Right to Counsel and Plea Bargaining: *Gideon*'s Legacy Continues

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INTRODUCTION

Throughout the twentieth century, the United States Supreme Court addressed questions regarding the Sixth Amendment right to counsel. Beginning in 1963 with the watershed decision of *Gideon v. Wainwright*,[1] right to counsel jurisprudence has developed and evolved into an interestingly complicated body of law. Initially, *Gideon* was hailed as a victory for human-rights advocates and promised a hopeful change in the administration of criminal justice.

Today, *Gideon*'s legacy faces new challenges. With indigent defense declared "shamefully inadequate" by the American Bar Association ("ABA") and the American brand of justice considered "'a system of pleas,'"[2] the Supreme Court has grappled with the jurisprudential reach of *Gideon*. In the plea-bargaining trilogy—*Padilla v. Kentucky*,[3] *Missouri v. Frye*,[4] and *Lafler v. Cooper*[5]—the Court wrestled with a number of questions concerning the right to effective assistance of counsel in the plea-bargaining context. While these decisions appear to comport with the principles espoused in *Gideon*, a closer look reveals that the plea-bargaining trilogy will likely suffer a fate similar to *Gideon*: problems in implementation and enforcement.

This Essay argues that the principles espoused in *Padilla*, *Frye*, and *Lafler* are a natural extension of the modern understanding of *Gideon*. However, as in *Gideon*, the Court declined to provide guidance on implementation and enforcement of these plea-bargaining principles. Absent such guidance, the constitutional protections advanced in the plea-bargaining cases will probably not be realized.

Part I of this Essay discusses the modern understanding of *Gideon*, particularly in the plea-bargaining context, thereby providing a basis on which to evaluate the principles announced in *Padilla*, *Frye*, and *Lafler*. Part II offers an overview of the current state of criminal justice in America—the context underlying the plea-bargaining trilogy. Focusing on indigent

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

2. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1388) (2012)).

3. Padilla v. Kentucky, 559 U.S. 356 (2010).

4. *Frye*, 132 S. Ct. 1399.

5. *Lafler*, 132 S. Ct. 1376.

defense, plea-bargaining, and mass incarceration, this Part presents a brief synopsis of the problems in the criminal-justice system. Part III provides a summary of the plea-bargaining trilogy highlighting the most important aspects of each case. Part IV analyzes the ways in which the plea-bargaining trilogy jurisprudentially comports with *Gideon*'s legacy. This Part also argues that the implementation of the principles announced in these cases will suffer from a distorted application as history demonstrates occurred with *Gideon*. Part V concludes the Essay with a brief summary.

I. THE RIGHT TO COUNSEL

The right to counsel and specifically, indigent defense, has long been accepted as an integral piece of federal criminal prosecutions. However, at the beginning of the twentieth century, it was far from clear whether the same understanding of the right to counsel was recognized in the states. A large part of the jurisprudence that courts developed in this area addressed the constitutional dimensions of this right as well as state responsibilities in recognition of the imperatives announced by the Court. This Part will discuss the development of the constitutional right to counsel, and introduce its use in the plea-bargaining context.

The first case in which the United States Supreme Court required a state to provide counsel for indigent defendants on constitutional grounds was *Powell v. Alabama* in 1932.[6] The Court held that it was the duty of the trial court to assign counsel in capital cases "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like."[7] Rooted in principles of justice and fairness, the *Powell* opinion concluded that the right to counsel was of a "fundamental character" constitutionally akin to freedom of speech and freedom of the press.[8] This "fundamental character" placed the right to counsel within the protections guaranteed by the Due Process Clause of the Fourteenth Amendment, thereby requiring state compliance.[9]

In *Betts v. Brady* in 1942, the Court declined to extend the right to counsel to indigent defendants in all criminal cases.[10] For the Court, the Due Process Clause required the appointment of counsel to an indigent defendant only when failure to do so would be "offensive to the common and fundamental ideas of fairness."[11] *Betts* stopped expansion of indigent defense to the states.[12] For the next two decades, the Court would grapple

6. Powell v. Alabama, 287 U.S. 45, 71 (1932).
7. *Id.*
8. *Id.* at 67–68.
9. *Id.* at 66.
10. Betts v. Brady, 316 U.S. 455, 472–73 (1942).
11. *Id.* at 473.
12. *Id.*

with questions concerning exactly when a state was required to provide counsel to poor defendants. However, in 1963, the Court firmly established the right to counsel for indigent defendants in *Gideon v. Wainwright*. The constitutional story of Clarence Earl Gideon begins with the Court's granting certiorari in a pauper's appeal from a Florida inmate in 1962.[13] Unable to afford counsel, Gideon handwrote his appeal to the United States Supreme Court and requested the Court to review the Florida trial court's decision that refused to appoint counsel in Gideon's criminal case for breaking and entering into a poolroom with intent to commit a misdemeanor.[14]

In 1963, the Court handed down its decision in *Gideon v. Wainwright*, in which Clarence Earl Gideon won.[15] With the *Betts* decision lingering and *stare decisis* requiring jurisprudential justification to overrule it, the Court reasoned that the principles espoused in *Powell v. Alabama* provided ample precedential support for guaranteeing indigent defendants the assistance of counsel.[16] Because *Powell* avowed the fundamental character of the right to counsel, *Betts* erroneously failed to hold that right obligatory on the states.[17] Thus, *Betts* had to be overruled.

The *Gideon* Court also supported its judgment with notions of fairness. In the opinion, the Court discussed the necessity of counsel for the achievement of a fair trial.[18] Quoting *Powell* extensively for the proposition that lay persons are inexperienced and unskilled in the art of lawyering, the *Gideon* Court rationalized that lawyers are necessary in order to achieve the noble ideal of a fair justice system.[19] Therefore, the Due Process Clause of the Fourteenth Amendment required that the states submit to the federal system's understanding of the right to counsel, including an indigent defendant's right to the assistance of counsel. In asserting that although "[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,"[20] the Court firmly entrenched fairness ideals in the jurisprudential understanding of indigent defense.

Gideon provides the basis of our modern understanding of the right to counsel. While the connection has not always been explicit, the Court's conception of the right to counsel is, and has been, intimately intertwined with the due process guarantee of a fair trial. *Gideon* laid the groundwork for the development of the right to counsel in two constitutionally different

13. Gideon v. Wainwright, 372 U.S. 335, 338 (1963).
14. *Id.* at 336–38.
15. *Id.* at 342–45.
16. *Id.* at 341.
17. *Id.* at 341–42.
18. *Id.* at 344.
19. *Id.* at 344–45.
20. *Id.* at 344.

directions: through the Sixth Amendment right to effective counsel and through the "critical stages" analysis.

A. *Effective Assistance*

By the 1980s, the Sixth Amendment right to appointed counsel was deeply embedded in American jurisprudence. The Court procedurally expanded the right to apply to a number of phases of criminal prosecution, including first appeal of right,[21] sentencing hearings,[22] and some misdemeanors where the defendant would actually be imprisoned if adjudicated guilty.[23]

However, this procedural expansion was short-lived and new questions surrounding the Sixth Amendment right to counsel began to percolate. One issue presenting itself for constitutional review was the substantive understanding of the right to counsel. This was decided in the case of *Strickland v. Washington*.[24]

1. *Strickland v. Washington*

Strickland v. Washington extended *Gideon* in that it firmly established that the Sixth Amendment right to counsel included the right to *effective* assistance of counsel.[25] However, the test crafted to evaluate claims of ineffective assistance of counsel set an extremely high threshold for defendants to meet.

In 1976, David Washington was indicted by the State of Florida for kidnapping and murder.[26] He was "appointed an experienced criminal lawyer to represent him."[27] Against counsel's advice, Washington confessed to crimes, waived his right to a jury trial, pled guilty to three capital murder charges, and waived his right to an advisory jury at his capital sentencing hearing.[28] In preparing for the sentencing hearing, defense counsel conducted minimal investigation and preparation as he was experiencing a "sense of hopelessness" caused by Washington's disregard of his advice.[29] Washington was sentenced to death and appealed on the ground that his lawyer had provided ineffective assistance of counsel.[30] The Court granted certiorari, using this as an opportunity to craft a constitutional test by which

21. Douglas v. California, 372 U.S. 353 (1963).
22. Mempa v. Rhay, 389 U.S. 128 (1967).
23. Argersinger v. Hamlin, 407 U.S. 25 (1972).
24. Strickland v. Washington, 466 U.S. 668 (1984).
25. *Id.* at 686.
26. *Id.* at 671–72.
27. *Id.* at 672.
28. *Id.*
29. *Id.* at 672–73.
30. *Id.* at 678.

lower courts could evaluate Sixth Amendment claims of inadequate representation.

Strickland set forth a two-pronged test for the resolution of ineffective assistance claims. The Court set the benchmark for judging ineffectiveness as "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[31] In the first prong of the test, courts conduct an assessment of attorney performance.[32] The prong requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness."[33] A court reviewing the case must judge counsel's performance at that time of the conduct at issue, with defendants required to point specifically to acts or omissions of counsel that were unreasonable.[34] Courts are to consider the totality of the circumstances using "[p]revailing norms of practice" to judge an attorney's performance.[35] In *Strickland*, the Court looked to ABA standards with a specific focus on "The Defense Function."[36] Present in the analysis is a strong presumption that counsel's conduct fell within the range "of reasonable professional judgment."[37]

The second prong of the *Strickland* test requires courts to determine whether counsel's performance prejudiced the defendant. To meet the requirements of this prong, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[38] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[39] There is also a presumption that the judge or jury acted in accordance with the law and requires consideration of the totality of the circumstances.[40]

However, *Strickland* was not a unanimous opinion. In a derisive dissent, Justice Marshall found the majority's holdings unlikely "to improve the adjudication of Sixth Amendment claims."[41] On the performance issue, Marshall found the Court's standard "malleable" writing that it will "have no grip at all" or will be applied with such variation so as to fail to delineate a reliable understanding of the Sixth Amendment.[42] With regard to prejudice, Marshall objected on the basis that such an assessment was difficult to make

31. *Id.* at 686.
32. *Id.* at 687.
33. *Id.* at 688.
34. *Id.* at 690.
35. *Id.* at 688.
36. *Id.*
37. *Id.* at 690.
38. *Id.* at 694.
39. *Id.*
40. *Id.*
41. *Id.* at 707 (Marshall, J., dissenting).
42. *Id.*

due to the number of variables that might have changed the outcome of the trial.[43] Thus, according to Marshall, the *Strickland* test would do little to validate meritorious claims of ineffective assistance of counsel on either prong of the test. Marshall's dissent was prophetic, as the Court would not explicitly find a constitutional violation of the Sixth Amendment based on ineffective assistance of counsel until the year 2000.[44] More importantly, *Strickland* has proven unreasonably difficult to employ with most defendants failing to meet the test despite egregious attorney performance.

The significance of *Strickland* cannot be overstated. While scholars often criticize the *Strickland* test for the overwhelming difficulty defendants face in meeting its requirements, it has been the basis of adjudication for ineffective assistance of counsel claims in a variety of different procedural contexts in American criminal prosecutions. One area in which the Court has employed *Strickland* for constitutional analysis is the plea process.

2. *Hill v. Lockhart*

Written just one year after *Strickland*, *Hill v. Lockhart* held that courts should use the *Strickland* test to review ineffective assistance of counsel claims in the context of guilty plea challenges.[45] While the Court slightly modified the parameters of *Strickland* to accommodate the procedural differences in the plea process, it preserved the core holding of *Strickland*.

In *Hill*, the petitioner pleaded guilty to first degree murder and theft.[46] Two years after his plea, he filed a habeas petition contending that his attorney provided ineffective assistance of counsel.[47] The heart of his claim was that his plea was "involuntary" because defense counsel failed to accurately advise him as to when he would be considered parole eligible.[48] The Court determined that while the advice may have been erroneous, it certainly was not prejudicial.[49] Because petitioner did not claim that he would have insisted on trial but for counsel's mistaken advice, petitioner failed on the prejudice prong of *Strickland*.[50] Thus, the Court affirmed the denial of petitioner's habeas petition.

In declaring that *Strickland* applied to the plea process, the Court constitutionally transitioned from the traditional due process inquiry associated with challenged pleas—whether the plea had been voluntary and

43. *Id.* at 710.

44. Williams v. Taylor, 529 U.S. 362, 390–98 (2000).

45. Hill v. Lockhart, 474 U.S. 52, 58–59 (1985).

46. *Id.* at 53.

47. *Id.*

48. *Id.* at 54. Defense counsel allegedly told petitioner that he would have to serve one-third of his sentence before being parole eligible while petitioner would in fact have to serve half of his sentence. *Id.* at 55.

49. *Id.* at 60.

50. *Id.*

intelligent—to whether defense counsel had been ineffective in her representation of the accused. Re-conceptualizing the issue in terms of *Strickland*, the Court determined that where "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'"[51] With this, the Court found a jurisprudential compromise between due process guarantees within guilty pleas and the right to effective assistance of counsel during the plea process.

The *Hill* Court then adjusted the *Strickland* test to accommodate the differences inherent in pleas. It determined that the standard of attorney conduct would follow the *McMann* line of cases, which, in effect, required an inquiry into whether the advice of counsel was within the scope of competence required by lawyers in criminal cases.[52] The Court then tackled the prejudice prong of *Strickland*, stating that the analysis would determine whether counsel's deficient representation "affected the outcome of the plea process."[53] The Court stated that "the defendant must show 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."[54] Accordingly, *Strickland* was engrafted onto the plea process. However, it would be over twenty years before the Court would again address ineffective assistance of counsel claims based on mistakes during the plea process.

B. "CRITICAL STAGE"

An important piece of the contemporary understanding of the Sixth Amendment right to counsel is the "critical stages" jurisprudence. Beginning with *United States v. Wade* in 1967, right to counsel constitutional analysis was expanded to include an evaluation of the specifics of criminal prosecution for which a defendant was entitled to counsel.[55] The subsequent cases of *Coleman v. Alabama* and *Rothgery v. Gillespie* reasoned through the parameters of "critical stage" jurisprudence, providing additional constitutional guidance in the interpretation of the Sixth Amendment.[56]

1. *United States v. Wade*

In *Wade*, the Court introduced the critical stages analysis.[57] Respondent Wade was arrested for robbing a bank and shortly thereafter appointed

51. *Id.* at 56 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

52. *Id.* at 58–59.

53. *Id.* at 59.

54. *Id.*

55. United States v. Wade, 388 U.S. 218, 227–28 (1967).

56. Rothgery v. Gillespie, 554 U.S. 191, 211–12 (2008); Coleman v. Alabama, 399 U.S. 1, 9 (1970).

57. *Wade*, 388 U.S. at 228.

counsel.[58] Two weeks later, an FBI agent, without notifying Wade's attorney, arranged a lineup.[59] At trial, two employees were asked on direct examination whether the bank robber was in the room.[60] Both employees pointed to the defendant.[61] On cross examination, the prior lineup was discovered.[62] "At the close of [this] testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the [employees'] identifications [of Wade] on the ground that . . . the lineup . . . violated [Wade's] Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to . . . counsel."[63] The question for the Court was whether "a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel" violated the Sixth Amendment.[64] The Court concluded that it did.

In making its determination, the Court relied on two primary arguments. Writing for the majority, Justice Brennan first reasoned that contemporary law enforcement practices are different from those the Framers confronted and such realities require an appropriate interpretation of the Sixth Amendment.[65] Instead of the accused confronting only the prosecutor and witnesses against him, "today's law enforcement machinery involves critical confrontations" and pretrial proceedings that may resolve the prosecution and diminish the trial to a formality.[66] Such "'critical' stages" trigger the Sixth Amendment right to counsel.[67] In addition, Justice Brennan maintained that principles of stare decisis require the presence of counsel where there is a risk of substantial prejudice to a defendant's constitutional rights.[68] For Brennan, the principles announced in *Powell v. Alabama*, *Escobedo v. Illinois*,[69] and *Miranda v. Arizona*[70] necessitated that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[71] Thus, the constitutional evaluation of pretrial confrontations requires a two-fold examination of whether there is a risk of substantial prejudice to the

58. *Id.* at 220.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 219–20.
65. *Id.* at 224–25.
66. *Id.* at 224.
67. *Id.*
68. *Id.* at 227.
69. Escobedo v. Illinois, 378 U.S. 478 (1964). The Court held that defendants are entitled to the right to counsel during police interrogations. *Id.* at 490–91.
70. Miranda v. Arizona, 384 U.S. 436 (1966).
71. *Wade*, 388 U.S. at 226.

accused's constitutional rights inherent in the confrontation and whether counsel may help to avoid such prejudice.[72] Because of the dangers inherent in eyewitness identification, the Court determined that lineups were a "critical stage" thereby entitling the accused to the presence of counsel.[73]

2. *Coleman v. Alabama*

The decision in *Coleman v. Alabama* extended the right to counsel to include lineups noting that lineups are a critical stage. In *Coleman*, petitioners were charged and convicted of assault with intent to murder in an Alabama criminal court.[74] On appeal, they complained that counsel had not been appointed for their preliminary hearing, which had deprived them of their right to the assistance of counsel.[75] While highlighting that a preliminary hearing was not a required phase in criminal prosecutions in Alabama, the Alabama Court of Appeals reasoned that nothing that could occur in a preliminary hearing would substantially prejudice the petitioners' right to a fair trial.[76] The United States Supreme Court disagreed.[77]

In a plurality opinion written by Justice Brennan, the Court began its analysis by examining whether "*any* pretrial confrontation of the accused" without counsel deprived a defendant of his or her right to a fair trial.[78] For the Court, such a violation occurs if the presence of counsel was necessary to effectuate an accused's right to cross examine witnesses.[79] As discussed in *Wade*, a pretrial confrontation is a "critical stage[]" when a threat of substantial prejudice to a defendant's rights exists and counsel may assist in avoiding such prejudice.[80]

The Court examined why the presence of defense counsel was critical at a preliminary hearing. First, counsel may help the accused by uncovering weaknesses in the State's case, resulting in the trial court's refusal to bind the case over for trial.[81] An attorney may also effectively cross examine a State's witness, thus developing a mode of impeachment while simultaneously preserving favorable testimony for the accused in the case where a witness may later become unavailable.[82] The assistance of counsel may also result in earlier psychiatric examinations and an effective argument

72. *Id.* at 227.
73. *Id.* at 239.
74. Coleman v. Alabama, 399 U.S. 1, 3 (1970).
75. *Id.*
76. *Id.* at 8.
77. *Id.* at 9–11.
78. *Id.* at 7.
79. *Id.*
80. *Id.*
81. *Id.* at 9.
82. *Id.*

for bail.[83] Citing *Powell*, the Court concluded that "[t]he inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' . . . at which the accused is 'as much entitled to such aid . . . as at the trial itself.'"[84] Using a harmless error standard, the Court vacated the convictions and remanded.[85]

3. *Rothgery v. Gillespie County*

In 2008, the Court again faced a "critical stages" issue. In this case, the Court sought to answer the question of whether the attachment of the right to counsel at an accused's first appearance also requires awareness of this proceeding by the prosecutor.[86] The majority held that the attachment of the right to counsel at the first appearance does not require awareness by the prosecutor.[87]

Beginning with the textual supposition that the attachment of counsel is predicated upon the "commencement" of prosecution, the Court asserted that the Sixth Amendment limits attachment of the right to counsel by the phrase "criminal prosecutions."[88] Commencement of prosecution is "the initiation of adversary judicial criminal proceedings."[89] The Court has previously determined such proceedings include the "preliminary hearing, indictment, information, or arraignment."[90] For the Court, awareness by the prosecutor of the proceeding was not the determinative question.[91] Instead, the issue was whether the State's relationship with the accused is "solidly adversarial."[92] Where a defendant is formally accused and his liberties restricted, the State's relationship with the defendant is unequivocally adversarial thereby triggering the right to counsel.[93]

The right to counsel has substantially evolved since *Gideon*. An indigent defendant's right to counsel requires the effective assistance of counsel. Effective assistance of counsel is mandatory not only at trial, but also during pretrial confrontations and during the plea process. To help lower courts determine when counsel is constitutionally required, the Court put forth a test examining whether the presence of defense counsel is necessary in a

83. *Id.*

84. *Id.* at 9–10 (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)).

85. *Id.* at 11.

86. Rothgery v. Gillespie, 554 U.S. 191, 194–95 (2008).

87. *Id.* at 198.

88. *Id.* (citing McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)).

89. *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)) (internal quotation marks omitted).

90. *Id.* (quoting *Kirby*, 406 U.S. at 689 (plurality opinion)) (internal quotation marks omitted).

91. *Id.* at 202.

92. *Id.*

93. *Id.* at 202–03.

specific phase of a criminal prosecution in order to prevent substantial prejudice to defendant's rights. It is from this jurisprudential point that the plea-bargaining trilogy was decided. However, before delving into these recent cases, it is important to discuss the context in which these cases were decided.

II. CONTEMPORARY ISSUES IN CRIMINAL JUSTICE

In order to appreciate the importance of the plea-bargaining trilogy, one must understand the critical and problematic features of today's criminal justice system. This Part discusses the context underlying *Padilla*, *Frye*, and *Lafler*—the era of mass incarceration in America. The criminal justice system in America is plagued by a "shamefully inadequate"[94] indigent defense structure, "meet 'em and plead 'em"[95] methodology, and an incarceral approach to punishment. Understanding that the administration of criminal justice carries with it substantial deprivations of freedom and liberty, it is critical that it be viewed as fair and equitable by those to whom its jurisdiction extends.

A. *INDIGENT DEFENSE*

The modern indigent defense system in America is in a crisis. While there are numerous explanations for the current state of indigent defense, two main variables that definitively contribute to the problem are inadequate funding and excessive caseloads.[96] The ABA asserted that funding for indigent defense programs is "shamefully inadequate."[97] The Bureau of Justice Statistics estimates that the United States spends approximately $146 billion annually on criminal-justice administration.[98] While the police and prosecutors receive more than half of those funds, indigent defense receives only about 4.3% of federal funds and two percent of total state and federal funds spent on criminal-justice administration.[99] In 2009, the National Right to Counsel Committee's first recommendation was that legislators provide appropriate funding to indigent defense organizations so that adequate services might be provided to the poor.[100]

94. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 38 (2004).

95. *See infra* Part II.B.

96. *See* NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 19–24 (2011).

97. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 94, at 38.

98. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at 2 tbl. 1.1 (reporting on figures from fiscal year 1999).

99. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 2 tbl. 1.2 (reporting on figures from fiscal year 1990).

100. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 11 (2009).

The system is also without financial incentives to attract competent members of the private bar.[101]

The second variable indigent defense workload is staggering. State public defenders have been estimated to carry as many as 1600 cases in a given year.[102] While the number of indigent criminal cases has increased exponentially across the country, there are jurisdictions where the number of staff attorneys in indigent defense offices has remained the same since 1980.[103]

In addition to excessive case loads, the indigent defense suffers from an untrained workforce. Often no experience is required to secure a job representing poor criminal defendants.[104] This results in the assignment of criminal cases to lawyers with hardly any understanding or skill in the representation of a criminal defendant.[105] Judges, too, may hinder effective representation by electing to appoint counsel they know will not aggressively advocate for their clients.[106] As David Cole suggests, "good lawyers make the task of convicting defendants more difficult."[107]

B. MEET 'EM AND PLEAD 'EM

Today, guilty pleas resolve at least ninety-seven percent of federal criminal cases[108] and ninety-four percent of state criminal cases.[109] "Meet 'em and plead 'em" is today's mantra in America's criminal justice system.[110] As "ours 'is for the most part a system of pleas, not a system of trials,'"[111] the plea negotiation phase certainly should be a "critical phase."[112] However, the plea bargaining process has largely been conducted in the shadows of the criminal justice system. Understanding that the lack of transparency in the

101. David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101, 118–21 (Carol S. Steiker ed. 2006).

102. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 94, at 17–18.

103. LEFSTEIN, *supra* note 96, at 17 (discussing a Pennsylvania county that had almost doubled its intake since 1980 without any increase in the number of staff in the public defender's office).

104. Cole, *supra* note 101, at 121.

105. *Id.*

106. *Id.* at 122 (discussing Ron Slick and Joe Frank Cannon, lawyers who are known to move quickly and poorly represent clients).

107. *Id.* at 123.

108. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 26 (2010), *available at* www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf.

109. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 25 (2009), *available at* http://www.bjs.gov/content/pub/pdf/fssco6st.pdf.

110. *See* Cole, *supra* note 101, at 120–22.

111. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012)).

112. *See infra* Part III.A.

process insulates it from judicial review, criticisms levied against the process have called for some type of regulation and constitutional protections for criminal defendants, many of whom are the "least able to represent themselves"—poor, uneducated, and often times minorities.[113]

It is important to understand that thousands of courts across the country serve simply as plea mills which churn out a profit for the county, town, or city in which the court is situated.[114] From misdemeanors to felonies, judges conduct hearings and take pleas without defendants ever consulting with or being represented by a lawyer.[115] Individuals plead guilty on the advice of a lawyer whom they met just minutes before.[116] Moreover, innocent people may plead guilty to avoid jail without understanding the full panoply of consequences associated with their pleas.

Gideon's legacy is violated every single day in the United States but particularly in the plea bargaining context. This poses serious Sixth Amendment questions. With prosecutors offering a reduced sentence, defense counsel too busy to pay close attention to the details, and a judge ready to clear her docket, the system works to encourage the guilty plea.

C. AMERICA'S INCARCERATION CRISIS

The United States of America has the highest incarceration rate in the world.[117] Compared to other nations, the U.S. rate of imprisonment is 750 per 100,000 residents versus 628 per 100,000 in Russia and 67 per 100,000 in Denmark,[118] and about one of every 136 U.S. residents are incarcerated.[119] In 2009, the total number of persons imprisoned in the U.S. was over two million.[120] Perhaps most significant is the fact that over half of the prison population will also return to custody within three years of release.[121]

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113. Padilla v. Kentucky, 559 U.S. 356, 370–71 (2010) (requiring attorneys to inform immigrant clients of the immigration consequences of criminal convictions).

114. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2152 (2013).

115. *Id.*

116. *Id.*

117. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

118. *Id.* at 5, 35.

119. Elizabeth White, *1 in 136 U.S. Residents Behind Bars*, COMMON DREAMS (May 22, 2006), http://www.commondreams.org/headlines06/0522-03.htm.

120. HEATHER C. WEST, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 19 (2010), *available at* http://www.bjs.gov/content/pub/pdf/pim09st.pdf.

121. PEW CTR. ON THE STATES, *supra* note 117, at 4 (citing a 1994 fifteen-state survey of recidivism rates).

With regard to indigency, eighty percent of people charged with a criminal offense are poor.[122] In 1997, at least fifty percent of the people in state prison "earned less than $1000 in the month before their arrest."[123] Moreover, almost seventy percent of state prisoners failed to earn a high school diploma.[124] Poor and uneducated people are also more likely to "languish in jail" awaiting the appointment of a lawyer while they lose their homes, their cars, and their jobs.[125] Horror stories are told of persons accused of crimes sitting in jail for months after their arrest without an attorney.[126] On the other hand, more affluent criminal defendants have the financial capacity to secure private and more experienced defense counsel and are typically released from prison immediately.[127]

The rate of incarceration in the United States has quadrupled since 1960, when 126 per 100,000 persons were incarcerated, to 2008, when 504 per 100,000 persons were incarcerated.[128] For Black defendants, the incarceration rate comparison is even starker. In 1960, the incarceration rate for Blacks was 660 per 100,000 people.[129] In 2010, the incarceration of Black men was 3074 per 100,000 people in the population.[130] While "[t]here ha[s] . . . always been racial disparit[y] in [the] American criminal justice" system, post-*Gideon* the disparity has widened.[131] "[F]rom the 1920s through the 1970s . . . the black/white incarceration disparity" was approximately "two-to-one."[132] Today, the Black/White disparity is seven-to-one.[133] At the pinnacle of the War on Drugs, admissions to prison for Blacks

122. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

123. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE. L.J. 2176, 2181 (2013).

124. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf.

125. Bright & Sanneh, *supra* note 114, at 2161.

126. *See* THE CONSTITUTION PROJECT, *supra* note 100, at 85–87.

127. *See id.*

128. MARGARET WERNER CAHALAN, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 30 (1986), *available at* https://www.ncjrs.gov/pdffiles1/pr/102529.pdf (providing incarceration rates for the 1960s); William J. Sabol, Heather C. West & Matthew Cooper, *Prisoners in 2008*, BUREAU JUST. STAT. BULL., Dec. 2009, at 1, 6, *available at* http://www.bjs.gov/content/pub/pdf/p08.pdf (discussing imprisonment rates in 2008).

129. Butler, *supra* note 124, at 2180 (citing Margaret Calahan, *Trends in Incarceration in the United States Since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 CRIME & DELINQ. 9, 40 tbl.11 (1979)).

130. PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 27 app. tbl.15 (rev. 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

131. Butler, *supra* note 123, at 2182.

132. *Id.* (citing Pamela E. Oliver & Marino A. Bruce, *Tracking the Causes and Consequences of Racial Disparities in Imprisonment* 2–3 (Aug. 2001) (unpublished proposal), *available at* http://www.ssc.wisc.edu/~oliver/RACIAL/Reports/nsfAug01narrative.pdf).

133. *Id.* (citing WEST, *supra* note 120, at 21 tbl.18).

quadrupled and reached a level in the year 2000 "*more than 26 times* the level in 1983."[134] The admission for Whites has increased, but only by eight times the level in 1983.[135] Although the majority of drug abusers in the U.S. are white, approximately three-fourths of all prison admissions for drug offenses are Black and Latino persons.[136]

D. SUMMARY

The current state of criminal justice in America contradicts the promise of *Gideon*. While the *Gideon* Court declined to provide explicit guidance to the states on the way in which indigent defense was to be implemented and maintained, it did discuss the expectation that such a system ought to be fair.[137] Today's criminal justice system is anything but fair. A poor indigent defense, a system of plea bargaining, and draconian penal policies all work to suggest that the current system is just as problematic as it was in *Gideon*'s time or worse. The accused is plea bargaining, probably to a jail sentence, with the assistance of counsel who is herself overworked and underfunded. The Court, faced with the reality of the current system, was presented with a trio of recent cases that address one aspect of the problem: effective assistance of counsel during the plea-bargaining process.

III. THE PLEA-BARGAINING TRILOGY

The plea-bargaining trilogy firmly establishes the right to counsel in the plea-bargaining context. While *Hill* asserted that the *Strickland* test applies to the plea process, the plea-bargaining trilogy proclaims the right to effective assistance of counsel in plea bargaining itself. Jurisprudentially, these cases are a natural extension of the current understanding of the right to counsel. The cases also build on *Strickland*'s prejudice prong, as well as fashion a remedy for Sixth Amendment violations during the plea-bargaining process.

A. PADILLA V. KENTUCKY

Padilla v. Kentucky[138] is a game changer in that the case sheds light into the shadow system of plea negotiations. In *Padilla*, the petitioner, Jose Padilla, pled guilty to drug charges related to the alleged transportation of a large amount of marijuana in Kentucky.[139] "Padilla, a native of Honduras, ha[d] been a lawful permanent resident of the United States for [over forty]

134. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 28 (2005) (emphasis added).

135. *Id.*

136. MARC MAUER & RYAN SCOTT KING, THE SENTENCING PROJECT, SCHOOLS AND PRISONS: FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION* 3 (2004).

137. Gideon v. Wainwright, 372 U.S. 335, 339–44 (1963).

138. Padilla v. Kentucky, 559 U.S. 356 (2010).

139. *Id.* at 359.

years" and served in the U.S. Armed Forces during Vietnam.[140] Padilla contended that during discussions with defense counsel, he was assured that a conviction on the charges would not result in deportation.[141] He further argued that, had he known such deportation consequences existed and were mandatory upon conviction, he would have insisted on going to trial.[142] With this, Padilla claimed his attorney had violated his Sixth Amendment right to have effective assistance of counsel based on his attorney's incorrect advice.[143] The majority agreed with Padilla, finding deficient performance, but leaving the issue of prejudice resulting from the misinformation provided petitioner by defense counsel to the lower courts to decide.[144]

In *Padilla*, the Supreme Court did two critical things. First, it expressly stated that plea negotiations are a critical phase of a criminal prosecution whereby counsel is required to assist a defendant.[145] For support of this principle, the Court cited *Hill* and *McMann v. Richardson*.[146] Secondly, the Court established an affirmative duty on defense counsel to advise her client of the deportation consequences of conviction.[147] The Court reasoned that without such a duty, defense counsel would be encouraged to remain silent on crucial issues, which would be at odds with the "the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'"[148] The Court's opinion recognized that criminal defendants facing deportation are typically those "least able to represent themselves."[149] The rationale is important as most defendants are poor, uneducated, and in desperate need of the advice of counsel.

B. MISSOURI V. FRYE

The Court further expanded defendants' right to effective counsel during plea bargaining when it required attorneys to notify defendants of any plea offers. In *Missouri v. Frye*, respondent Galin Frye was charged with driving with a revoked license, a felony, in August of 2007.[150] The prosecutor sent Frye's defense counsel two formal written plea offers.[151] The letter stated that on December 28, 2007, both offers would expire.[152]

140. *Id.*
141. *Id.* at 359–60.
142. *Id.*
143. *See id.*
144. *Id.* at 368–70.
145. *Id.* at 373–74.
146. *Id.*
147. *Id.* at 368–70.
148. *Id.* at 370 (quoting Libretti v. United States, 516 U.S. 29, 50–51 (1995)).
149. *Id.*
150. Missouri v. Frye, 132 S. Ct 1399, 1404 (2012).
151. *Id.*
152. *Id.*

Defense counsel failed to advise Frye that the offers were made, and they expired without any discussion between Frye and his lawyer.[153] Frye pled guilty to a class D felony charge without a plea agreement between himself and the State.[154] The judge sentenced Frye to three years in prison.[155] Frye appealed, contending that his lawyer's failure to inform him of the plea offers denied him effective assistance of counsel.[156] The U.S. Supreme Court granted certiorari.[157]

The main issue before the Court was "whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both."[158] The Court answered the question in the affirmative and found that when defense counsel failed to communicate the offer to his client, he failed to provide effective assistance of counsel as required by the Sixth Amendment.[159] Just as importantly, the Court recognized that plea bargains are "central to the administration" of justice.[160] The failure to recognize this reality would gut much of the Sixth Amendment of its meaning because "ours 'is for the most part a system of pleas, not a system of trials.'"[161] In order to remain loyal to the constitutional imperative of the Sixth Amendment, the Court acknowledged the salience of plea bargaining in our system and the necessity of effective counsel during the bargaining process.[162]

The Court then proceeded to *Strickland*'s two-pronged analysis. On the issue of performance, the fact that defense counsel had not communicated the offer to the client was enough to satisfy that prong. However, on the issue of prejudice, the Court modified the *Strickland* inquiry to further accommodate the plea-bargaining context. To show prejudice, the Court stated that the defendant must show that there was a reasonable probability that he would have accepted the plea bargain offered by the prosecutor, that the bargain would not have been canceled by the prosecutor, and that it would have been accepted by the trial court.[163] The Court remanded to the

153. *Id.*

154. *Id.* It is important to note that Frye was again arrested on December 30, 2007 for driving with a revoked license. *Id.* At his January 4, 2008 preliminary hearing, he waived the hearing on the August 2007 charge and proceeded to arraignment shortly thereafter. *Id.* During his arraignment, he first plead not guilty then changed his plea to guilty. *Id.*

155. *Id.* at 1404–05.

156. *Id.* at 1405.

157. *Id.*

158. *Id.* at 1408.

159. *Id.*

160. *Id.* at 1407.

161. *Id.* (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012)).

162. *Id.* at 1407–09.

163. *Id.* at 1409.

trial court to determine whether the prejudice prong under this new standard was met.

C. LAFLER V. COOPER

While *Frye* set the parameters for ineffective assistance of counsel claims during plea negotiations, *Lafler v. Cooper* discussed remedies. In *Lafler*, the respondent was charged with a number of felonies, including assault with intent to murder.[164] Instead of pleading guilty pursuant to an offer for the respondent to serve 51 to 85 months, he elected to plead not guilty upon the advice of his attorney. Respondent's attorney allegedly stated that because the victim "had been shot below the waist," the prosecutor would be unable to prove intent to murder.[165] At trial, the respondent was convicted on all counts and was sentenced to the mandatory minimum of 185 to 360 months in prison.[166]

In *Lafler*, the Court sought to provide a remedy to defendants prejudiced by an attorney's ineffective assistance of counsel where the ineffective assistance results in the rejection of a plea offer and the defendant is convicted at trial. In tackling the remedy, the Court fashioned two alternatives and placed them both within the exclusive discretion of the trial judge. For the Court, the proper remedy required the prosecution to reoffer the plea. Once this occurs, the trial judge may determine within her own discretion either to vacate the conviction and accept the plea or allow the conviction to stand.[167] The Court reasoned that this permits the trial court to review the injury suffered by the defendant and in turn, allows the trial court to evaluate the case within proper constitutional guidelines.

D. *IN DISSENT*

The dissents of both *Frye* and *Lafler*, written by Justice Scalia and joined by Chief Justice Roberts and Justice Thomas, rested primarily on the principle that the Sixth Amendment guarantees fair trials *only*.[168] Justice Scalia's view is that there is no right to a plea bargain and because of this, defendants are not entitled to constitutional remedies premised upon ineffective assistance of counsel in the plea-bargaining context.[169] For Justice Scalia, the "whole new boutique of constitutional jurisprudence" is

164. *Lafler*, 132 S. Ct. at 1383.

165. *Id.*

166. *Id.*

167. *Id.* at 1389.

168. *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting); *Lafler*, 132 S. Ct. at 1392–93 (Scalia, J., dissenting). Justice Alito, as well as Justice Thomas and the Chief Justice also joined Justice Scalia's dissent in *Frye*. *See Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting).

169. *Lafler*, 132 S. Ct. at 1394–95 (Scalia, J., dissenting).

illegitimate.[170] Moreover, the majority's opinion "elevates plea bargaining from a necessary evil to a constitutional entitlement."[171]

The trilogy has been hailed as a victory for the civil rights of criminal defendants. However, Justice Scalia's dissent raised a number of jurisprudential problems with the majority's opinion. Specifically, Justice Scalia criticized the Court for opening "a whole new field of constitutionalized criminal procedure: plea-bargaining law."[172] Before *Padilla*, the Court had never intervened in the actual plea bargaining negotiation process. Instead, the Court largely framed the importance of counsel during the plea process as a waiver issue, thereby requiring a showing that the defendant knowingly and intelligently waived important constitutional rights (the right to remain silent, right to a fair trial) and entered a valid plea of guilty.[173] In a number of cases, the Court had highlighted the significance of counsel during the plea process and the ways in which counsel serves a critical role in the fair administration of justice.[174] However, it was not until *Padilla* that the Court unequivocally thrust Sixth Amendment protections into the plea negotiation process. And it was not until *Frye* and *Lafler* that the Court fashioned the *Strickland* test to accommodate the plea-bargaining context so as to firmly entrench the idea that effective assistance of counsel is a constitutional imperative in the plea-negotiation process.

IV. CONTINUING *GIDEON*'S LEGACY: PRINCIPLES AND ENFORCEMENT

The plea-bargaining trilogy is a natural extension of the right to counsel jurisprudence. These cases rest on principles announced in previous right to counsel cases, including *Gideon*, *Strickland*, *Hill*, and *Coleman*. The plea-bargaining cases also recognize that the current system of American justice is primarily a system of plea bargaining, as opposed to trials.

This Part discusses three ways that the Court elaborates on the current understanding of the right to counsel in the reasoning of these cases. First, the Court specifically recognizes that the plea-bargaining process is itself a

170. *Id.* at 1398.

171. *Id.* at 1397.

172. *Id.* at 1391.

173. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (stating that "[p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered").

174. Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (holding that when one pleads guilty without counsel to a capital charge, prejudice results and the conviction must be reversed); Moore v. Michigan, 355 U.S. 155, 159 (1957) (holding, in a case involving a guilty plea entered without counsel, that "the intervention of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing"); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118–19 (1956) (discussing a guilty plea "where the circumstances show that [defendant's] rights could not have been fairly protected without counsel").

"critical phase" of criminal prosecution, thereby entitling the accused to the right to counsel.[175] Second, these cases require that the counsel to which the accused is entitled must provide effective assistance.[176] Finally, by explicitly recognizing that the majority of criminal cases are disposed of in the plea-bargaining process, the Court mandates right to counsel guarantees in the specific phase of criminal prosecution where the majority of defendants need the advice and skill of counsel the most.[177]

Lastly, while the principles espoused in *Padilla*, *Frye*, and *Lafler* accord with the contemporary understanding of the right to counsel, this Part will argue that they will probably suffer the same fate as the *Gideon* mandate—ineffective implementation and enforcement. As with the *Gideon* opinion, the Court in the plea-bargaining trilogy declined to offer any guidance for the implementation and enforcement of the right to counsel directives announced in the opinions. The recent case of *Burt v. Titlow*,[178] where the Court was asked to clarify the standards announced in *Frye* and *Lafler*, demonstrates that this is already beginning to surface.

A. CRITICAL STAGE

As mentioned above, *Padilla v. Kentucky* announced that the plea-negotiation process is a "critical stage" of criminal prosecution thereby entitling an accused to the right to counsel.[179] The significance of this principle cannot be overstated. Never before had the Court explicitly recognized that the plea-negotiation process was a "critical stage." While *Hill* asserted that the *Strickland* test applied to the plea process, it did not determine that the plea process was a "critical stage." Thus, without deciding whether the process was a "critical stage" in *Hill*, the Court punted on the issue of whether the right to counsel was always constitutionally mandated in the plea-bargaining process. *Padilla* affirmatively proclaimed this, leaving no question whether the plea-bargaining process itself was of constitutional significance. Both *Frye* and *Lafler* reiterated this principle, thereby further entrenching plea bargaining as a "critical stage" in the right to counsel jurisprudence.[180]

Finding that plea-bargaining negotiation is a "critical stage" also coincided to the Court's jurisprudence in another regard. As Justice Scalia asserted in his dissents in *Frye* and *Lafler*, plea bargaining is not a

175. Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

176. Missouri v. Frye, 132 S. Ct. 1399, 1405–06 (2012); *Lafler*, 132 S. Ct. at 1384 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

177. *Frye*, 132 S. Ct. at 1407–08.

178. Burt v. Titlow, 134 S. Ct. 10 (2013).

179. *Padilla*, 559 U.S. at 373–74.

180. *Frye*, 132 S. Ct. at 1406; *Lafler*, 132 S. Ct. at 1384.

constitutional right to which the defendant is entitled.[181] The labeling of plea bargaining as a "critical stage" guarantees a defendant right to counsel protections only if the prosecutor decides to engage in the negotiation process. Simply labeling the plea-bargaining process a "critical stage" maintains the discretion of the prosecutor while protecting the accused if the prosecutor does seek to negotiate a plea.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Padilla, *Frye*, and *Lafler* unequivocally declare that an accused is entitled to the right to effective assistance of counsel. While *Hill* requires that the *Strickland* test is used in the plea process, the plea-bargaining trilogy does more. First, all three cases, like *Hill*, apply the ineffective assistance of counsel standards to the substantive content of the advice given by counsel in the plea-negotiation process itself. In *Padilla*, the Court analyzed whether the attorney's advice to his client regarding the deportation consequences of a guilty plea constituted deficient performance.[182] *Frye* concerned an attorney's failure to communicate formal plea-bargaining offers to his client.[183] Finally, *Lafler* involved an attorney's misadvice to his client regarding the client's chances of acquittal at trial.[184] Each case specifically analyzed the advice (or lack thereof) that counsel gave the defendant during the plea-negotiation process itself, thus ascribing constitutional importance to the dialogue between counsel and her client. By looking at substantive advice as opposed to procedural aspects of plea bargaining, the Court effectively created a constitutional porthole into the plea-bargaining process in which to assess attorney performance. While the Court did not go as far as to label plea bargaining a constitutional entitlement, it did affirmatively offer constitutional protections to criminal defendants in the substantive advice that they receive from defense counsel.

The plea-bargaining trilogy modifies the *Strickland* test to accommodate the plea-negotiation process. *Padilla* itself imported direct language from *Strickland* for the purpose of analyzing the performance prong of the test.[185] Both *Padilla* and *Frye* analyzed counsel's conduct, finding deficient performance in each case.[186] In both cases, the Court looked to the prevailing norms in the profession as described by the ABA in the context of pleas.[187] *Frye* went a step further and analyzed the prejudice prong of

181. *Frye*, 132 S. Ct. at 1412, 1413–14 (Scalia, J., dissenting); *Lafler*, 132 S. Ct. at 1397–98 (Scalia, J., dissenting).

182. *Padilla*, 559 U.S. at 359–60. The Court remanded for a determination on prejudice. *Id.* at 368–69.

183. *Frye*, 132 S. Ct. at 1404.

184. *Lafler*, 132 S. Ct at 1383.

185. *Padilla*, 559 U.S. at 366–67.

186. *Frye*, 132 S. Ct. at 1408–09; *Padilla*, 559 U.S. at 366–68.

187. *Frye*, 132 S. Ct. at 1408; *Padilla*, 559 U.S. at 366–67.

Strickland, but restructured that part of the test to correspond to the plea-bargaining process.[188] *Lafler* concerned the remedies associated with a successful ineffective assistance of counsel claim in the plea-negotiation context.[189] With this, the Court extended effective assistance of counsel to plea bargaining while simultaneously tailoring the *Strickland* test to fit the realities of the plea-bargaining process.

C. A REALISTIC ASSESSMENT

The right-to-counsel jurisprudence recognizes the necessity of defense counsel in criminal prosecutions. Beginning with *Powell v. Alabama*, the Court has acknowledged that an accused "lacks both the skill and knowledge adequately to prepare his defense, even though he ha[s] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[190] Relying heavily on the principles espoused in *Powell*, the *Gideon* Court reiterated the belief that the right to defense counsel in a criminal prosecution is of a fundamental nature in the American system of justice.[191]

The novelty in the plea-bargaining trilogy is the majority's explicit recognition that criminal adjudications are principally disposed of by plea bargaining and because of this the accused is entitled to effective assistance of counsel. Providing statistics on the rate of convictions resolved by plea, the Court reasoned in *Frye* that because plea bargaining is the primary mode of disposition in criminal cases, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[192] Thus, the Court's opinions in *Padilla*, *Frye*, and *Lafler* are grounded in a realistic assessment of the current state of affairs in the American criminal justice system.

D. IMPLEMENTATION AND ENFORCEMENT

A major problem with the *Gideon* decision is the lack of guidance to the states and lower courts on the implementation and enforcement of its directive.[193] This Subpart argues that, while seemingly clear, *Padilla*, *Frye*, and *Lafler* do indeed present similar problems in implementation and enforcement. The dissents in all three cases, as well as the subsequent case of *Burt v. Titlow*, demonstrate that the opinions are obscure and opaque in providing guidance on implementation.

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188. *Frye*, 132 S. Ct at 1409–10.
189. *Lafler*, 132 S. Ct. at 1388–90.
190. Powell v. Alabama, 287 U.S. 45, 69 (1932).
191. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).
192. *Frye*, 132 S. Ct. at 1407.
193. Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2680 (2013).

1. The Dissent

Justice Scalia, dissenting in all three cases, provides a basis for underscoring the potential problems associated with implementation and enforcement. In *Padilla*, Justice Scalia concluded that requiring counsel to advise about deportation consequences "has no logical stopping point."[194] Scalia argued that the Court had failed to discuss what areas of immigration law are relevant for purposes of requiring counsel to advise her client[195]—must counsel generally state that there may be deportation consequences associated with a guilty plea or must counsel provide more specific advice to the client regarding definitive consequences of the plea? The *Padilla* majority failed to answer this question stating only that failure to advise a client regarding deportation consequences amounts to deficient performance under *Strickland*.

In *Frye*, Justice Scalia again chastised the majority for its failure to explicitly state the requirements for defense counsel during the plea-negotiation process.[196] The Court determined that bargaining during the plea process is "by its nature, defined to a substantial degree by personal style,"[197] but Justice Scalia found the statement utterly unhelpful to defense counsel attempting to determine the constitutional expectations of effective assistance of counsel during plea negotiations.[198] The statement itself provided no guidance on a constitutional minimum requirement of performance by defense counsel in plea bargaining.[199]

In *Lafler*, Justice Scalia derided the "incoherence" of the Court's remedy for a Sixth Amendment violation.[200] Noting that the majority opinion says that there are "factors" that are to be considered by trial courts in determining the remedy for an unconstitutional conviction, Justice Scalia pointed out that the Court had failed to announce what exactly these factors are.[201] In dissent, Justice Scalia opined that giving the trial judge the discretion to reoffer a plea when fashioning a remedy for an unconstitutional conviction "is a remedy unheard-of in American jurisprudence."[202] Thus, he considered the remedy constitutionally baseless and believed that it failed to give proper guidance to lower courts.

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194. Kentucky v. Padilla, 559 U.S. 356, 390 (2010) (Scalia, J., dissenting).
195. *Id.* at 391.
196. *Frye*, 132 S. Ct. at 1412–13 (Scalia, J., dissenting).
197. *Id.* at 1408 (majority opinion).
198. *Id.* at 1412–13 (Scalia, J., dissenting).
199. *Id.*
200. Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).
201. *Id.*
202. *Id.* at 1396.

2. *Burt v. Titlow*

Burt v. Titlow is the most recent case in which the Court granted certiorari to review an ineffective assistance of counsel claim in the plea-bargaining context. In the case, Titlow was accused of murdering her aunt's husband.[203] Michigan originally charged Titlow with first degree murder, but offered Titlow a plea deal that would have permitted her to plead guilty to manslaughter and face a sentencing range of seven to fifteen years in exchange for her testimony against her aunt.[204] At the plea hearing, Titlow confirmed that she had reviewed all of the evidence and admitted some facts that implicated her in the crime.[205] The court accepted the plea.[206] Convinced of her innocence, Titlow subsequently hired Attorney Toca.[207] Toca withdrew her plea on the basis of an unacceptable sentencing range for manslaughter as opposed to his client's claimed innocence.[208] Titlow took the case to trial, was convicted, and was sentenced to between twenty and forty years in prison.[209] She filed a habeas petition on the basis of ineffective assistance of counsel, specifically alleging that Toca advised her to withdraw the plea without conducting an adequate investigation.[210] The Sixth Circuit agreed with Titlow and found Toca's performance unreasonable in that he did not adequately investigate and hence was ineffective.[211] In fashioning a remedy, the Sixth Circuit remanded the case with instructions that Michigan reoffer the original plea to Titlow and "fashion" the remedy for the Sixth Amendment violation.[212]

Two important questions were presented to the Supreme Court for review that revolved around *Frye* and *Lafler*. The first concerned "[w]hether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea."[213] Thus, the issue concerned the *Frye* prejudice test requiring a convicted defendant show that he or she would have accepted the plea but for counsel's deficient performance. The second question asked whether the Court's opinion in *Lafler* requires a trial court to always resentence a

203. Burt v. Titlow, 134 S. Ct. 10, 13 (2013).
204. *Id.*
205. *Id.*
206. *Id.*
207. *See id.* at 13–14.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 13.
212. *Id.* at 14.
213. Question Presented at 1, Burt v. Titlow, 571 U.S. ___ (2013) (No. 12-414), *available at* http://www.supremecourt.gov/orders/grantednotedlist.aspx?Filename=13grantednotedlist.html (follow 12-414 hyperlink to download "Questions Presented").

defendant who meets the *Frye-Strickland* ineffective assistance of counsel test "in such a way as to 'remedy' the violation of the defendant's constitutional right."[214] The Court declined to decide the case on either *Frye* or *Lafler* grounds and instead elected to decide the issue on the standard of review for Antiterrorism and Effective Death Penalty ("AEDPA") claims.[215] In demurring on the ineffective assistance of counsel issues, the Court in effect left such questions for lower courts to work through for themselves, thereby following along the same trajectory as *Gideon* in implementation and enforcement.

E. SUMMARY

In *Padilla*, *Frye*, and *Lafler*, the Court made significant symbolic strides in recognizing the need for counsel in the plea-bargaining process. Constitutionally requiring effective assistance of counsel in the phase of criminal prosecution in which most cases are disposed was a necessary step in protecting the accused from losing important constitutional guarantees. However, as discussed in the dissents as well as demonstrated by *Burt v. Titlow*, the plea-bargaining trilogy's implementation and enforcement are unclear and muddled. Because of the lack of guidance in these opinions, lower courts will likely struggle to interpret the full constitutional meaning of these cases. As with *Gideon*, the plea-bargaining cases are on a path of various interpretations and a legacy unfulfilled.

V. CONCLUSION

Over the past fifty years, the United States Supreme Court has interpreted the Sixth Amendment as including the right to effective assistance of counsel at all critical stages of criminal prosecution. While asserting that right to counsel principles are fundamental, the Court has declined to provide specific guidance on implementation and enforcement. This has resulted in various applications of right to counsel principles cross-nationally. This was the result with *Gideon* and it will likely be the result with the plea-bargaining cases. The plea-bargaining cases are an exciting expansion of the Sixth Amendment right to counsel. However, the effect of these cases on defense representation depends on implementation of the plea-bargaining principles.

214. *Id.*

215. *Burt*, 571 U.S. at 13.