Gideon v. Wainwright – From a 1963 Perspective

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INTRODUCTION

Gideon v. Wainwright[1] is more than a "landmark" Supreme Court ruling in the field of constitutional criminal procedure.[2] As evidenced by the range of celebrators of *Gideon*'s Fiftieth Anniversary (extending far beyond the legal academy)[3] and *Gideon*'s inclusion in the basic coverage of high school government courses,[4] *Gideon* today is an icon of the American justice system. I have no quarrel with that iconic status, but I certainly did not see any such potential in *Gideon* when I analyzed the Court's ruling shortly after it was announced in March of 1963. I had previously agreed to write an article for the *Supreme Court Review*'s coverage of the Court's 1962–63 term. Phillip Kurland, the *Review*'s editor, made *Gideon* my assignment, noting that the Court during that term had decided numerous constitutional criminal procedure cases and *Gideon* clearly was the most prominent of those rulings. As my research progressed, I came to the conclusion that *Gideon* was more significant as a case study in the crafting of an opinion that overruled a previous decision (*Gideon* had overruled *Betts v. Brady*[5]) than as a contribution to the field of constitutional criminal procedure. Indeed, as I noted in the introduction to my article on *Gideon* and the "art of overruling,"[6] *Gideon* appeared to have less doctrinal and practical

1. Gideon v. Wainwright, 372 U.S. 335 (1963). I have commented more extensively on *Gideon* and other right-to-counsel cases in two sources that will be cited throughout this article: Jerold H. Israel, Gideon v. Wainwright*: The Art of Overruling*, 1963 SUP. CT. REV. 211, and 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE §§ 11.1–.10 (3d ed. 2013) [hereinafter CRIMPROC], *available at* Westlaw.

2. The "landmark" designation might suggest a very exclusive club, but dozens of criminal procedure rulings have been admitted to membership if the test is frequent commentator description of a decision as a "landmark" ruling. My November 1, 2013 search of the Westlaw database for law reviews, texts, and bar journals indicates that three Supreme Court decisions from the 1962–63 term alone have been described as "landmark" criminal procedure rulings in more than twenty publications. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (eighty-three publications in Westlaw search results); Fay v. Noia, 372 U.S. 391 (1963) (twenty-nine publications—referring to the status of *Fay* at the time of decision and not today, as it was later overruled); *Gideon*, 373 U.S. 335 (403 publications). This is not to suggest that all landmarks are equal. In casebooks, landmarks often become reduced to note cases, but *Gideon* at year 50 has escaped that fate. Whether it will retain that status as long as *Boyd v. United States*, 116 U.S. 616 (1886), remains to be seen.

3. *See, e.g.*, *Consulate Celebrates 50th Anniversary of* Gideon v. Wainwright, CONSULATE GEN. U.S. SHANGHAI - CHINA, http://shanghai.usembassy-china.org.cn/033012gideon.html (last visited May 20, 2014); Gideon v. Wainwright—*Case Providing Defendants an Attorney—Turns 50*, CBS NEWS (Mar. 16, 2013, 1:32 PM), http://www.cbsnews.com/8301-33816_162-57574701; Bill Mears, *'Gideon' at 50 and the Right to Counsel: Their Words*, CNN, http://www.cnn.com/2013/03/18/justice/Gideon-own-words (last visited May 20, 2014).

4. *See, e.g.*, COLORADO MODEL CONTENT STANDARDS: CIVICS 13 (1998), *available at* http://www.lawanddemocracy.org/pdffiles/civics.pdf; *United States Era 9*, NAT'L CENTER HIST. SCHS., http://www.nchs.ucla.edu/Standards/us-history-content-standards/us-era-9-1 (last visited May 20, 2014).

5. Betts v. Brady, 316 U.S. 455 (1942).

6. *See* Israel, *supra* note 1, at 211 n.1.

significance than two other criminal procedure rulings decided on the same day—*Douglas v. California*[7] and *Fay v. Noia*.[8] This Essay recounts the analysis that led me to view *Gideon* in 1963 as an important, but limited, decision—certainly not one destined to be an all-time landmark ruling.

The *Gideon* extension of the state's obligation to provide appointed counsel for indigent defendants struck me in 1963 as not nearly as significant as other recent developments in the rapidly expanding constitutional regulation of the state criminal justice processes—in particular *Mapp v. Ohio*'s application of the Fourth Amendment's exclusionary rule to the states.[9] *Gideon* overruled *Betts v. Brady*, which had held that the state's obligation to provide appointed counsel was limited to instances in which the special circumstances of the case required counsel's assistance in order to gain a fair trial.[10] Overruling *Betts* in 1963 did not mean as much as it would have if done shortly after *Betts* was decided in 1942. In the intervening years, the Court had recognized that appointment was required in all capital cases (the potential of the death penalty apparently constituting a *per se* special circumstance).[11] In non-capital felony cases, "special circumstances" had come to include some very common circumstances.[12] Appointment of counsel had been required simply because the prosecution was brought under a statute that could present interpretative issues as to its coverage,[13] or trial proceedings offered an opportunity to raise an objection or pursue a strategy that could not readily be evaluated by a layperson.[14] Thus, a leading casebook, in adding the

7. Douglas v. California, 372 U.S. 353 (1963) (discussed in CRIMPROC, *supra* note 1, § 11.1(d)).

8. Fay v. Noia, 372 U.S. 391 (1963) (discussed in CRIMPROC, *supra* note 1, §§ 28.3(b), 28.4(b)). *Gideon* had received considerable public attention because it overruled *Betts*, but apart from a "handful of states," prosecutors were more likely to be concerned about the impact of the other two cases. Israel, *supra* note 1, at 212–13. *Douglas* imposed an appointment requirement that currently was met by "[o]nly a handful of states," and *Noia* had dramatically expanded federal habeas review of state convictions by allowing review of constitutional claims forfeited in state proceedings, provided counsel had not engaged in a deliberate bypass in failing to raise the claim there. *Id.* at 213 & nn.8–9.

9. Mapp v. Ohio, 367 U.S. 643, 655 (1961); *see* CRIMPROC, *supra* note 1, § 3.1(a).

10. *Betts*, 316 U.S. at 471–72.

11. *See* Israel, *supra* note 1, at 249–50. Justice Clark joined in the overruling of *Betts* on the ground that having a lesser standard for non-capital cases was inconsistent with the thrust of his opinion for the Court in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), rejecting such a distinction in the application of the Fifth and Sixth Amendments to the trial of civil dependents of military personnel for overseas offenses. *See* Gideon v. Wainwright, 372 U.S. 335, 348–49 (1963) (Clark, J., concurring).

12. *See* Israel, *supra* note 1, at 251–61.

13. Chewning v. Cunningham, 368 U.S. 443, 447 (1962).

14. Hudson v. North Carolina, 363 U.S. 697, 701–04 (1960).

Gideon case to its 1963 supplement, asked: "After Chewning v. Cunningham what was left of Betts v. Brady to overrule?"[15]

As Justice Harlan noted in his *Gideon* concurrence,[16] the state court rulings applying *Betts* had often failed to take into account this broad reading of special circumstances. Thus, the practical impact of *Gideon*, in flatly rejecting *Betts*, had the potential to be substantially greater than the limited doctrinal extension of the constitutional right. However, by 1963, only five states were regularly relying on *Betts*.[17] The remainder, as a matter of state law or state practice, were regularly appointing counsel in at least all felony cases (and *Gideon* presented only a felony case[18]).

The limited practical and doctrinal impact of the *Gideon* holding did not necessarily define *Gideon*'s place in the rapidly expanding field of constitutional criminal procedure. *Gideon* might be assigned far greater significance as a result of the implications of that decision for issues that went beyond the overruling of *Betts*. Before deciding against writing about *Gideon*'s contributions to constitutional criminal procedure, I explored what *Gideon* might contribute to the resolution of a series of these other issues.[19] The issues I considered were: (1) the relationship of Fourteenth Amendment due process to the guarantees found in the Bill of Rights; (2) the expansion of constitutional regulation to eliminate distinctions based on indigence in the administration of the criminal justice process; and (3) a series of questions relating to the interpretation of the Sixth Amendment right to counsel.[20] My conclusion was that *Gideon* offered very

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15. *See* WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPER, 1963 SUPPLEMENT TO DODD'S CASES ON CONSTITUTIONAL LAW 579 (1963) (citation omitted); *see also The Supreme Court, 1961 Term*, 76 HARV. L. REV. 75, 115 (1962) ("After *Chewning*, little may be left of *Betts* . . . . It would seem preferable for the Court squarely to overrule *Betts*.").

16. *See Gideon*, 372 U.S. at 351 (Harlan, J., concurring).

17. *See* Israel, *supra* note 1, at 267. The Brief for Petitioner stressed that only five states would be impacted by overruling *Betts*, and even there, some counties regularly appointed counsel in felony cases. "The task here," it noted, "is essentially a modest one: to bring into line with the consensus of the states and professional opinion the few stragglers who persist in denying fair treatment to the accused." Brief for the Petitioner at 32, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115120, at *32. Of course, retroactive application would impact other states that had only recently moved to regular appointment and still had incarcerated felony defendants who had not been provided counsel. *See* Israel, *supra* note 1, at 212 n.7.

18. *See infra* note 41 and accompanying text.

19. I was not alone in viewing *Gideon*'s substantive significance as primarily related to still unsettled issues. *See The Supreme Court, 1962 Term*, 77 HARV. L. REV. 79, 103–05 (1963) (discussing briefly of why the "decision in *Gideon* was not unexpected," followed by a discussion of two open issues—whether *Gideon* would be applied retroactively and whether the right to appointed counsel would extend to misdemeanor cases).

20. One issue I did not consider was the bearing of *Gideon* on originalism in constitutional interpretation. *Betts v. Brady* had taken into account the historical distinction between the right to utilize retained counsel and the state's obligation to provide counsel. *See* Betts v. Brady, 316 U.S. 455, 466–67 (1942). *Johnson v. Zerbst*, however, had not addressed that distinction in recognizing a Sixth Amendment right to appointed counsel. Johnson v. Zerbst, 304 U.S. 458

little direction on these issues, certainly not enough to justify an article on the substantive contributions of *Gideon*. In reconstructing the reasoning that led me to that conclusion, I may be influenced by the Supreme Court's later opinions addressing those issues, but my recollection is reinforced by some skimpy notes that I retained and some occasional comments on those issues in the footnotes of my *Supreme Court Review* article.

I. THE FOURTEENTH AMENDMENT ISSUE

Betts v. Brady was a paradigm of the application of the traditional "fundamental fairness" analysis in assessing the relationship between a Bill of Rights guarantee and Fourteenth Amendment due process, emphasizing particularly "federalism concerns." Justice Black's opinion for the Court in *Gideon*, in contrast to *Betts*, appeared to hold that Fourteenth Amendment due process made the Sixth Amendment right to counsel fully applicable to the states. Its conclusion, that the Sixth Amendment right was fundamental and therefore applicable to the states, was consistent with acceptance of the *Palko* view of traditional "fundamental fairness" analysis (as Justice Harlan argued in his concurring opinion[21]), although it could also reflect application of the selective incorporation doctrine that had been recently

(1938). Thus, the amicus brief for the 22 states urging the overruling of *Betts* criticized *Betts*' historical argument as inconsistent with *Johnson*'s reading of the Sixth Amendment; *see also* Brief for the State Government Amici Curiae at 5–6, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115122, at *5–6. *See also* Brief for the Petitioner at 18–19, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115120, at *18–19.

In the commentary, only Judge Henry Friendly challenged *Johnson* for its inconsistency with the original purpose of the Sixth Amendment, and he acknowledged that the Court's "sound" result could have been achieved under due process. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 944–45 (1965). Justice Black has occasionally been described as an "originalist," but he focused primarily on what he viewed as the "plain meaning" of the text. *See* CRIMPROC, *supra* note 1, §§ 2.8(a) n.17, 2.9(c) n.46. The application of his textual reasoning could readily have produced the following analysis: the Sixth Amendment nowhere conditions the guarantees of the accused on the accused's ability to pay the costs associated with the implementation of those guarantees; the right of compulsory process is not dependent on being able to pay witness fees and right to jury trial is not conditioned on the ability to reimburse the court for juror fees and other juror costs; nothing in the language of the Sixth Amendment justifies a different treatment of the right to the assistance of counsel. This would be consistent with Justice Black's approach in analyzing other constitutional provisions. *See generally* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH (1968); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

21. Justice Harlan's concurring opinion did not reject the possibility that the right to counsel under due process had the same scope as the right to counsel under the Sixth Amendment. *Gideon*, 372 U.S. at 352 (Harlan, J., concurring). He argued against a position that would "automatically carry over an entire body of federal law and apply it in full sweep to the states." *Id.* The fundamental fairness ruling cited by Justice Harlan, *Palko v. Connecticut*, recognized that a particular guarantee could be fully "absorbed" by the Due Process Clause (although it held that was not the case as to the double jeopardy clause). Palko v. Connecticut, 302 U.S. 319, 326 (1937). *See* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 302–08 (1982); CRIMPROC, *supra* note 1, § 2.5(c).

urged by Justice Brennan.[22] Considering the ambiguous description of the relationship between due process and the guarantees of the Bill of Rights in Justice Black's opinion, the diverse positions on incorporation that had been advanced by several of the Justices who joined Justice Black's opinion,[23] and Justice Harlan's concurrence, I concluded that *Gideon* reached a result consistent with the adoption of Justice Brennan's selective incorporation analysis, but fell short of clearly adopting that position. *Gideon* was *not* the landmark opinion that established that procedural guarantees found in the Bill of Rights could no longer be held to be fundamental (and therefore applicable to the states) only in some aspects, as opposed to being applied fully to the states under the same standards applied to the federal criminal justice process. That ruling arguably came one year later in *Malloy v. Hogan*,[24] although it was in *Duncan v. Louisiana*,[25] decided five years later, that the Court fully explored its application of the selective incorporation doctrine. Subsequent discussions of the selective incorporation doctrine

22. *See* Israel, *supra* note 21, at 253. The conference notes on *Gideon*, reproduced in THE SUPREME COURT IN CONFERENCE (1940–1985) 502–03 (Del Dickinson ed., 2001), indicate that Justice Brennan viewed *Gideon* as a selective incorporation case, as he referred to incorporation and to his article on selective incorporation. *See* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 768–69 (1961). Justice Stewart, who also joined Justice Black's opinion, expressly rejected incorporation. The reconstructed conference notes (based on the papers of Justices Douglas and Brennan) offer the following summary of Justice Stewart's position: "Due Process requires that a man be represented by counsel if he is to have a fair trial. I would not 'incorporate' or 'absorb' the Sixth into the Fourteenth Amendment. There are no circumstances when the absence of counsel can produce a fair trial. I reverse." THE SUPREME COURT IN CONFERENCE, *supra*, at 503. Justice Stewart did not find it necessary to join Justice Harlan's concurring opinion insofar as it rejected any version of incorporation, although he later joined Justice Harlan's opinion in *Duncan v. Louisiana*, which challenged the majority's explicit adoption of incorporation. Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting). Although both supported *Gideon*'s rejection of *Bett*'s special circumstances rule, Justices Stewart and Harlan did so on different grounds. Justice Stewart apparently concluded that counsel was always needed to ensure a fair trial. Justice Harlan did not, as he made clear in the oral argument. Oral Argument, Part 2 at 26:50, Gideon v. Wainwright, 372 U.S. 335 (No. 155), *available at* http://www.oyez.org/cases/1960-1969/1962/1962_155 (responding to the argument of J. Lee Rankin, Justice Harlan originally notes that there are cases in which lawyers would agree that "the best thing that a client could do . . . is go and try his case himself," and then adds, "to make a sweeping generalization as a dogmatic . . . assertion that there can be no fair trial without a counsel ignores the facts of life that everybody—lawyer knows"). However, Justice Harlan was willing to apply an absolute requirement of appointment to avoid the administrative difficulties posed by a special circumstances standard—supporting a ruling that has been characterized as "prophylactic" in nature. *See* Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Powell, J., concurring); CRIMPROC, *supra* note 1, § 11.1(a) n.24 .

23. For a more extensive analysis of each of these elements, see Israel, *supra* note 21, at 292–95.

24. Malloy v. Hogan, 378 U.S. 1, 10–11 (1964); *see also* Israel, *supra* note 21, at 295–97.

25. Duncan v. Louisiana, 391 U.S. 145 (1968); *see also* CRIMPROC, *supra* note 1, § 2.6(a) n.28, (c).

have concentrated on *Duncan*, not *Gideon*,[26] and it is *Duncan*, rather than *Gideon*, that achieved prominence in large part because of its relationship to that doctrine.

II. INDIGENT EQUALITY

The briefs in *Gideon*, with good reason, addressed the question of whether *Betts* produced a ruling that was inconsistent with the subsequent decision in *Griffin v. Illinois*.[27] The *Griffin* Court, relying in part on the Equal Protection Clause, held unconstitutional—as applied to an indigent—a state practice conditioning appellate review upon presenting a stenographic transcript of lower court proceedings (which the indigent could not afford to purchase). *Griffin*'s equality analysis had been extended to various other contexts, but always to invalidate state prerequisites to access to the judicial process.[28] Commentators had questioned whether that principle would be extended to providing to the indigent the resources needed to take advantage of that access.[29] Still, the *Griffin* plurality opinion by Justice Black had included that famous generality: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[30]

Relying in part on that statement, previous briefs had argued that the "*Griffin* principle" had implicitly rejected the *Betts* analysis and automatically

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26. *See* CRIMPROC, *supra* note 1, § 2.6(a) & n.1 (collecting articles discussing selective incorporation). However, both Don Dripps and Tracy Meares have brought attention to *Gideon*'s reliance on an incorporationist approach, arguing that the Court limited effective future development of the right to counsel by focusing on the Sixth Amendment rather than the more flexible standard of due process. *See* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE 117–18, 152–55 (2003); Tracy L. Meares, *What's Wrong With* Gideon, 70 U. CHI. L. REV. 215, 223–24 (2003).

27. Griffin v. Illinois, 351 U.S. 12, 36–38 (1956). Three key *Gideon* briefs argued in favor of overturning *Betts*. Brief for the Petitioner at 25–28, Gideon v. Wainwright, 372 U.S. 355 (1963) (No. 155), 1962 WL 115120, at *25–28; Brief of the American Civil Liberties Union and the Florida Civil Liberties Union, Amici Curiae at 26–29, Gideon v. Wainwright, 372 U.S. 355 (1963) (No. 155), 1962 WL 115121, at *26–29; Brief for the State Government Amici Curiae at 12–13, Gideon v. Wainwright, 372 U.S. 355 (1963) (No. 155), 1962 WL 115122, at *12–13. Discussions with fellow clerks during the 1959–60 and 1960–61 terms, when I clerked for Justice Stewart, led me to believe that many of the Justices did not read amicus briefs, leaving that task to the clerks. The ACLU and State Government briefs, however, were almost certainly given more attention. The ACLU participated in oral argument, so its brief surely would have been read by the Justices in preparing for that argument. The State Government Brief was discussed in oral argument by petitioner's counsel, Abe Fortas. *See* Oral Argument, Part 2, *supra* note 22, at 33:08. The Court was obviously interested in the position taken by states other than Florida, as evidenced by its decision also to allow Alabama to participate in the oral argument.

28. Rulings extending *Griffin* related to fees and transcripts, where indigents were either denied access to posttrial proceedings or limited as to the contentions they could raise. *See* CRIMPROC, *supra* note 1, § 11.2(d).

29. *See, e.g.*, Israel, *supra* note 1, 246 & n.202 (collecting articles); CRIMPROC, *supra* note 1, § 11.1(d).

30. *Griffin*, 351 U.S. at 19.

required appointment of trial counsel for the indigent.[31] The petitioner's brief for Gideon followed the same path. It argued that denial of counsel "violates both due process and equal protection," citing in support the "principle . . . articulated in *Griffin v. Illinois*."[32] The brief for Florida challenged the extension of equal protection analysis, arguing that "the *Griffin* case does not require that states take affirmative action to equalize economic conditions" and to so hold "would open a veritable 'Pandora's Box.'"[33]

The Supreme Court in the 1962 term did extend the *Griffin* analysis to require the provision of counsel for the indigent, but that didn't come in *Gideon*. *Douglas v. California*, decided the same day as *Gideon*, relied in part on equal protection to hold unconstitutional a California practice of refusing to appoint counsel for an indigent seeking appellate review where the appellate court, after a preliminary review of the trial record, concluded "no good whatsoever could be served" by adding the input of counsel.[34] The *Gideon* opinion did not cite to *Douglas* or *Griffin*, or mention equal protection. Justice Black did note that the criminal justice system enshrined in "our state and national constitutions" sought to "assure fair trials . . . in which every defendant stands equal before the law," and that "[t]his noble ideal cannot be realized if the poor man . . . has to face his accusers without a lawyer to assist him."[35] The opinion added that "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."[36]

Even with the above statements, the *Gideon* opinion's "equality" focus was limited. It did not stress the need for the process to treat the indigent and the non-indigent equally. Rather, the focus was on the general

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31. *See* Brief for the Petitioner at 39–44, Chewning v. Cunningham, 368 U.S. 443 (1962) (No. 63), 1961 WL 102331, at *39–44; Brief for the Petitioner at 23–26, Carnley v. Cochran, 369 U.S. 506 (1962) (No. 158), 1961 WL 101650, *23–26; Brief for Petitioner at 23–27, Hudson v. North Carolina, 363 U.S. 697 (1960) (No. 466), 1960 WL 98415, at *23–27. In *Hudson* and *Chewning*, the briefs presented the contention as resting entirely on equal protection, rather than a combination of equal protection and due process—the rationale advanced in the *Gideon* briefs. Thus, the *Chewning* brief argued that petitioner was entitled under equal protection to appointed counsel in a recidivist trial "because Virginia law allows counsel in recidivist trials for defendants who are financially able to obtain counsel." Brief for the Petitioner at 40, *Chewning*, 368 U.S. 443 (No. 63).

32. Brief for the Petitioner, *supra* note 17, at 25–26.

33. Brief for Respondent at 52–53, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), 1963 WL 105476, at *52–53. Justice White apparently was persuaded by this argument. *See* THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 22, at 504 ("[Justice] White: Equal protection of the laws would apply in civil cases and would require a lawyer where the state is a litigant . . . .")

34. Douglas v. California, 372 U.S. 353, 355 (1963) (quoting People v. Douglas, 10 Cal. Rptr. 188, 195 (Cal. Ct. App. 1960)) (internal quotation marks omitted).

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

36. *Id.*

applicability of the fair trial requirement (also the theme of *Johnson v. Zerbst*), without regard to the defendant's financial status.[37] The opinion did not articulate a broader requirement of giving the indigent equal ability to utilize elements of the process that are not required by due process. Every state criminal justice process includes procedures through which a defendant may obtain an advantageous result that go beyond the procedural prerequisites for a fair trial. A broad equality requirement would ensure that the indigent had the means to take advantage of the most important of those procedures. Unlike *Gideon*, *Douglas* addressed such a procedure. Due process did not require appellate review, but *Douglas* required that the indigent be given counsel to take advantage of the equal protection access to such review already guaranteed by *Griffin*.[38]

As between *Gideon* and *Douglas*, with respect to the development of an equality principle, *Douglas* appeared to me to be the more significant case, both in doctrine and practical impact. *Douglas*' reliance on *Griffin*'s analysis provided a far more significant doctrinal development. Also, the *Douglas* ruling would impact far more states than *Gideon*. As I noted in my *Supreme Court Review* article, "only a handful of states, if that many, follow[ed] a practice that [met] the requirements of *Douglas*."[39] An article addressing the equality issue therefore would have to be more about *Douglas* than *Gideon*.

III. SIXTH AMENDMENT ISSUES

Application of the Sixth Amendment guarantee to the states was certain to present constitutional questions that had not yet been resolved in the application of that Amendment solely to the federal system. I considered writing about *Gideon* and the future development of the Sixth Amendment. In that connection, I prepared a list of key issues: (a) what level or type of charge will give rise to the duty to appoint counsel; (b) when does a person become entitled to appointment, and how does that bear on access to counsel thereafter at each stage in the process; (c) will the Sixth Amendment right extend to providing funding for persons with special expertise who might assist counsel; and (d) how will the Court develop the concept of "effective assistance," which had been viewed as an aspect of the constitutional right to counsel. My conclusion was that the *Gideon* opinion offered limited direction as to the first issue and basically no direction as to the other three.

37. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

38. *See* CRIMPROC, *supra* note 1, § 11.1(d) & nn.107–16 (discussing the subsequent retreat from *Douglas'* equal protection analysis in Ross v. Moffitt, 417 U.S. 600 (1974)).

39. Israel, *supra* note 1, at 213 n.9.

A. OFFENSE LEVEL

Justice Harlan's concurring opinion in *Gideon* sought to limit the ruling there to the prosecution for "offenses which . . . carry the possibility of a substantial prison sentence" (i.e., a "serious criminal charge"),[40] but Justice Black's opinion for the Court contained no such limitation. It repeatedly described the right to counsel by reference to the language of the Sixth Amendment—the right of an "accused" in a "criminal prosecution."[41] However, the opinion did not address the meaning of the term "criminal" as used in "criminal prosecution." Were all charges placed on the state's "criminal" docket therefore criminal accusations for the purposes of the Sixth Amendment right to counsel? The exemption of petty offenses under the Jury Clause had been brought to the Court's attention,[42] and that exemption, even if it had no bearing on the right to counsel, illustrated that the history and function of a particular Sixth Amendment guarantee could result in excluding a particular charge from its application even though the "offense" charged was found in the jurisdiction's "criminal code."

Justice Black's opinion stressed the necessity of a lawyer's assistance in achieving a fair trial, but the fair trial objective also applied to various

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40. Gideon v. Wainwright, 372 U.S. 335, 351 (1963). Justice Harlan noted that the overruling of *Betts* should extend to "at least" such cases. Justice Clark also referred to persons charged with "serious crimes." *Id.* at 347.

41. The Court referred to the right as that of the "accused" in a "criminal prosecution," *id.* at 339, 343, as that of an "indigent criminal defendant," *id.* at 340–41, and as that of "one charged with crime." *Id.* at 343 (quoting Betts v. Brady, 316 U.S. 455, 462–63 (1963)) (internal quotation marks omitted). The conference notes attribute to Chief Justice Warren the following comment: "We should not go all the way and say that a man is entitled to counsel in all criminal cases . . . ." THE SUPREME COURT IN CONFERENCE, *supra* note 22, at 502.

Justice Black's opinion also noted that petitioner Gideon had been charged with a non-capital felony, *Gideon*, 372 U.S. at 342–45, and subsequent cases, considering the bearing of pre-*Gideon* convictions on recidivist charges, referred to *Gideon* as prohibiting "uncounseled felony conviction[s]." Loper v. Beto, 405 U.S. 473, 490 (1972); *see* United States v. Tucker, 404 U.S. 443, 448–49 (1972). Immediately after *Gideon* was decided, it commonly was described as a ruling applicable "at least [to] felony prosecutions" or to "'serious' crime[s]." Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1434 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1561 (1963) (quoting *Gideon*, 372 U.S. at 351 (Harlan, J., concurring)).

42. The petty offense exception had been noted in the Petitioner's Brief, *supra* note 17, at 44 n.43, and was noted in the oral argument. *See* Oral Argument, Part 1, *supra* note 22, at 46:56. The petty offense exemption is discussed in CRIMPROC, *supra* note 1, § 22.1(b). Petitioner's counsel did not suggest adoption of a petty offense limitation, but simply noted its existence. Abe Krash, one of the lawyers working with Gideon's appointed counsel (Abe Fortas), later rejected the petty offense analogy in a law review article. He argued that Gideon should be applied "in all cases where [the individual] may be deprived of life, or liberty, or property by criminal process." Abe Krash, *The Right to a Lawyer: The Implications of* Gideon v. Wainwright, 39 NOTRE DAME LAW. 150, 157 (1964). This would have encompassed "infractions"—offenses prosecuted under the criminal rules but subject only to the imposition of fines. Krash noted, however, that a current Congressional proposal for appointment of compensated counsel in the federal courts would exclude petty offenses. *Id.* at 157–58.

actions instituted by the government that had clearly been defined as civil, such as a civil forfeiture or civil contempt (indeed, at the time, criminal contempt was treated differently under the Jury Clause).[43] The characteristic that would identify a "criminal charge" would not be the value of a fair trial or prosecutorial initiation of the action, but some other aspect of the government's cause of action. That could be the potential sanction,[44] the actual sanction,[45] the purpose of the cause of action (whether to impose a "punishment"),[46] or even other aspects of procedure (which led to various

43. *See* Bloom v. Illinois, 391 U.S. 194, 197–200 (1968) (citing and overruling early cases holding that criminal contempt cases did not require a jury trial). As for due process requirements for civil forfeiture and civil contempt, see Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826–34 (1994); CRIMPROC, *supra* note 1, § 26.6(d); Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

44. The potential sanction standard could carry the right far beyond charges under the state criminal code. *Betts* had referred to traffic court cases since traffic violations (located in a separate code) at that time typically carried potential sentences of incarceration and fines that were viewed as punitive. *Betts v. Brady*, 316 U.S. 455, 473 (1942); *see* CRIMPROC, *supra* note 1, § 1.8(d) & nn.58–60. Justice Stewart asked about the traffic violation in the *Gideon* oral argument. *See* Oral Argument, Part 2, *supra* note 22, at 50:49. Various regulatory "offenses" located outside the criminal code also included incarceration as a possible penalty.

45. While *Gideon* referred to counsel's assistance being necessary to ensure the "fundamental human rights of life and liberty," that reference was not seen as suggesting that charges were not criminal for Sixth Amendment purposes simply because they involved misdemeanors and the particular defendant would not be sentenced to a loss of liberty. *See Gideon*, 372 U.S. at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)); LIVINGSTON HALL & YALE KAMISAR, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 295–96 (2d ed.1966). The actual incarceration standard initially was proposed in connection with the recognition that certain statutes providing for incarceration sentences (e.g., traffic offenses) rarely, if ever, resulted in that sentence, and for all practical purposes, were simply "infractions." *See* John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 710–11 (1968). To ensure that the violation had that character in the particular case, it was also necessary that a sentence of incarceration not be imposed. Of course, the actual incarceration standard eventually imposed by the Court differed from this proposal because it made the Sixth Amendment inapplicable to defendants convicted of violations that often do result in incarceration (and carry the stigma of such offenses), but did not have that consequence in the particular case. *But see* Argersinger v. Hamlin, 407 U.S. 25, 39–40 (1972); *but see* Scott v. Illinois, 440 U.S. 367, 380–81 (1979) (Brennan, J., dissenting) ("Unlike many traffic or other 'regulatory' offenses, [theft] carries the moral stigma associated with common-law crimes traditionally recognized as indicative of moral depravity."); Brief of the Nat'l Legal Aid and Defender Ass'n as Amicus Curiae at 13–14, *Scott*, 440 U.S. 367 (1978) (No. 77-1177), 1978 WL 206722, at *13–14 (arguing that *Argersinger* should be reconsidered because it denies counsel based on the "personal [sentencing] philosophy" of the "judge in the case," so for crimes such as "possession of marijuana," there will be no right to counsel before a particular judge although elsewhere "jail [is] routinely imposed"); Lawrence Herman & Charles A. Thompson, Scott v. Illinois *and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 106 (1979) ("If there is any misdemeanor deserving a full panoply of rights due a criminal accused, it is misdemeanor-theft. A rational argument cannot be made that a defendant charged with felony-theft can be denied counsel merely because no imprisonment is imposed upon conviction.").

46. That has been the focus, in part, of the effort to define an "offense" for double jeopardy purposes. *See* CRIMPROC, *supra* note 1, § 17.4(b) & nn.115–17.

states classifying ordinance violations as "civil" or "quasi-criminal" even though they duplicated misdemeanors in content and sanctions).[47] I did not see anything in *Gideon* providing substantial direction on these alternatives. When the Court in *Scott v. Illinois* eventually drew the line by reference to the defendant's actual confinement,[48] it did not rely on *Gideon*, and it saw no need to respond to Justice Brennan's argument that *Gideon* necessarily implied that potential confinement created a criminal prosecution. *Gideon* strongly indicated that the right was not limited to felonies, but did no more than that. Thus, Justices White and Stewart (who had joined the *Gideon* opinion) could readily be part of the *Scott* majority.

B. STARTING POINT/STAGES

At what point in the criminal process does the constitutional right to counsel attach, and at what steps in the process thereafter does the defendant have a right to insist upon the participation of that counsel? Prior to *Gideon*, the Court had provided at least partial answers to both these questions in the course of applying the due process right to counsel. *Hamilton v. Alabama* had held, in a state capital case, that the right to representation by appointed counsel extended to a pretrial stage in a criminal proceeding if it was a "critical stage."[49] That encompassed a stage at which a basic right could be "irretrievably lost" by failing to assert it. *Hamilton* involved a trial arraignment proceeding at which the defense of insanity was forfeited if not pleaded.[50] In *White v. Maryland*, decided several weeks before *Gideon* was argued, that critical stage analysis was extended to a preliminary hearing at which the uncounseled defendant entered a guilty plea, which was used against him when he later changed his mind and went to trial.[51] Although these cases spoke to the right to have the advice of counsel in these proceedings, they implicitly set a starting point for judicial appointments of counsel as sufficiently in advance of the critical stage proceeding to provide advice in that proceeding. *White* was particularly

47. *See id.* § 17.4(b) & nn.118–40.

48. *See Scott*, 440 U.S. at 373–74 (majority opinion). This includes sentences that provide for potential confinement on violation of conditions of the sentence. *See* CRIMPROC, *supra* note 1, § 11.2(a). The actual incarceration standard applies only to misdemeanors. *See id.* Appointment in felony cases is not conditioned on an incarceration sentence. *See* Nichols v. United States, 511 U.S. 738, 743 n.9 (1994).

49. Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961).

50. Justice Douglas's opinion spoke only of the "arraignment," but the cited Alabama cases established that the reference was to the "trial arraignment"—i.e., the arraignment on the indictment before the trial court, not a first appearance before a magistrate. *See* CRIMPROC, *supra* note 1, § 1.4(g) (noting jurisdictions that refer to the latter proceeding as an "arraignment on the complaint" or "preliminary arraignment").

51. White v. Maryland, 373 U.S. 59, 59–60 (1961).

significant in this regard because it required appointment before the defendant reached the trial court.[52]

Although *Gideon* emphasized the need for counsel to ensure a fair trial, that reasoning did not alter a critical stage analysis that could include pretrial proceedings because of their impact on the trial. The critical stage concept had been derived from *Powell v. Alabama*'s reference to the need for the "guiding hand of counsel at every step in the proceedings against him."[53] The same language had been cited by Justice Black in *Johnson v. Zerbst*, which established the Sixth Amendment right to counsel.[54] Of course the Sixth Amendment referred to the rights of an "accused." Neither *Hamilton* nor *White* addressed that term, arguably because it was not critical under due process analysis, but arguably also because a person who was being asked to respond to a formal charge quite obviously is an accused.

By adding to the analytical mix the language of the Sixth Amendment, *Gideon* might be seen as impacting the question of when the right to appointment attaches, treating that issue as distinct from what constitutes a "critical stage."[55] Of course, that addition would not necessarily broaden the right to counsel, as a due process analysis of what constitutes a critical stage might include steps in the process that occurred before a defendant became an "accused."[56] When the Court eventually set a starting point at which the individual became an accused for Sixth Amendment purposes, in *Kirby v. Illinois*,[57] it cited as relevant "a line of constitutional cases" starting with *Powell* and including *Hamilton* and *White* as well as *Gideon*. There was no suggestion that *Gideon* itself was decisive.

Both *Hamilton* and *White* involved judicial proceedings, and the starting point for becoming an accused was also a judicial proceeding (the first appearance). The Court later concluded that critical stage analysis applied to non-judicial proceedings involving the accused (e.g., lineups and government elicitation of statements),[58] but here again *Gideon* was viewed as

52. *See id.* at 60.

53. Powell v. Alabama, 287 U.S. 45, 69 (1932). *Powell*, the original "landmark" ruling on the right to counsel, was the primary grounding for *Gideon*'s argument that *Betts* had been wrongly decided. *See* Israel, *supra* note 1, at 231–38.

54. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

55. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 211–12 (2008); CRIMPROC, *supra* note 1, § 11.2(b).

56. *See* Wade v. United States, 388 U.S. 218, 236–37 (1967); Escobedo v. Illinois, 378 U.S. 478, 485–86 (1964); *see also* CRIMPROC, *supra* note 1, §§ 6.4(c), 7.3(b). *But see* Kirby v. Illinois, 406 U.S. 682, 688–90 (1972) (limiting *Escobedo* and *Wade*).

57. *Kirby*, 406 U.S. at 688–89; *see* CRIMPROC, *supra* note 1, § 11.2(b) nn. 44–48.7.

58. *Wade*, 388 U.S. at 237 (requiring notification of right to counsel where lineup is impending); Massiah v. United States, 377 U.S. 201, 206 (1964) (eliciting statements by an informant).

not having added substantially to the analysis first developed in the *Hamilton–White* line of cases.[59]

C. THE ASSISTANCE OF EXPERTS

A pre-*Gideon* ruling had also addressed the question of whether the Constitution required the state to provide an indigent defendant with the assistance of a defense expert. *United States ex rel. Smith v. Baldi* viewed that claim as presenting a due process issue that stood apart from the right-to-counsel cases. [60] The Court held that any due process obligation had been met when the state trial court utilized its own appointed psychiatric expert, and it therefore could deny defense counsel's request for a defense psychiatrist to assist on an insanity defense. *Smith*'s very brief discussion of the issue did not consider the bearing of *Powell* or *Johnson v. Zerbst* and the discussion there of the wide range of assistance that could be provided by court appointed counsel. *Gideon*'s discussion was similar and no more relevant to the issue than the *Powell* and *Johnson v. Zerbst* discussions.[61] When the Court reexamined *Smith* in *Ake v. Oklahoma*,[62] it suggested otherwise. *Ake* too relied on due process rather than the constitutional right to counsel, but it held that due process did require appointment of a defense psychiatric expert when a sufficient showing of relevance was made. The Court noted that *Smith* was decided "at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel."[63] Subsequent rulings in *Griffin*, its progeny, and in *Gideon* had "signaled our increased commitment to assuring meaningful access to the judicial process."[64] In light of these shifts and other developments (in particular, the "extraordinarily enhanced role of psychiatry in criminal law today"), *Smith* was not binding as to "whether fundamental fairness today requires a different result."[65]

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59. In *Wade* the Court cited the *Powell–Hamilton–White* line of cases, but did not include *Gideon*. *Wade*, 388 U.S. at 224–27. In *Kirby*, which limited *Wade* to "accused" persons, the Court cited *Gideon* (along with the other cases) in addressing the "attachment" issue. *Kirby*, 406 U.S. at 688. In *Massiah* the Court cited *Gideon* as simply reaffirming *Powell*, which, in turn, recognized the need for counsel in pretrial stages. *Massiah*, 377 U.S. at 205.

60. United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 568 (1953); *see* CRIMPROC, *supra* note 1, § 11.2(e) & n.140.

61. This is not to say that those discussions lacked relevancy. *See* John R. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 335, 337 (1964) (arguing that *Gideon* requires reexamination of rulings rejecting the "claim that adequate legal representation embraces non-legal assistance as well," since "the provision of counsel to a poor man may bring only half a defense if the accused is without funds to employ additional assistance").

62. Ake v. Oklahoma, 470 U.S. 68, 84–85 (1985); *see* CRIMPROC, *supra* note 1, § 11.2(e) & n.142.

63. *Ake*, 470 U.S. at 85.

64. *Id.*

65. *Id.*

Smith had been a capital case, where a constitutional right to counsel did exist even in state cases.[66] That led me to wonder whether the *Ake* Court really found in *Gideon* the establishment of new grounds for rejecting the perspective that shaped *Smith*, or simply preferred to refer to later cases that had undercut that perspective, rather than acknowledge that the *Smith* perspective was wrong at the outset. In any event, as to the later cases, *Griffin* arguably played the more important role in rejecting disparate treatment of indigent defendants.

D. EFFECTIVE ASSISTANCE

Pre-*Gideon* precedent also addressed the concept of effective assistance. *Powell v. Alabama*, after establishing that the defendants there had a due process right to appointed counsel, concluded that the right had been denied because the appointment process had been so "indefinite" (in initially appointing the entire bar) and "so close upon the trial as to amount to denial of effective and substantial aid" by counsel.[67] Several subsequent due process cases noted that the defendant was denied the due process right when a defendant entitled to the assistance of counsel was "force[d] . . . to trial with such expedition as to deprive him of the effective aid and assistance of counsel."[68] In *Glasser v. United States*,[69] another pre-*Gideon* ruling, the Court held that the Sixth Amendment right to counsel was violated when the trial court directed a retained defense attorney to also represent a codefendant, thereby creating a conflict of interest, which led counsel to forego actions that would have favored only one of the codefendants. Representation contrary to a defendant's best interests due to a conflict of interest denied the disfavored codefendant "his right to have the effective assistance of counsel."[70]

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66. *Smith* was decided in 1953. The capital offense exception was firmly established in *Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961), but had been explicitly recognized in dicta in pre-1953 cases. *See* Vegas v. Pennsylvania, 335 U.S. 437, 441 (1948); Bute v. Illinois, 330 U.S. 641, 674 (1948).

67. Powell v. Alabama, 287 U.S. 45, 53 (1932).

68. White v. Ragen, 324 U.S. 760, 764 (1945); *see also* Avery v. Alabama, 308 U.S. 444, 452 (1940); *Ex parte* Hawk, 321 U.S. 114, 118 (1944); Hawk v. Olson, 326 U.S. 271, 278–79 (1945); Reece v. Georgia, 350 U.S. 85, 90 (1955) (similar analysis rendered unconstitutional state forfeiture of a claim where state law failed to allow for appointment of counsel in time to object). In *White*, the allegations found to be sufficient to require a state response, although described as raising a claim under the *Powell* ineffective appointment line of cases, also referred to various failures by counsel that appeared unrelated to the trial court's failure to grant a continuance. *White*, 324 U.S. at 762–63. However, the Court's reliance upon cases like *Powell*, *Avery*, and *Hawk* led to *White* being read as part of that line of rulings. *See, e.g.*, Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958).

69. Glasser v. United States, 315 U.S. 60, 70 (1942); *see* CRIMPROC, *supra* note 1, § 11.9(a) n.1.

70. *Glasser*, 315 U.S. at 76.

One common characteristic of each of these pre-*Gideon* rulings was that the trial court was responsible for the lack of effective representation. As Sara Mayeux notes in her contribution to this symposium,[71] a long line of common law rulings had rejected claims of ineffective assistance under an agency doctrine, holding the defendant responsible for his counsel's shortcomings.[72] As she notes also, *Powell* had cited in support of its position state cases that had rejected that agency analysis.[73] However, the holdings in the pre-*Gideon* cases could be reconciled with the acceptance of traditional agency analysis because the ineffectiveness there could be attributed to the state, which arguably caused the agent-attorney's inadequate representation.

Reliance upon the federal constitutional right to counsel also arguably brought into play a slightly different limitation that made state responsibility a critical element of the ineffective-assistance-of-counsel claim ("IAC"). Constitutional violations require "state action," and numerous pre-*Gideon* lower court rulings had suggested that state action was not present unless a state actor (most likely the trial court) was somehow responsible for counsel's deficient performance.[74] *Mitchell v. United States*, a prominent opinion by Judge Prettyman of the D.C. Court, noted:

> It is clear from these opinions that the term "effective" has been used by the Supreme Court to describe a procedural requirement, as contrasted to a standard of skill. . . . It has never used the term to refer to the quality of the service rendered by a lawyer.[75]

Mitchell, however, also concluded that due process was violated where counsel "is so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce [as] one descriptive expression."[76] Of course, such gross incompetence not only rendered the

71. Sara Mayeux, *Ineffective Assistance of Counsel Before* Powell v. Alabama*: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014).

72. This agency doctrine was still being discussed at the time of the *Gideon* ruling, although it had been rejected by many courts. *See, e.g.*, Waltz, *supra* note 61, at 297 (providing the leading commentary on ineffective assistance at that time).

73. *See* Mayeux, *supra* note 71.

74. Waltz, *supra* note 61, at 297–300 (collecting state action rulings); *see also* Note, *Effective Assistance of Counsel for the Indigent Defendant*, *supra* note 41, at 1437–38; Note, *Effective Assistance of Counsel*, *supra* note 41, at 1553–58.

75. Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958). *Cf.* Waltz, *supra* note 61, at 293–94 (criticizing Judge Prettyman's reasoning). *But see* Payton v. Fields, 147 S.E.2d 762, 766 (Va. 1966) (citing the "well-reasoned opinion by Judge Prettyman in *Mitchell v. United States*").

76. *Mitchell*, 259 F.2d at 793.

appointment a "sham,"[77] but could be viewed as a state responsibility, since it would be apparent to the trial judge.[78]

Gideon's emphasis on counsel's assistance being a necessity in achieving fair trials arguably required the effective assistance requirement to address counsel incompetence without regard to state responsibility or trial court awareness. The responsibility for a "fair trial" lies with the state, and as the Ninth Circuit noted in a post-*Gideon* ruling, "effective assistance of counsel is equally 'essential to a fair trial' whether or not the court or the prosecutor participates directly in depriving the accused of that aid."[79] While "[t]here may be less reason to charge the State with knowledge of the deficiency," the "fundamental unfairness" remains.[80] In *Cuyler v. Sullivan*, the Supreme Court put to rest, in another context, any state action restriction on the character of the counsel deficiencies constituting ineffective assistance.[81] The Court cited *Gideon* in support of the principle that the state bore the ultimate responsibility for the process that resulted in conviction, but it also looked to pre-*Gideon* due process cases that supported that principle.[82] *Cuyler* confirmed my 1963 conclusion that *Gideon* might well lead to rejection of the state action restriction, but only as the last in a line of rulings inconsistent with that restriction.[83]

Gideon also appeared likely to influence the standard applied in determining whether counsel's performance fell short of effective assistance,

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77. *See* Avery v. Alabama, 308 U.S. 444, 446 (1940) (explaining that if a denial of continuance operated to "convert the appointment of counsel into a sham," the constitutional "guarantee of assistance of counsel [would not] be satisfied").

78. *See* Diggs v. Welch, 148 F.2d. 667, 670 (D.C. Cir. 1945) ("[A]bsence of effective representation . . . mean[s] representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it.").

79. Wilson v. Rose, 366 F.2d 611, 616 (9th Cir. 1966).

80. *Id.*

81. Cuyler v. Sullivan, 446 U.S. 335 (1980). The question addressed in *Cuyler* was whether the state action requirement imposed a different standard for retained counsel, as here the court was not responsible for the selection of the counsel. A unanimous Court flatly rejected that contention. *See* CRIMPROC, *supra* note 1, § 11.7(b).

82. *Cuyler*, 446 U.S. at 343. The Court relied on Moore v. Dempsey, 261 U.S. 86, 90–91 (1923), holding that due process was violated where the trial was dominated by the threat of mob violence, and Lisenba v. California, 314 U.S. 219, 236–37 (1941). *Id.* In *Lisenba*, the Court noted that due process was violated by state use of a confession where "mob violence anterior to the trial is the inducing cause of the . . . confession." *Lisenba*, 314 U.S. at 237. In the mob violence cases, the trial court presumably is aware of the threat of mob action. A fair trial can also be denied by jury misconduct, even though the court has no reason to be aware of that misconduct. *See* CRIMPROC, *supra* note 1, § 24.9(f). The ineffective assistance doctrine, in effect, treats defense attorneys, whether appointed or retained, in the same fashion as jurors. They are official participants in the administration of the process.

83. Insofar as *Gideon*'s contribution rested on its recognition of the need for counsel to ensure a fair trial, that connection dated back to *Powell* and could have led to rejection of the state action limitation in cases in which *Powell*, *Betts*, or *Johnson v. Zerbst* required the appointment of counsel.

although here again that would be due to analysis grounded in earlier rulings. Both in describing the Sixth Amendment right to counsel and discussing "reason and reflection" as to the importance of counsel, *Gideon* emphasized the ultimate objective of ensuring that the defendant receive a "fair trial."[84] If the right to counsel's assistance is viewed as an instrumental right aimed at ensuring a fair trial, it seemed to follow logically that counsel's performance would be assessed by reference to whether counsel's deficiencies in assistance resulted in the lack of a fair trial.[85] While the unfairness of the adjudication, or the likely unfairness of the adjudication, would not be the only consideration (e.g., counsel may have had a legitimate justification, such as the client's preferences, for inactions resulting in the lack of a fair trial), that unfairness would be a prerequisite for a finding of constitutionally deficient assistance.

Prior to *Gideon*, various lower courts had applied a "fair trial analysis" to claims of ineffective assistance.[86] Commentators complained that this analysis was just as vague and subjective as the "mockery and farce" analysis applied by *Mitchell* and numerous other courts.[87] *Gideon*'s frequent references to a fair trial did not include a description of the content of "fairness" for this purpose. However, a possible reference point was a line of due process cases holding that actions of a prosecutor or trial court had (or had not) resulted in an unfair trial. In 1963, this meant turning to older cases such as *Moore v. Dempsey*[88] and *Mooney v. Holohan*,[89] and more recent cases, such as *Thompson v. Louisville*[90] and *Brady v. Maryland*[91] (decided the same term as *Gideon*).

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84. *See* Gideon v. Wainwright, 372 U.S. 335, 340, 342–44 (1963). The "essential to a fair trial" phrasing was used in six different sentences, describing both the character of fundamental rights and the need for counsel's assistance. Although the Court referred to the achievement of a "fair trial," that reference included fairness in the adjudication of guilt without a trial. The Court had previously noted that the right to the assistance of counsel applied to the defendant who pleads guilty, thereby waiving his trial right. *See* Carnley v. Cochran, 369 U.S. 506, 515 (1962); Rice v. Olson, 324 U.S. 786, 788 (1945).

85. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006); Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v. Cronic, 466 U.S. 648, 658 (1984).

86. *See* Waltz, *supra* note 61, at 305 n.106; Note, *Effective Assistance of Counsel*, *supra* note 41, at 1552.

87. *See* Waltz, *supra* note 61, at 304–05; Note, *Effective Assistance of Counsel*, *supra* note 41, at 1558 (noting the fair trial standard is "vague both in definition and effect").

88. Moore v. Dempsey, 261 U.S. 86, 87 (1923). The trial in *Dempsey* was dominated by a mob. *Id.*

89. Mooney v. Holohan, 294 U.S. 103, 111 (1935). In *Mooney*, the prosecution knowing relied on perjured testimony. *Id.*

90. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960). In *Thompson*, the defendant was convicted without evidentiary support. *Id.*

91. Brady v. Maryland, 373 U.S. 83, 88 (1963). In *Brady*, the prosecution failed to disclose material exculpatory evidence within its possession. *Id.*

As I have discussed elsewhere, this line of "fair trial" due process rulings has continued to grow even after the specific trial rights in the Bill of Rights were made applicable to the states under selective incorporation.[92] Three characteristics tend to be reflected in the rulings finding that the adjudication of guilt violated due process because the trial was unfair: (1) they require a showing that the challenged action had a prejudicial impact (i.e., altered or likely altered the outcome);[93] (2) they examine the challenged action in light of the circumstances of the individual case;[94] and (3) they evaluate fairness by reference to the basic process objective of precluding the conviction of the innocent (often the factually innocent but sometimes the legally innocent).[95] In quoting *Powell v. Alabama*'s discussion of the need for a lawyer's assistance, the *Gideon* opinion arguably recognized that same objective: "Without [counsel's assistance], though [the defendant] be not guilty, he faces the danger of conviction."[96] The quotation from *Powell* also suggested that what was needed for effective assistance would vary with the circumstances (e.g., although a checklist of defense counsel's basic duties might include determining whether "the indictment is good or bad," the failure to do so does not necessarily result in the defendant being "put on trial without a proper charge" and even that does not necessarily lead to the conviction of a defendant not legally guilty). Of course, *Gideon* insisted on a flat rule as to the appointment of counsel, eschewing a case-by-case analysis, but that differs from a post-conviction analysis where assistance was provided.[97] So too, although the failure to provide counsel required an

92. *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001); CRIMPROC, *supra* note 1, § 2.7(b).

93. *See* Israel, *supra* note 92, at 395 n.541 (collecting cases); *see also* Note, *Effective Assistance of Counsel*, *supra* note 41, at 1558–60 (contending that a "fair trial" analysis would allow for shifting to the government the burden of showing a lack of prejudice in some circumstances).

94. *See* CRIMPROC, *supra* note 1, § 2.7(b) n.80–81 and accompanying text; Israel, *supra* note 92, at 396 (noting that other due process rulings announced "a general prohibition of a particular type of governmental action," and took the circumstances into account only insofar as they related to the presence of prejudice).

95. *See* Israel, *supra* note 92, at 397 n.549.

96. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)). Since *Powell* referred to counsel's ability to exclude "incompetent evidence," which could include evidence excluded on grounds other than suspect reliability, the reference to "innocence" and being "not guilty" presumably refers to legal innocence as opposed to factual innocence. That however, was not entirely clear, as evidenced by *United States v. Cronic*'s reference discussed *infra*, at text accompanying notes 104–10, to discovery of the truth as the "ultimate objective" of the adversary process that requires the assistance of counsel. *See* United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

97. *See* United States v. Decoster, 624 F.2d 196, 203 (D.C. Cir. 1976) (opinion of Leventhal, J.) (noting this distinction). Consider also the opinion of Judge MacKinnon that the term "ineffectiveness" suggests reference to the actual impact of counsel's performance. *Id.* at 222 (opinion of MacKinnon, J.).

automatic reversal of a conviction, attempting to assess the impact of the total absence of counsel was quite different from assessing the impact of specific actions or inactions alleged to have produced constitutionally deficient representation.[98]

The *Gideon* opinion did describe counsel's assistance as an essential element of "our adversary system of criminal justice,"[99] and it implicitly pointed to adversary-process concerns when it noted that the state would be represented by a lawyer. It did not take the further step, however, of characterizing the Sixth Amendment right to counsel as a mandated structural component of the adversary process, similar to other Sixth Amendment rights (in particular the confrontation and compulsory process clause). It stressed the fair trial objection, and a properly functioning adversary process was part of that focus, as its objective of adjudicative reliability certainly is a major element of a fair trial. *Gideon* did not suggest that anything more was involved, although the adversary process has been described as having an additional attribute—"respect[ing] individual autonomy and reflect[ing] the proper relationship between the individual and the state."[100] From that perspective, the assistance of counsel is designed to go beyond ensuring that the trial is "fair"—i.e., beyond ensuring that the defense is able to present evidence, challenge the prosecution evidence, and raise legal objections, thereby producing a result that is both reliable and consistent with the protection of the legally innocent. The adversary process provides the defendant with a "champion," whose obligations include taking advantage of whatever the process allows to achieve a result favorable to the defendant. This standard of zealous representation could require an analysis of defense counsel's capacity to perform and actual performance that goes beyond asking whether counsel's alleged deficiencies deprived the defendant of a fair trial. It could conceivably lead to a definition of effectiveness requiring that counsel had the time and resources needed to utilize the process to the defendant's advantage and then made a significant effort to do exactly that. As *United States v. Gonzalez-Lopez*[101] explained in distinguishing the right to counsel of choice from the right to effective assistance, the focus would be on the right specified (to a counsel able to serve, and actually serving, as an effective defense advocate), rather than

98. *See Cronic*, 466 U.S. at 658–59 (identifying special situations in which deficient performance is likely to have such a pervasive influence as to justify a presumption of prejudice, similar to that applied to the "complete denial of counsel").

99. *See Gideon*, 372 U.S. at 344.

100. *See* CRIMPROC, *supra* note 1, § 1.5(c).

101. United States v. Gonzales-Lopez, 548 U.S. 140, 147–48 (2006) (holding that the erroneous denial of right to counsel of choice required automatic conviction reversal and rejecting the government's argument that reversal was required only if "prejudice" could be established under the standard applied to IAC claims).

whether "the trial is, on the whole, fair."[102] In 1963, I concluded that this additional characteristic of adversary representation was completely missing from the *Gideon* discussion. That was to be expected from an opinion that focused on explaining why the *Betts* due process opinion (which quite naturally had a "fair trial" focus) had been incorrectly decided under the ground rules that then governed due process analysis.[103]

In 1984, the Supreme Court issued its two seminal rulings on the IAC claim, *United States v. Cronic*[104] and *Strickland v. Washington.*[105] The conventional wisdom is that these rulings largely undermined the "promise" of *Gideon.*[106] Yet, the reasoning of both opinions can be tied directly to the reasoning of *Gideon. Cronic* points out that "the right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[107] This fair trial focus, in turn, leads the *Cronic* Court to conclude that an IAC claim ordinarily requires a case-specific showing of likely prejudicial impact. The *Cronic* Court does offer an adversary system benchmark for assessing counsel's performance, but it does so by reference to an adversary system aimed at

102. *Id.* at 145. Justice Scalia's opinion for the *Gonzalez-Lopez* Court majority stressed that "the right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial." *Id.* at 147–48. That distinguished the IAC claim, which included a prejudice element. That element was attributed to the IAC claim having historical roots in due process (*Powell v. Alabama*) and being grounded in the Sixth Amendment's general objective of ensuring a fair trial.

103. In *Gonzalez-Lopez*, the Court also drew a distinction between a right that commands "that a trial be fair" and a right commanding "that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Id.* at 146. As the Court had noted in addressing the confrontation clause, where a particular procedure has been prescribed by a constitutional provision, though that procedure has been prescribed to serve the overall purpose of achieving a fair trial, it does not follow that the failure to adhere to that procedure "can be disregarded so long as the trial is . . . fair." *Id.* at 145–46. *Gideon*, because it responded to *Betts* and relied heavily on *Powell*, did not seek to describe the assistance of counsel as a prescribed structural element of the adversary system. Even if *Gideon* had done so, *United States v. Cronic* indicates that, for the issue of effectiveness, the overall fairness of the proceeding would remain relevant. *Cronic*, 466 U.S. at 658. *Cronic* referred to representation by counsel as "a fundamental component of our criminal justice system," but still looked to overall objective of the guarantee in assessing performance. *Id.* at 653.

104. *Cronic*, 466 U.S. 648.

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

106. Thus, numerous commentators have noted that *Strickland* "gutted *Gideon* by allowing anyone with a warm body and a law degree to satisfy the Sixth Amendment." Abbe Smith, *Gideon Was A Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH & LEE L. REV. 1363, 1385 (2013) (internal quotation marks omitted). *See also* Richard Klein, *The Constitutionalization of* In*effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999); and the various articles collected in CRIMPROC, *supra* note 1, § 11.10(a) n.16.

107. *Cronic*, 466 U.S. at 658.

implementing the fair trial objective by advancing the "truth-seeking function of trials."[108]

Strickland builds upon that adversary system benchmark in articulating a two-pronged analysis of counsel's performance. When it came to describing the potential for prejudice, *Strickland* turns to two cases applying freestanding due process in the fair trial context.[109]

That was certainly consistent with what would have been predicted in 1963,[110] although neither prong of the *Strickland* standard was necessarily dictated by *Gideon*.

Neither *Cronic* nor *Strickland* relied heavily on *Gideon*, and Justice Marshall did not do so either in his dissent in *Strickland*. *Gideon* did not address the content of ineffective assistance, and while its reasoning arguably pointed toward the eventual rejection of the "mockery and farce" standard and the state action limitation, the end results produced in *Cronic* and *Strickland* certainly were a distinct possibility. On this Sixth Amendment issue, as with the others I explored, *Gideon* did not promise more than we eventually received. Indeed, even if the "promise" of *Gideon* was tied to the perceived inclinations of the liberal core of the nine Justices who overruled *Betts* (Chief Justice Warren and Justices Black, Douglas, Brennan, and Goldberg), it arguably was misplaced. Justice Brennan joined the Court's opinion in both *Cronic* and *Strickland* (although dissenting from the *Strickland* judgment because it failed to vacate a death sentence).

In 1963, *Gideon* was destined to play an important role in the further interpretation of the Sixth Amendment, but it was not the role of giving significant direction to the resolution of those issues. Without *Gideon*, in state cases those issues would be faced only after initially concluding that special circumstances granted the defendant a constitutional right to appointed counsel. After *Gideon*, at least in all felony cases, the special circumstances issue was eliminated and lower courts would be forced to address the Sixth Amendment issues. That was a significant step and the overruling of *Betts* was a significant step, but from my perspective those steps fell short of making *Gideon* an instant "landmark ruling."

My mistake at the time was looking at *Gideon* only in terms of its immediate practical impact and its potential doctrinal contributions. I

108. *Id.* at 655 n.14 (quoting Gardner v. Florida, 430 U.S. 349, 360 (1977)). As to the Court's adversary system "touchstone," see CRIMPROC, *supra* note 1, § 11.7(c).

109. *Strickland*, 466 U.S. at 694. *Strickland* adopted a "reasonable probability" standard based on two cases: (1) United States v. Agurs, 427 U.S. 97, 102 (1976), a case applying the *Brady v. Maryland* due process obligation to disclose material exculpatory evidence (see *supra* note 91); and (2) United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982), a case assessing the prosecutor's due process responsibilities where a potential witness is made unavailable to the defense by the governmental action of deporting the witness. *Strickland*, 466 U.S. at 694.

110. *See supra* note 84 and accompanying text.

missed its symbolic impact. That was not true of others. Justice Mitchell D. Schweitzer of the New York Supreme Court noted:

> Future treatises on constitutional and criminal law will surely deem *Gideon v. Wainwright* a landmark decision, but in all probability, they will do so not because of its direct, but rather because of its indirect, effects. When the Supreme Court finally overruled *Betts v. Brady*, few indeed were the states which, in reliance upon it, refused to assign counsel to an indigent defendant charged with a serious crime. Thus, *Gideon* changed the law (or at least the practice) in very few states. What *Gideon* has done, however, is to focus the nation's attention upon the fundamental importance of the right to counsel in a criminal case. Even more significantly, it has prompted the legal profession to reexamine the procedures by which that right is afforded to an indigent defendant.[111]

Justice Schweitzer was correct in both respects. He recognized, as I did not, that *Gideon* furnished the organized bar with exactly the right storyline to vigorously push for dramatic reform of the method for providing legal assistance to indigent defendants and for funding that assistance. Of course, writing in 1965, he had the advantage of being aware of that storyline because of Anthony Lewis' compelling *Gideon's Trumpet*.[112] It is that storyline and the message Lewis conveys about equal justice and the value of a good lawyer that has made *Gideon* what it is today.

111. Mitchell D. Schweitzer, Book Review, 65 COLUM. L. REV. 183, 184 (1965) (footnotes omitted).

112. ANTHONY LEWIS, GIDEON'S TRUMPET (1964). The book was later made into a popular made-for-TV movie starring Henry Fonda and José Ferrer. *See Gideon's Trumpet* (CBS television broadcast Apr. 30, 1980).