies. Subsequent rulings, however, have concluded that the constitutional right to appointed trial assistance extends to all indigents charged with felonies, but only to some accused of misdemeanors. The Court first addressed the issue in *Argersinger v. Hamlin*, discerning an entitlement to appointed counsel for misdemeanor prosecutions that result in a "loss of liberty."[16] According to the Court, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."[17] Seven years later, in *Scott v. Illinois*, a sharply divided Court decided that *Argersinger* had, in fact, "delimit[ed] the constitutional right to appointed counsel in state" misdemeanor prosecutions to cases involving "actual imprisonment" of the accused.[18] Moreover, that limitation was constitutionally legitimate because "incarceration [is] so severe a sanction," and "is . . . different in kind

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In his view, *Betts* had extended the right to appointed assistance beyond what was recognized in precedent at the time. *See id.* at 349–50 (Harlan, J., concurring).

12. *Id.* at 344 (emphasis added).

13. *Id.*

14. *Id.*

15. Twenty-two states had advocated the *Gideon* position in the Supreme Court while only two states joined Florida's opposition to this extension of appointed counsel. *Id.* at 345. *See* Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 33–34 (1984) (observing that even though many jurisdictions already provided counsel for indigents at the time *Gideon* was decided, the ruling still had important consequences).

16. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

17. *Id.*

18. Scott v. Illinois, 440 U.S. 367, 373 (1979).

from fines or the mere threat of imprisonment."[19] Consequently, the Sixth and Fourteenth Amendments require appointed assistance only if an "indigent criminal defendant [is] sentenced to a term of imprisonment."[20]

Subsequently, the Court has rendered two significant rulings regarding the qualified right to appointed counsel in misdemeanor proceedings—one that restricted and one that expanded the entitlement to state-funded aid. In *Nichols v. United States*, the Justices concluded that if an uncounseled misdemeanor conviction is valid under *Scott* because the sentence imposed did not entail imprisonment, that conviction may constitutionally be used to *increase* a term of imprisonment imposed upon conviction for a later offense.[21] On the other hand, *Alabama v. Shelton* "[held] that a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed [for a misdemeanor conviction] unless the defendant was accorded . . . 'counsel.'"[22] The Justices could "find no infirmity" in the conclusion that the right to appointed trial counsel extends to "[a] defendant who receives a suspended or probated sentence *to imprisonment*" for a misdemeanor.[23] A state may not impose such a sentence unless it furnishes trial counsel to an indigent who wants assistance.

B. APPOINTED ASSISTANCE FOR CRITICAL PRETRIAL STAGES

Shortly before *Gideon*'s general recognition of a right to appointed assistance in state proceedings, the Court had concluded, in *Hamilton v. Alabama*, that a defendant was entitled to counsel's assistance at a capital prosecution arraignment.[24] According to the Court, arraignment was "a critical stage [of the] criminal proceeding" requiring counsel because "[w]hat happen[ed] there may affect the whole trial."[25] Because an accused was entitled to assistance in capital trials, and because "the same [kinds of] pitfalls . . . face[d]" at such trials were also present at the arraignment, the right to counsel reached that stage.[26] The month after *Gideon*, in *White v. Maryland*—another capital prosecution—the Justices concluded that because

19. *Id.* at 372–73. It seems fair to assume that the constitutional distinction between felonies, which trigger a categorical right to appointed assistance, and misdemeanors, for which the right is restricted to prosecutions resulting in imprisonment, is identical to the line commonly drawn by jurisdictions—*i.e.*, a felony is any offense for which the authorized imprisonment is more than a year and a misdemeanor is an offense for which the maximum jail time is one year or less.

20. *Id.* at 373–74.

21. Nichols v. United States, 511 U.S. 738 , 746–49 (1994).

22. Alabama v. Shelton, 535 U.S. 654, 658 (2002).

23. *Id.* at 674 (internal quotation marks omitted).

24. Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

25. *Id.* at 54.

26. *Id.* at 55.

a defendant had entered a guilty plea at a preliminary hearing, that stage of the proceedings was critical and triggered a right to assistance.[27]

Neither *Hamilton* nor *White* dealt explicitly with the right to appointed counsel. It was implicit, however, that indigents had the same entitlement to appointed counsel at critical pretrial courtroom proceedings that they had at trial. In *Coleman v. Alabama*, seven years after *Gideon*, the Justices expressly acknowledged a right to appointed counsel at a preliminary hearing in a noncapital case.[28] The hearing qualified as a "'critical stage' of the State's criminal process" because of the significant "advantages of a lawyer's assistance" that an unaided "indigent accused [would be unable] on his own to realize."[29] In sum, *Gideon*'s right to appointed trial assistance extends to any critical pretrial courtroom appearance.

During the four years that followed *Gideon*, in two controversial rulings, the Warren Court held that both official efforts to obtain incriminating statements from defendants prior to trial and to secure eyewitness identification evidence also could qualify as "critical stages" of criminal prosecutions. *Massiah v. United States* held that an accused has a constitutional right to assistance whenever a government agent "deliberately elicit[s] from him" incriminating words prior to trial.[30] *United States v. Wade* decided that a pretrial "lineup [to identify an accused] was a critical stage of the prosecution" triggering the right to counsel.[31] Both the Sixth and Fourteenth Amendment rights to assistance at such pretrial confrontations outside courtrooms clearly include *Gideon*'s entitlement to state-funded aid for those unable to retain assistance. Thus, the government has an obligation to provide defense counsel not only for trials, but for formal and informal critical stages of criminal proceedings.

C. APPOINTED ASSISTANCE ON APPEAL

Convicted defendants sometimes have the right to appointed assistance in seeking appellate relief. On the same day *Gideon* was decided, in *Douglas v. California*, the Justices decided that in first appeals of convictions granted by states as a matter of right, defendants were entitled to state-funded legal assistance.[32] The decision clearly rested on the Fourteenth Amendment guarantee of equal protection. According to the Court, the "equality demanded by" that provision is lacking if a "rich man" enjoys counsel's

27. White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam).

28. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970).

29. *Id.*

30. Massiah v. United States, 377 U.S. 201, 206 (1964).

31. United States v. Wade, 388 U.S. 218, 237 (1967).

32. Douglas v. California, 372 U.S. 353, 357 (1963). Unlike *Gideon*, the decision in *Douglas* was not unanimous. Three Justices believed that no constitutional provision could support the majority's ruling. *See id.* at 358 (Clark, J., dissenting); *id.* at 360 (Harlan, J., dissenting).

assistance on appeal, but an "indigent . . . is forced to shift for himself."[33] The Court indicated that a failure to furnish assistance also denied due process. According to the majority, without legal assistance, the "right to appeal does not comport with fair procedure," and is, in fact, "only the right to a meaningless ritual," not the right to "a meaningful appeal."[34]

Eleven years later, however, the Court proved that it had been serious in *Douglas* when it declared that the Constitution did not demand "absolute equality" between the appellate reviews afforded indigents and those with funds.[35] In *Ross v. Moffitt*, a divided Court concluded that neither the Due Process nor the Equal Protection Clause afforded indigent appellants a right to appointed assistance with petitions for discretionary review by a state or the United States Supreme Court.[36] The decision rested on two premises—that an indigent appellant already had the benefit of a lawyer's assistance in pursuing his first appeal and that, unlike the function of a first appeal, the function of discretionary review is not merely to correct an erroneous decision.[37] For these reasons, while an indigent defendant without counsel is "somewhat handicapped in comparison with a wealthy defendant capable of retaining a lawyer to assist with a petition for discretionary review,"[38] the indigent is not "denied meaningful access to the appellate system because of . . . poverty,"[39] and is "assure[d] . . . an adequate opportunity to present his claims fairly in the context of the . . . appellate process."[40]

In 2005, the Justices confronted a situation that fell between *Douglas* and *Ross*. In *Halbert v. Michigan*, the Court discerned an entitlement to assistance based on the guarantees of due process and equal protection in a case where the first and only appeal available to an indigent convicted upon a guilty or nolo contendere plea was discretionary.[41] The defendant argued that *Douglas* controlled because a "first-tier appellate proceeding" was at issue.[42] The State maintained that *Moffitt* governed because review was "discretionary."[43] The majority was persuaded that "*Douglas* provide[d] the

33. *Id.* at 357–58 (majority opinion).

34. *Id.* It bears mention that the Sixth Amendment right to assistance does not extend to appellate processes. *See* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 163 (2000).

35. *Douglas*, 372 U.S. at 357.

36. Ross v. Moffitt, 417 U.S. 600, 617–19 (1974). Three Justices dissented. *See id.* at 619 (Douglas, J., dissenting).

37. *Id.* at 614–15.

38. *Id.* at 616.

39. *Id.* at 611.

40. *Id.* at 616. According to the Court, there was even more reason to reject an entitlement to state-funded assistance for petitioning the Justices themselves for review, because the state is not the source of that right to seek discretionary review. *Id.* at 617.

41. Halbert v. Michigan, 545 U.S. 605, 610 (2005). Again, the Court was divided. Three Justices dissented. *See id.* at 624 (Thomas, J., dissenting).

42. *Id.* at 609 (majority opinion).

43. *Id.*

controlling instruction" because: (1) the appellate court's role was to correct errors and "necessarily entail[ed] some evaluation of the merits of the applicant's claims;" (2) the appellate court's "ruling . . . provide[d] the first, and likely the only, direct review [of] the defendant's conviction and sentence" and the *pro se* indigent did not have the benefits of a lawyer's earlier review or brief or a prior appellate court opinion; and (3) indigent appellants, convicted upon guilty pleas and facing potentially intimidating processes for seeking appellate review, often are "particularly handicapped as self-representatives" by "little education, learning disabilities, and mental impairments."[44]

D. APPOINTED ASSISTANCE AND COLLATERAL CHALLENGES

Defendants generally have no right to appointed counsel for postconviction collateral attacks on convictions. In *Pennsylvania v. Finley*, the Justices asserted that "the right to appointed counsel extends to first appeal of right, and no further," concluding that the considerations that led to the ruling in *Ross v. Moffitt* "appl[ied] with even more force to postconviction review."[45] Neither due process nor equal protection mandates appointed assistance for purposes of efforts to obtain collateral, postconviction relief from convictions.[46] In *Murray v. Giarratano*, however, a majority did indicate that death row inmates petitioning states for postconviction relief might well have a constitutional entitlement to representation.[47] A plurality would have extended *Finley* to those convicted of capital offenses and sentenced to death.[48] Four Justices, however, would have required appointed counsel for "indigent death row inmates who wish to pursue state postconviction relief."[49] Moreover, two others, acknowledging that capital defendants were entitled to "meaningful access" to "collateral relief proceedings" and were unlikely to "be able to file successful petitions for collateral relief without . . . assistance," joined the plurality in rejecting the prisoners' claims *only* because "no prisoner on death row in [the state] ha[d] been unable to obtain counsel."[50]

In sum, the right to state-funded assistance has evolved in various expansive and restrictive ways during the five decades since *Gideon*. Indigents' core right to appointed trial counsel has been preserved except in misdemeanor prosecutions that do not result in a liberty loss. The right to assistance in seeking relief from unjust convictions is much more limited. On *Gideon*'s anniversary, one question is whether the evolutionary

44. *Id.* at 616–22.
45. Pennsylvania v. Finley, 481 U.S. 551, 555–56 (1987).
46. *Id.* at 556–57.
47. *See* Murray v. Giarratano, 492 U.S. 1 (1989).
48. *Id.* at 12 (plurality opinion).
49. *Id.* at 15 (Stevens, J., dissenting).
50. *Id.* at 14 (Kennedy, J., concurring).

developments sketched are constitutionally defensible. Another, perhaps more pressing, question is whether we are honoring the spirit of *Gideon* in practice.[51]

II. *STRICKLAND V. WASHINGTON*: EVERY ACCUSED'S RIGHT TO EFFECTIVE LEGAL ASSISTANCE

Gideon expanded the indigent accused's right to appointed counsel. *Strickland v. Washington* gave content to the right *Gideon* deemed fundamental by affirming and defining a constitutional entitlement to *effective* assistance.[52] Prior to *Gideon*, the Supreme Court had addressed the right to appointed assistance on multiple occasions. In contrast, *Strickland* was the Court's first genuine exploration of every defendant's entitlement to have defense counsel perform effectively. Fourteen years before *Strickland*, in *McMann v. Richardson*, the Justices had declared that a guilty plea would be "unintelligent" and invalid if it was not "based on reasonably competent advice"—that is, if the advice provided by counsel was not "within the range of competence demanded of attorneys in criminal cases."[53] According to the Court, "defendants facing felony charges are entitled to the effective assistance of competent counsel" and "cannot be left to the mercies of incompetent counsel."[54] Although the context was guilty plea validity, the Justices' general pronouncement seemed to recognize a broader entitlement applicable to trial representation.

In *Strickland*, the Court made it clear that the Constitution encompasses a promise of effective trial assistance *and* that by simply failing to perform adequately an attorney can deny a defendant that promise.[55] According to this "actual ineffectiveness" doctrine, the purpose of the constitutional guarantee of counsel is "to ensure a fair trial" by means of an "adversarial testing process [that] works to produce a just result."[56] By undermining the adversary process and casting doubt on the justice of the result, a lawyer's simple failure "to render 'adequate legal assistance'" can yield an unfair trial and deprive the defendant of his constitutional entitlement.[57]

These premises led the *Strickland* Court to prescribe two doctrinal requirements for a valid ineffective assistance claim. An accused must show

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51. Critics have long lamented the fact that the realities of state-funded assistance do not comport with the theoretical entitlement. *See, e.g.*, Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 706 (2010); Norman Lefstein, *A Broken Indigent Defense System: Observations and Recommendations of a New National Report*, HUM. RTS., Spring 2009, at 11.

52. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

53. McMann v. Richardson, 397 U.S. 759, 770–71 (1970).

54. *Id.* at 771.

55. *Strickland*, 466 U.S. at 686.

56. *Id.* at 686–87.

57. *Id.* at 686.

"deficient performance" by counsel—that is, "that counsel's representation fell below an objective standard of reasonableness."[58] Moreover, an accused who satisfies this demanding performance prong must also "affirmatively prove prejudice"—that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[59] Eight Justices joined the Court's reasoning and the governing doctrinal scheme. Only Justice Marshall disagreed, asserting that the performance standard was too "malleable" and ambiguous and that the prejudice demand was wholly unjustifiable.[60]

A. THE SCOPE AND PURVIEW OF THE "ACTUAL INEFFECTIVENESS" DOCTRINE

Strickland's dual ineffective assistance requisites also govern the guilty plea process and other "critical" stages of criminal prosecutions. One year after *Strickland*, the Justices decided *Hill v. Lockhart*, in which an accused contended that he had pleaded guilty based on counsel's misinformation.[61] The Court held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel."[62] Thus, an accused contesting a guilty plea must show that the attorney's assistance with the plea process was objectively unreasonable and that prejudice resulted.[63] Prejudice in this context requires a "show[ing] that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[64]

More than twenty-five years later, in two vitally important rulings in *Lafler v. Cooper* and *Missouri v. Frye*, a sharply split Court held that situations in which defendants allege that they did not accept plea bargains due to counsel's misperformance—but, instead, stood trial or accepted less favorable bargains—are also governed by *Strickland*'s two demands.[65] According to the majority, the right to counsel "extends to the plea-bargaining process," and "[d]uring plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'"[66] The deficient performance standard is identical. Where a lost opportunity for a plea deal is the harm alleged, however, a defendant satisfies the prejudice demand by "show[ing] that but for the ineffective advice of counsel there is a

58. *Id.* at 688. The Court used a number of other similar phrases to describe this doctrinal requisite.

59. *Id.* at 693–94. Although this "reasonable probability" standard demands more than a mere possibility, it does not require a "more likely than not" showing. *Id.* at 693.

60. *See id.* at 706–12 (Marshall, J., dissenting).

61. Hill v. Lockhart, 474 U.S. 52, 54–55 (1985).

62. *Id.* at 58.

63. *Id.* at 57–58.

64. *Id.* at 59.

65. Lafler v. Cooper, 132 S. Ct 1376, 1384 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

66. *Lafler*, 132 S. Ct. at 1384 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."[67]

The government had forcefully argued that because defendants have no right to plea bargains, even if counsel performs deficiently with regard to a plea offer, an accused cannot suffer prejudice and therefore cannot establish ineffective assistance if conviction follows either a fair trial or an otherwise valid guilty plea.[68] In rejecting the contention, the majority relied heavily on "the reality that criminal justice today is for the most part a system of pleas, not a system of trials," recognizing "the central role plea bargaining plays" in the criminal justice system,[69] and consequently, that plea negotiation "is almost always the critical point for a defendant."[70] According to the Court, the right to effective assistance is "not designed simply to protect the trial."[71] A defendant who has a constitutionally fair trial or pleads guilty "instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."[72] In sum, the effective assistance entitlement extends to both the innocent and guilty, and neither a fair trial nor a guilty plea "wipes clean any deficient performance by defense counsel during plea bargaining."[73]

In *Lafler* and *Frye*, the Justices made it clear that because the right to assistance is not "designed simply to protect the trial" process, the constitutional guarantee of effective assistance and the safeguards against attorney incompetence acknowledged in *Strickland* apply to all other "pretrial critical stages that are part of the whole course of a criminal proceeding."[74] Thus, an accused is entitled to effective counsel at the formal and informal pretrial confrontations to which *Gideon*'s right to appointed counsel applies—"arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea."[75]

Strickland's shelter against actual ineffectiveness also extends to sentencings. *Strickland* itself involved a claim of attorney incompetence in connection with a capital sentencing proceeding.[76] The Court's opinion

67. *Id.* at 1385; *see also Frye*, 132 S. Ct. at 1410.
68. *See Lafler*, 132 S. Ct. at 1385; *Frye*, 132 S. Ct. at 1406.
69. *Lafler*, 132 S. Ct. at 1388.
70. *Frye*, 132 S. Ct. at 1407.
71. *Lafler*, 132 S. Ct. at 1385.
72. *Id.* at 1386; *see also Frye*, 132 S. Ct. at 1409–10.
73. *Lafler*, 132 S. Ct. at 1388.
74. *Id.* at 1385.
75. *Frye*, 132 S. Ct. at 1405.
76. *See* Strickland v. Washington, 466 U.S. 668, 675–76 (1984).

explained the entitlement to effective trial assistance and then effortlessly applied it to the sentencing process at issue.[77] More recently, the Justices declared that "[e]ven though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in" constitutional deprivation.[78]

As explained above, the right to counsel for first appeals finds roots not in the Sixth Amendment, but in the guarantees of due process and equal protection. In *Evitts v. Lucey*, the Court held that the right to appointed or retained assistance on appeal includes a due process-based entitlement to efficacy.[79] Although states need not provide appeals, if they do the appellate process must comport with due process, and an appeal involving ineffective assistance is fundamentally unfair.[80] On the other hand, there is no guarantee of effective assistance for phases of the post-conviction process in which an accused enjoys no constitutional right to counsel's assistance.[81]

Before turning to more specific developments of *Strickland*'s two doctrinal demands, a decision relevant to a defendant's ability to obtain relief for ineffective assistance merits brief mention. In 1976, in *Stone v. Powell*, the Justices held that a defendant *could not raise* a Fourth Amendment exclusionary rule claim in a federal habeas corpus challenge to a state conviction if the state had afforded the claim full and fair consideration.[82] In *Kimmelman v. Morrison*, the Court rejected the government's contention that the *Stone* bar to habeas review should extend to a Sixth Amendment ineffectiveness claim based on an attorney's failure to competently pursue a Fourth Amendment exclusionary rule claim.[83] A denial of counsel challenge, even one rooted in neglect of a Fourth Amendment issue, is significantly different from a Fourth Amendment exclusion claim and "reflect[s] different constitutional values."[84] Consequently, an accused may raise an actual ineffectiveness claim in a federal habeas proceeding even if a state has afforded full and fair consideration.[85] The Justices refused to restrict the right to effective assistance by foreclosing an important means of vindicating denials of that right.

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77. *Id.* at 698–700. Today a capital sentencing proceeding like the one in *Strickland* is considered a part of trial. *See* Ring v. Arizona, 536 U.S. 584, 599, 608–09 (2002).

78. *See Lafler*, 132 S.Ct. at 1386.

79. Evitts v. Lucey, 469 U.S. 387, 395–96 (1985).

80. *Id.* at 396–97, 400–01.

81. *See* Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam).

82. Stone v. Powell, 428 U.S. 465, 494 (1976).

83. Kimmelman v. Morrison, 477 U.S. 365, 382–83 (1986).

84. *Id.* at 375.

85. *Id.* at 383.

B. DOCTRINAL DEVELOPMENTS OF THE DEFICIENT PERFORMANCE AND PREJUDICE REQUIREMENTS

Strickland announced a "highly deferential" general standard for deficient performance that requires a demonstration that counsel's aid was not "within the wide range of reasonable professional assistance."[86] There has been only modest embellishment of that standard since 1984. One noteworthy doctrinal development is the conclusion in *Padilla v. Kentucky* that "counsel must advise her client regarding the risk of deportation" resulting from a guilty plea.[87] According to the Justices, "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear," but when the consequences are unclear, counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[88] The majority refused to decide whether an attorney has any obligation to provide advice about collateral consequences of a conviction, concluding narrowly that because deportation "is a particularly severe 'penalty'"[89] with a "close connection to the criminal process" that makes it "uniquely difficult to classify as either a direct or collateral consequence," the Sixth Amendment affords an entitlement to "advice regarding deportation."[90]

The other revelation deserving emphasis here is the terse explanation of counsel's obligation to perform competently during plea bargaining. At a minimum, defense counsel "has the duty to communicate [to his client] formal offers from the prosecution to accept a plea on terms and conditions that may be favorable."[91] Although counsel clearly has additional obligations during plea negotiations, the Court suggested that it was "neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge" of those obligations because "[b]argaining is, by its nature, defined to a substantial degree by personal style" and involves "alternative courses and tactics in negotiation."[92] Review of the quality of a lawyer's representation during plea negotiations clearly must be exceedingly deferential.

In contrast, the Justices have paid considerable attention to the "prejudice" requirement. In two significant rulings, the Court concluded that in some situations, prejudice cannot be established *even if* an attorney performs deficiently *and* there is a reasonable probability of a different outcome but for counsel's incompetence. *Nix v. Whiteside* held that if

86. Strickland v. Washington, 466 U.S. 668, 689 (1984).
87. Padilla v. Kentucky, 559 U.S. 356, 367 (2010).
88. *Id.* at 369.
89. *Id.* at 365 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).
90. *Id.*
91. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).
92. *Id.*

counsel's deficiency prevents an accused from testifying falsely, prejudice cannot be established as a matter of law.[93] Relying on language in *Strickland*, the Justices opined that the fairness of a trial and "confidence in [its] result" cannot be "diminished [when the accused] desist[s] from . . . contemplated perjury."[94] The concurring opinion noted that "[t]he proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable,"[95] and that attorney error that prevents falsehood cannot deprive the client of a fair trial or of any "specific constitutional rights designed to guarantee a fair trial."[96]

Lockhart v. Fretwell extended *Nix*'s refinement on prejudice.[97] The Court concluded that prejudice cannot result from an attorney's incompetent failure to advocate a governing rule of law later determined to be erroneous, even if there is a reasonable probability that the result of the proceeding would have been different with adequate performance.[98] According to the majority, a prejudice assessment must not "focus[] solely on mere outcome determination, without attention to whether the [actual] result of the proceeding was fundamentally unfair or unreliable,"[99] but instead, must focus on "whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair."[100] A result based on erroneous law is a "windfall," not an accused's Sixth Amendment entitlement.[101] When attorney error merely prevents reliance on incorrect law, the result of the trial is "neither unfair nor unreliable"[102] and the proceeding is not unfair because the accused has been deprived of no "procedural right to which the law entitles him."[103]

The reasoning in *Nix v. Whiteside* and *Lockhart v Fretwell* had the potential to narrow the prejudice demand substantially, precluding actual ineffectiveness claims in a number of additional situations where competent performance could have yielded a better outcome. *Fretwell* observed that without "some effect . . . on the *reliability* of the trial process, the Sixth Amendment guarantee is generally not implicated"[104] and that a defendant

93. Nix v. Whiteside, 475 U.S. 157, 175 (1986); *see also id.* at 184–88 (Blackmun, J., concurring).

94. *Id.* at 175 (majority opinion).

95. *Id.* at 185 (Blackmun, J., concurring).

96. *Id.* at 186–87 (Blackmun, J., concurring).

97. *See* Lockhart v. Fretwell, 506 U.S. 364, 370–71 (1993).

98. *Id.* at 366.

99. *Id.* at 372.

100. *Id.* at 369.

101. *Id.* at 370.

102. *Id.* at 371.

103. *Id.* at 372.

104. *Id.* at 369 (emphasis added) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)) (internal quotation marks omitted).

must be deprived "of a fair trial, a trial whose result is *reliable*."[105] The *Nix* majority stated that "truthful testimony could not have prejudiced the result of the trial,"[106] and the concurring Justices suggested that lawyer error is of concern only when it detracts from a trial's *reliability*.[107] It is true that in each case, there were indications that if lawyer deficiency did not jeopardize reliability but occasioned "unfairness" or a procedural right deprivation, a prejudice showing might be possible—but the scope of this alternative was uncertain.[108] Based on *Nix* and *Fretwell*, it seemed possible that a defendant might not be able to demonstrate prejudice, for example, if defense counsel incompetently failed to exclude reliable evidence that an accused had no "right" to suppress.[109] If an attorney incompetently urged his client to "take the stand and tell the whole truth" in a trial with an exceedingly weak prosecution case, and the accused proceeded to admit guilt and seal a guilty verdict, the client might not have been able to demonstrate prejudice because the reliability of the result was not undermined by truthful testimony and counsel deprived the defendant of no specific constitutional right.

Decisions since *Fretwell*, however, have rejected expansive readings of *Nix* and *Fretwell*, confining their impact to situations involving false evidence or erroneous law. *Williams v. Taylor* overturned a denial of an ineffectiveness challenge based on an overly broad interpretation of *Fretwell* which led to the "erroneous view that a 'mere' difference in outcome [was] not sufficient to establish" prejudice.[110] The attorney's error had deprived the defendant of his constitutional right "to provide the jury with . . . mitigating evidence."[111] The majority indicated that *Strickland*'s prejudice standard governed "virtually all ineffective-assistance-of-counsel claims,"[112] intimating that *Nix* and *Fretwell* "require[d] a separate inquiry into fundamental fairness" *only* in exceptional situations like those involved in those two cases.[113]

More significant were the insights in Justice Kennedy's majority opinion in *Lafler v. Cooper*.[114] A broad construction of *Nix* and *Fretwell* could have

105. *Id.* (emphasis added) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)) (internal quotation marks omitted).

106. Nix v. Whiteside, 475 U.S. 157, 176 (1986).

107. *Id.* at 185 (Blackmun, J., concurring).

108. *See Fretwell*, 506 U.S. at 372; *see also Nix*, 475 U.S. at 186–87 (Blackmun, J., concurring).

109. A defendant, for example, has no personal right to exclude evidence secured in violation of the Fourth Amendment, the *Miranda* doctrine, or the *Massiah* doctrine, and the reliability of such evidence is not impaired by the violations.

110. Williams v. Taylor, 529 U.S. 362, 397 (2000).

111. *Id.* at 393.

112. *Id.* at 391.

113. *Id.* at 393.

114. *See generally* Lafler v. Cooper, 132 S. Ct. 1376 (2012).

supported a conclusion that a defendant who loses an opportunity for a plea bargain but is convicted after a fair trial could not suffer prejudice.[115] The Court resoundingly rejected that reading, strictly confining the reach and impact of those decisions. The majority disagreed with the government's "claim that [because] the sole purpose of the Sixth Amendment is to protect the right to a fair trial, . . . [pretrial] [e]rrors [were] not cognizable . . . unless they affect the fairness of the trial."[116] According to Justice Kennedy, "[t]he Sixth Amendment . . . is not so narrow in its reach."[117] A fair trial, in fact, can cause injury after attorney deficiency during plea bargaining, prejudicing an accused by yielding "a conviction on more serious counts or the imposition of a more severe sentence" than would have resulted from the bargain offered.[118]

The Court stressed that *Fretwell* did not modify *Strickland* by "add[ing] an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right."[119] *Fretwell* and *Nix* addressed unique situations involving "considerations that, as a matter of law, ought not inform the [prejudice] inquiry,"[120] and "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate prejudice."[121] They qualified the *Strickland* standard to prevent defendants from receiving windfalls due to erroneous legal principles or false testimony.[122] Defendants who allege that counsel's incompetence deprived them of advantageous plea bargains are not requesting windfalls, but, instead, are "seek[ing] relief from counsel's failure to meet a valid legal standard."[123]

The contention that the Sixth Amendment's purpose is to ensure that a conviction is reliable "fail[ed] to comprehend the full scope of the Sixth Amendment's protections."[124] *Strickland* recognized that the benchmark is whether counsel's performance prevents reliance on the trial "as having produced a just result," and that "[t]he goal of a just result is not divorced

115. In *Lafler*, the government relied heavily upon *Nix* and *Fretwell* in arguing that ineffectiveness claims in such situations had no merit because prejudice could not be shown. *See id.* at 1386–88. The dissent agreed that *Fretwell* supported a no prejudice conclusion. *See id.* at 1394–95 (Scalia, J., dissenting).

116. *Id.* at 1385.

117. *Id.*

118. *Id.* at 1386.

119. *Id.*

120. *Id.* at 1387 (quoting Lockhart v. Fretwell, 506 U.S. 364, 373 (1993) (O'Connor, J., concurring)) (internal quotation marks omitted).

121. *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 391–92 (2000)) (internal quotation marks omitted).

122. *Id.*

123. *Id.*

124. *Id.*

from the reliability of a conviction."[125] Nonetheless, in situations where defendants claim the deprivation of favorable plea opportunities, "the question is . . . the fairness and regularity of the processes that preceded [the trial and may have] caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance."[126]

Finally, the Court characterized *Kimmelman v. Morrison* as confirmation of the view that "a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome."[127] *Kimmelman* held that an incompetent failure to seek suppression of *reliable* evidence can yield prejudice if there is a reasonable probability that competent performance would have produced a different trial outcome.[128] The *Kimmelman* Court recognized that the right to effective assistance does not "belong[] solely to the innocent or . . . attach[] only to matters affecting the determination of actual guilt."[129] In sum, the fact that a defendant "is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining."[130]

The opinions in *Williams* and *Lafler* preclude the argument that the prejudice burden always requires a negative impact on outcome reliability or the deprivation of a recognized right. Even guilty defendants who have received fair trials with reliable results might be able to establish that a lawyer's errors caused constitutional prejudice by depriving them of more favorable outcomes. Together, these two significant post-*Strickland* opinions prevented the logic of *Nix* and *Fretwell* from shrinking the definition of prejudice and thereby diminishing the right to effective assistance.

Some think that the *Strickland* doctrine is an ineffective guarantor of effective assistance, finding fault with both the indulgent, amorphous deficient performance prong and the demanding prejudice prong.[131] Critics believe that *Gideon*'s promise is too often undermined by lawyer incompetence and that *Strickland*'s standards invite courts to ignore denials of meaningful legal assistance for those accused of crimes. With *Gideon*

125. *Id.* at 1388 (internal quotation marks omitted).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* (quoting Kimmelman v. Morrison, 477 U.S. 365, 380 (1986)) (internal quotation marks omitted).

130. *Id.*

131. *See* Strickland v. Washington, 466 U.S. 668, 706 (1984) (Marshall, J., dissenting); *see also* Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 347–48; Bright, *supra* note 51, at 706; Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441 (2003–2004).

reaching the half-century mark and *Strickland* turning thirty in 2014, the time is ripe for serious reflection upon our national commitment not only to providing lawyers for those unable to afford assistance, but to ensuring that every defendant has the assistance consistent with our Constitution's highest aspirations.

Happy Anniversary, *Gideon v. Wainwright*! The scholarly gifts that follow are tributes to the aspirations reflected in the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,"[132] and to your pithy, inspiring declaration that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[133]

132. U.S. CONST. amend.VI.

133. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).