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WHAT MATTERS MORE: A DAY IN JAIL OR A CRIMINAL CONVICTION?

John P. Gross*

INTRODUCTION

This Article will examine the Supreme Court's most recent holdings on the right to counsel under the Sixth Amendment[1]: *Padilla v. Kentucky*,[2] *Missouri v. Frye*,[3] and *Lafler v. Cooper*.[4] These cases shed light on the current state of our criminal justice system, a system where criminal convictions carry with them enmeshed penalties[5] which are often of greater concern to defendants than actual incarceration and where effective representation during plea bargaining is potentially more valuable than effective representation at trial. Recognizing that there are penalties that result from a conviction which are far worse than incarceration and that our criminal justice system has become essentially a pretrial justice system calls into question the wisdom of the current rule making the Sixth Amendment right to counsel contingent upon actual incarceration following conviction.

This Article will trace the Sixth Amendment's evolution from a right to have counsel at trial into a right which attaches at any critical stage of the proceedings. It will analyze the Court's decision to limit the right to counsel to cases where a defendant is actually incarcerated and argue that this limitation is inconsistent with the Court's rationale for requiring the presence of counsel during all critical stages of a criminal prosecution.

Even assuming that the actual incarceration standard was a good one at the time it was created forty years ago,[6] changes in our criminal justice system have rendered

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[1] U.S. CONST. amend. VI, § 3.

[2] 130 S. Ct. 1473 (2010).

[3] 132 S. Ct. 1399 (2012).

[4] 132 S. Ct. 1376 (2012).

[5] In *Padilla*, the Supreme Court described deportation as an "enmeshed" penalty of the criminal justice system; the argument that deportation was a "collateral consequence" of conviction was rejected. 130 S. Ct. at 1481–82. Throughout this Article I will use the term "enmeshed penalty" when referring to those consequences of conviction which have, both in court decisions and in scholarly journals, previously been termed "collateral consequences."

[6] *See* Scott v. Illinois, 440 U.S. 367 (1979) (holding that, while the Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense, a state trial court need not appoint counsel for a criminal defendant charged with a statutory offense for which imprisonment upon conviction is authorized but not imposed).

it obsolete. Three developments have made the actual incarceration standard an unjustified limitation on the right to counsel: (1) our criminal justice system's growing reliance on plea bargaining; (2) the rise of enmeshed penalties tied to a conviction; and (3) the widespread availability and dissemination of criminal records.

In order to guarantee the right to counsel under the Sixth Amendment, courts need to take into account the potential punishments that result from conviction itself and not focus solely on whether a defendant will be sentenced to incarceration. Courts must recognize that there are severe and lasting penalties which occur automatically as a result of a criminal conviction, even those convictions which never result in the defendant being incarcerated.

I. THE EXPANSION OF THE RIGHT TO COUNSEL UNDER *PADILLA*, *FRYE*, AND *LAFLER*

A. Padilla v. Kentucky

In March of 2010, the Supreme Court decided *Padilla v. Kentucky*.[7] The *Padilla* case involved a claim of ineffective assistance of counsel under *Strickland v. Washington*.[8] The defendant, a lawful permanent resident of the United States who pled guilty to drug distribution charges, claimed that his counsel was ineffective for failing to advise him that his conviction would subject him to deportation.[9] The defendant's claim had been rejected by the Supreme Court of Kentucky on the grounds that the advice he sought regarding the risks of deportation concerned only collateral matters.[10] Although the precise definition of what constitutes a "collateral," as opposed to a "direct," consequence of a criminal conviction is not entirely clear,[11] a collateral consequence is one which generally refers to a matter outside the sentencing authority of the court.[12] Following this definition, a state trial court would regard any deportation proceeding initiated in federal court as a collateral consequence of a state court

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[7] 130 S. Ct. 1473 (2010).

[8] 466 U.S. 668 (1984). In *Strickland*, the Court found that the question at issue when evaluating an ineffectiveness claim is "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." *Id.* at 686. To prevail on a claim of ineffective assistance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. That involves demonstrating that counsel's performance was deficient by showing "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "that the deficient performance prejudiced the defense." *Id.* at 687.

[9] Commonwealth v. Padilla, 253 S.W.3d 482, 484–85 (Ky. 2008), *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[10] *See id.*

[11] *See generally* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009) (discussing the distinction between direct and collateral consequences).

[12] *See* Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005).

criminal conviction. The Supreme Court of Kentucky found that "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."[13]

The Supreme Court disagreed and refused to apply "a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[14] The Court declined to consider whether or not any such distinction is appropriate because *Padilla* involved the "particularly severe 'penalty'" of deportation.[15] The Court stated that "because of its close connection to the criminal process," deportation was "uniquely difficult to classify as either a direct or a collateral consequence."[16] The Court held that "counsel must inform her client whether his plea carries a risk of deportation."[17] This holding was grounded in the Court's "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country."[18]

The Supreme Court characterized deportation as "the equivalent of banishment or exile."[19] Coupled with the severity of deportation is the recognition that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[20] As dramatic as the Court's holding was on one level,[21] on another the Court simply recognized the obvious: a defendant who is offered a plea bargain wherein he would not serve any time in jail but would be deported might forego the plea bargain and risk going to jail in the hope that he would be acquitted and thus avoid deportation.

The Supreme Court's decision in *Padilla* could have a profound effect on the obligations of criminal defense attorneys; interpreted broadly, there could be a whole range of collateral consequences that defense attorneys might need to address when counseling clients on the potential benefits and consequences of a plea bargain.[22] However,

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[13] *Padilla*, 253 S.W.3d at 483.

[14] *Padilla*, 130 S. Ct. at 1481 (quoting *Strickland*, 466 U.S. at 689).

[15] *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting)).

[16] *Id.* at 1482.

[17] *Id.* at 1486.

[18] *Id.*

[19] *Id.* (citing Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

[20] *Id.* at 1483 (citing INS v. St. Cyr, 533 U.S. 289, 323 (2001)).

[21] *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution* of Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795 (2011) (discussing the extent to which *Padilla* requires defense attorneys to advise their clients about the various consequences of conviction).

[22] *Id.* at 797; Margaret Colgate Love, *Collateral Consequences after* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 88–92 (2011); Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515,

the Supreme Court did place particular emphasis on the severity of deportation as a sanction as well as the fact that, in Padilla's case, the consequences of his plea were obvious.[23] It may be that future decisions will limit the requirement that defense counsel provide advice regarding the consequences of criminal convictions to only instances where those consequences are deemed to be as "severe" as deportation.[24] The Court's characterization of deportation as a "severe" penalty may also have an impact on the right to counsel in deportation proceedings where the Court has yet to recognize a right to counsel under either the Sixth or the Fourteenth Amendments.[25]

Regardless of the extent to which the *Padilla* decision impacts the obligations of defense counsel in a criminal case or the right to counsel in deportation proceedings, the Court's decision to view deportation as an enmeshed penalty is of profound importance:

> We have long recognized that deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context.[26]

The distinction between criminal penalties and civil penalties becomes a distinction without a difference when it comes to criminal convictions that inevitably lead to deportation.[27] The court simply cannot separate the conviction in criminal court from

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1516–19 (2011); Steven Zeidman, Padilla v. Kentucky*: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 206–08 (2011).

[23] "In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Padilla*, 130 S. Ct. at 1483.

[24] For a discussion of the limited impact of *Padilla* on defendants facing deportation, see Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011).

[25] For a discussion of *Padilla*'s potential impact on immigration law, see Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-In-Progress?*, 45 NEW ENG. L. REV. 305 (2011).

[26] *Padilla*, 130 S. Ct. at 1481 (citations omitted).

[27] For a detailed analysis of the distinction between criminal and civil penalties, see William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996). *See also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedure Divide*, 85 GEO. L.J. 775 (1997).

the ensuing civil penalty which is automatically triggered. This type of enmeshed penalty is "a severe penalty, intimately related to the criminal process, and nearly an automatic result of certain convictions."[28]

B. Missouri v. Frye *and* Lafler v. Cooper

In March of 2012, two years after *Padilla*, the Supreme Court decided a pair of cases that also dealt with a claim of ineffective assistance of counsel. In *Missouri v. Frye*[29] and *Lafler v. Cooper*,[30] the issue was what remedies were available to a defendant who would have accepted a plea bargain offered by the prosecution but for his attorney's ineffective assistance.

In *Missouri v. Frye*, "Galin Frye was charged with driving with a revoked license."[31] Due to the fact that he had three prior convictions for driving with a revoked license, the prosecution charged him with a felony that carried a potential sentence of four years of imprisonment, but also extended an offer of a ninety-day sentence in exchange for a guilty plea to a misdemeanor.[32] Frye's lawyer never informed him of the offer.[33] Subsequently, he was arrested again for the same offense, and with no offer extended by the prosecution, he pled guilty and received a three-year sentence.[34]

In *Lafler v. Cooper*, Anthony Cooper was charged with assault with intent to murder and other offenses.[35] It was alleged that Cooper fired a gun at the victim repeatedly and hit her in the hip, abdomen, and buttocks.[36] The prosecution offered to recommend a sentence of fifty-one to eighty-five months in exchange for a guilty plea.[37] In a communication to the court, Cooper admitted his guilt and indicated he would accept the plea offer.[38] However, in an obvious legal error, his attorney advised him to reject the offer on the theory that he could not be convicted of attempted murder because the victim had been shot below the waist.[39] Cooper proceeded to trial and, after conviction, was sentenced to 185 to 360 months in prison.[40]

In both cases, the Court emphasized that defendants are entitled to the effective assistance of counsel at all "critical stages" of the proceeding and that plea bargaining is

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[28] Smyth, *supra* note 21, at 801.
[29] 132 S. Ct. 1399 (2012).
[30] 132 S. Ct. 1376 (2012).
[31] *Frye*, 132 S. Ct. at 1404.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 1404–05.
[35] *Lafler*, 132 S. Ct. at 1383.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

a "critical stage[ ]."[41] The Court found in *Frye* that the defense counsel was ineffective for failing to communicate the prosecution's plea offer,[42] and in *Lafler*, that the defense counsel was ineffective for providing deficient advice concerning the advisability of accepting a plea offer.[43] Just as in *Padilla*, the assertion that a defendant is entitled to the effective assistance of counsel during plea negotiations is not particularly remarkable; previous decisions by the Court have made that clear.[44] What is remarkable is the Court's recognition that our system of criminal justice has become wholly dependent upon plea bargaining.[45] While acknowledging that a defendant does not have a right to a plea bargain, the Court pointed to the "simple reality" that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[46] Our criminal justice system "is for the most part a system of pleas, not a system of trials."[47] Plea bargains were described by the Court as "central to the administration of the criminal justice system."[48] The Court also recognized the practical effect of a criminal justice system which relies almost exclusively on plea bargaining: "In

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[41] Missouri v. Frye, 132 S. Ct. 1399, 1405 (2012); *see Lafler*, 132 S. Ct. at 1384.

[42] *Frye*, 132 S. Ct. at 1410.

[43] *Lafler*, 132 S. Ct. at 1384.

[44] In both *Frye* and *Lafler*, the Court cites *Padilla* for this proposition. *Frye*, 132 S. Ct. at 1406; *Lafler*, 132 S. Ct. at 1384. In *Padilla* itself the Court cites *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), and *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970). For the proposition that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel, see *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2009). *See also* Norman L. Reimer, Frye *and* Lafler*: Much Ado About What We Do—And What Prosecutors and Judges Should* Not *Do*, CHAMPION, Apr. 2012, at 7, 7 (stating that it has long been recognized that competent representation requires lawyers to notify their clients of plea offers).

[45] *See* Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 35 (2012), http://yalelawjournal.org/2012/06/20/bibas.html ("After four decades of neglecting laissez-faire plea bargaining, the Supreme Court got it right. In *Missouri v. Frye* and *Lafler v. Cooper*, the Court recognized that the Sixth Amendment regulates plea bargaining." (footnotes omitted)).

[46] *Frye*, 132 S. Ct. at 1407 (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf; SEAN ROSENMERKEL ET AL., U.S. Dep't of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006—STATISTICAL TABLES 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; *Padilla*, 130 S. Ct. at 1485–86 (recognizing that pleas account for nearly 95% of all criminal convictions)).

[47] *Lafler*, 132 S. Ct. at 1388.

[48] *Frye*, 132 S. Ct. at 1407. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.").

today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[49]

What is also significant about the Court's finding of ineffective assistance of counsel in *Lafler* is that the defendant was found guilty following a trial.[50] Even though the defendant received effective assistance at trial, that fact was not sufficient to undo the harm the defendant suffered because of his counsel's ineffective assistance during plea negotiations.[51] The "claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial" was rejected by the Court.[52]

Padilla, *Frye*, and *Lafler* all dealt with the adequacy of defense counsel's performance during plea bargaining. These cases addressed the application of *Strickland*'s prejudice test when counsel is alleged to have misinformed the defendant about the consequences of his plea, failed to convey a favorable plea bargain, or misinformed the defendant about the advisability of accepting a plea bargain. While all three cases address claims of ineffective assistance of counsel, there are two components of the Court's decisions which suggest that these cases have broader implications for the right to counsel under the Sixth Amendment.

The first is *Padilla*'s recognition that there are some things of greater consequence to a defendant than the length of time he or she could potentially spend in jail.[53] *Padilla* stands for the proposition that the decision to accept or reject a plea bargain is not simply based on an effort to minimize the amount of time a defendant may have to spend in jail. For some defendants, jail simply isn't the issue; it is the conviction and the enmeshed penalties that flow from it that are paramount.

The second implication is that our adversarial system of justice seldom resolves disputes through trials and instead relies almost exclusively on plea bargaining.[54] The effective assistance of counsel required by the Sixth Amendment has more to do with the lawyer's ability to negotiate with the prosecution and counsel his or her client than with the ability to litigate. Before exploring how these elements of the Court's decisions in *Padilla*, *Frye*, and *Lafler* impact the right to counsel under the Sixth Amendment, it is first necessary to briefly review the ways in which the right to counsel has historically been interpreted by the Court.

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[49] *Frye*, 132 S. Ct. at 1407.

[50] *Lafler*, 132 S. Ct. at 1383.

[51] *Id.* at 1386 ("Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.").

[52] *Id.* at 1385–86.

[53] Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("We too have previously recognized that '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" (quoting INS v. St. Cyr, 533 U.S. 289, 323 (2001)) (internal quotation marks omitted)).

[54] *See id.* at 1485 ("Pleas account for nearly 95% of all criminal convictions.").

II. THE DEVELOPMENT OF THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT

The need for the assistance of counsel to present an adequate defense was first recognized by the Supreme Court in *Powell v. Alabama*,[55] more than thirty years before the Court's landmark decision in *Gideon v. Wainwright*.[56] *Powell* was actually decided not under the Sixth Amendment right to counsel, but rather under the Fourteenth Amendment's Due Process Clause.[57] The defendants in *Powell* were charged with a capital crime, and there was no question regarding their entitlement to counsel under state statute.[58] The question presented to the Court was whether the defendants in fact were represented by counsel during their trial and, if so, whether they had been given an opportunity to consult with counsel in advance of the trial.[59] The Court held that the defendants had counsel in name only and that the absence of effective counsel at their trial amounted to a denial of due process under the Fourteenth Amendment.[60]

Using language that would echo throughout the *Gideon* decision, the Court stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[61]

The Court's reasoning in *Powell* is based on the assumption that no one who is not a lawyer is capable of defending himself or herself. The Court does not believe that

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[55] 287 U.S. 45 (1932).
[56] 372 U.S. 335 (1963).
[57] *Powell*, 287 U.S. at 60.
[58] *Id.* at 48.
[59] *Id.* at 50, 52.
[60] *Id.* at 71.
[61] *Id.* at 68–69.

even the "intelligent and educated layman" could adequately defend him- or herself.[62] It is worth considering that today the vast majority of criminal defendants are too poor to hire their own counsel.[63] This makes the Court's concerns regarding "ignorant and illiterate" defendants even more significant when we consider the link between poverty and education.[64] Our adversarial criminal justice system simply cannot function properly without the "guiding hand of counsel."[65] The Court also believes that counsel is needed at "every step" of the proceedings to ensure fundamental fairness; thus, the right to counsel is not simply a right to have the assistance of counsel at trial, but throughout the entire criminal prosecution.[66]

Not long after the Court's decision in *Powell*, the Court specifically addressed the right to counsel under the Sixth Amendment in *Johnson v. Zerbst*.[67] In *Zerbst*, the issue was whether the defendants had waived their right to counsel. In ruling that they had not waived the right, the Court spoke about the importance of the Sixth Amendment's guarantee that the accused have the assistance of counsel in all criminal prosecutions:

> This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards

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[62] *Id.* at 69. *But see* Turner v. Rogers, 131 S. Ct. 2507, 2517–21 (2011) (finding that "alternative procedural safeguards" could be used to guard against an "erroneous deprivation of liberty" in a civil contempt proceeding).

[63] In 1998, approximately two-thirds of federal-felony defendants, and in 1996, more than eighty percent of felony defendants in the country's seventy-five largest counties were represented by publicly funded counsel. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES (2000), *available at* http://bjs.gov/content/pub/pdf/dccc.pdf. Specifically, in federal court, 30.1% of all defendants were represented by counsel from a public defender organization, and 36.3% were represented by a court-appointed attorney. *Id.* In the large state courts, 68.3% were represented by public defenders, and 13.7% were represented by assigned counsel. *Id.*

[64] The U.S. Department of Labor, Bureau of Labor Statistics keeps detailed data on income and educational attainment. The *Usual Weekly Earnings of Wage and Salary Workers* for the second quarter of 2012 estimates that "full-time workers age 25 and over without a high school diploma had median weekly earnings of $483, compared with $659 for high school graduates (no college) and $1,164 for those holding at least a bachelor's degree." U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS: SECOND QUARTER 2012, *available at* http://www.bls.gov/news.release/archives/wkyeng_07182012.pdf.

[65] *Powell*, 287 U.S. at 68–69.

[66] *Id.* at 69.

[67] 304 U.S. 458 (1938).

> it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman, may appear intricate, complex and mysterious.[68]

Once again, the Supreme Court speaks about the necessity of having defense counsel in a criminal case and recognizes the "obvious truth" that the average defendant stands little chance of adequately defending himself.[69] The Sixth Amendment right to counsel, as it was in *Powell*, is associated with the right to be heard, a right which can be thought of as enabling other "constitutional safeguards."[70]

Neither *Powell* nor *Zerbst* established a constitutional right to have counsel appointed in criminal cases where the defendant was indigent.[71] Nevertheless, in both cases the Court's reasoning seemed to indicate that, under either the Sixth Amendment's right to counsel clause or the Fourteenth Amendment's Due Process Clause, counsel was required to ensure the fairness of our adversarial system. When the Court next considered the question of the right to counsel under the federal constitution in *Betts v. Brady*,[72] it was widely expected that the Court would hold that the concept of "due process of law" incorporated in the Fourteenth Amendment would require state courts to appoint counsel to indigent defendants in criminal cases in state court. Somewhat surprisingly, the Court decided against such a requirement.[73] Instead, the Court

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[68] *Id.* at 462–63 (footnote omitted).

[69] *Id.* at 462.

[70] *Id.* As the Supreme Court noted in *Powell*, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 68–69.

[71] That may have been in part due to the Court's observation in *Powell* that

> [t]he United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

287 U.S. at 73.

[72] 316 U.S. 455 (1942).

[73] *Id.* at 461–62 ("The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may,

found "that appointment of counsel is not a fundamental right" and "has generally been deemed one of legislative policy."[74] The Court did hold that trial courts have the power "to appoint counsel where that course seems to be required in the interest of fairness."[75] Instead of a categorical rule requiring the appointment of counsel in all criminal cases, the Court limited the appointment of counsel to those cases which present special circumstances.[76]

It is worth noting that even though the Court in *Betts* failed to recognize the right to counsel as a fundamental right, the Court continued to recognize, at least in some circumstances, the need for "the guiding hand of counsel."[77] In *Hamilton v. Alabama*,[78] the Court found a defendant had a right to an attorney at his arraignment. The Court's holding was based on the fact that certain defenses were unavailable to a defendant unless they were pled at the time of arraignment.[79] The Court specifically referenced *Powell* and the notion that counsel was needed "at every step in the proceedings," because without the benefit of counsel, "he faces the danger of conviction because he does not know how to establish his innocence."[80] The Court went on to acknowledge that "the same pitfalls or like ones face an accused in Alabama who is arraigned without having counsel at his side."[81] The Court declared arraignment in Alabama to be a "critical stage in a criminal proceeding" by virtue of the fact that "[w]hat happens there may affect the whole trial."[82] Although *Hamilton* is not typically regarded as a decision of great significance, it was the first time the Court used the phrase "critical stage" when evaluating when counsel is required in a criminal proceeding.[83]

A. Gideon v. Wainwright

Two decades after the creation of the "special circumstances rule," the Court revisited its decision in *Betts* and declared that the Sixth Amendment right to counsel was

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in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth." (footnotes omitted)).

[74] *Id.* at 471.

[75] *Id.* at 472.

[76] *Id.* at 471–72.

[77] *Id.* at 476 (Black, J., dissenting).

[78] 368 U.S. 52 (1961).

[79] *Id.* at 53–54.

[80] *Id.* at 54 (citing Powell v. Alabama, 287 U.S. 45 (1932)). It is worth noting that the Court's reference to a defendant proving his innocence is at odds with the constitutional requirement of proof beyond a reasonable doubt in criminal cases.

[81] *Id.* at 55.

[82] *Id.* at 54.

[83] *See* White v. Maryland, 373 U.S. 59, 60 (1963) (finding a preliminary hearing under Maryland law to be a "critical" stage of the proceeding). Both *Hamilton* and *White* made reference to the fact that the defendant lost certain rights at trial during the preliminary proceedings which led some state courts (Alabama and Maryland) to conclude that the initial arraignment or a preliminary hearing was not a "critical stage" unless it had an impact on the defendant's rights at trial. *Id.*; *Hamilton*, 368 U.S. at 54.

indeed a fundamental right.[84] In overruling *Betts*, the Court characterized that decision as "an abrupt break with its own well-considered precedents."[85] The Court referenced both *Powell* and *Zerbst* and restored "constitutional principles established to achieve a fair system of justice."[86] The language used by the Court in *Gideon* made it clear that the right to counsel played a central role in our criminal justice system:

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The 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.[87]

The language used by the Court in *Gideon* is sweeping. Without an attorney, the fairness of the adversarial system is cast into doubt, something which the Court regards as an "obvious truth."[88] Lawyers were absolutely necessary in criminal cases and the right to counsel was a fundamental right. When hearing the Court's pronouncement concerning the right to counsel in *Gideon*, one can hear the echoes of the language used in The Declaration of Independence: that some truths are "self-evident."[89]

The Supreme Court's declaration in *Gideon* that "[t]he right of one charged with crime to counsel may not be deemed fundamental . . . in some countries, but it is in ours"[90] was founded upon the right to counsel "in all criminal prosecutions" guaranteed by the Sixth Amendment.[91] The reasoning used by the Court in *Gideon* was that, without counsel, a person too poor to hire an attorney could not receive a fair trial.[92] While

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[84] *See* Gideon v. Wainright, 372 U.S. 335 (1963).
[85] *Id.* at 344.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[90] *Gideon*, 372 U.S. at 344.
[91] *Id.* at 339.
[92] *Id.* at 344.

Gideon dealt with a felony charge, as had *Powell*, the Court's decision was based on the right to counsel under the Sixth Amendment "in all criminal prosecutions."[93] Still, whether the Sixth Amendment required the appointment of counsel to indigent defendants in every case, or only in felony cases, remained an open question following *Gideon*.[94]

B. The Application of Gideon *to Critical Stages*

That question would be answered almost a decade later by the Supreme Court in *Argersinger v. Hamlin*,[95] but in the intervening years the Court extended the right to counsel to other "critical stages" of the proceedings in addition to trial. The year after *Gideon* was decided, the Court ruled in *Massiah v. United States*[96] that the Sixth Amendment right to counsel prohibits the use of incriminating statements against a defendant if they were obtained by federal agents after he had been indicted and in the absence of counsel.[97] The Court based its holding on "a constitutional principle established . . . long ago" by *Powell* that the accused is entitled to the aid of counsel from the time of his arraignment until the beginning of trial.[98] In *Escobedo v. Illinois*,[99] the Court found the refusal by the police to allow a suspect to consult with counsel while in custody but before charges were filed also violated the Sixth Amendment right to counsel.[100] The suspect admitted to being complicit in a murder plot, unaware that under Illinois law at that time an admission of "mere" complicity in a murder plot was as legally damaging as an admission of firing the fatal shots.[101] The Court found that counsel was needed "to advise petitioner of his rights in this delicate situation"[102] and that the interrogation was "the stage when legal aid and advice were most critical."[103]

Two years after *Massiah* and *Escobedo*, the Court's decision in *Miranda v. Arizona*[104] established a right to consult with an attorney during custodial interrogation. While the *Miranda* decision is rooted in the Fifth Amendment privilege against self-incrimination, the right to an attorney guaranteed by the Sixth Amendment was seen as a necessary corollary to ensure the exercise of one's Fifth Amendment right to

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[93] *Id.* at 339.

[94] *See id.* at 351 (Harlan, J., concurring) ("Whether the rule should extend to *all* criminal cases need not now be decided.").

[95] 407 U.S. 25 (1972).

[96] 377 U.S. 201 (1964).

[97] *Id.* at 206.

[98] *Id.* at 205.

[99] 378 U.S. 478 (1964).

[100] *Id.* at 490–91.

[101] *Id.* at 479, 486.

[102] *Id.* at 486.

[103] *Id.* at 486 (quoting *Massiah*, 377 U.S. at 204).

[104] 384 U.S. 436 (1966).

remain silent.[105] The Court next extended the right to counsel under the Sixth Amendment to pretrial identification proceedings in *United States v. Wade*.[106] In *Wade*, the Court found that there was a

> grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself."[107]

Relying on the principles established in *Powell*, the Court found it necessary to

> scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.[108]

That same year the Court also decided *Mempa v. Rhay*,[109] which held that a probationer was entitled to counsel at the time his probation was revoked because "certain

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[105] *Id.* at 469. ("The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.").

[106] 388 U.S. 218 (1967).

[107] *Id.* at 236–37 (quoting Powell v. Alabama, 287 U.S. 45 (1932) (footnote omitted)). The Court also stated:

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

Id. at 224.

[108] *Id.* at 227. The Court declined to extend the right to counsel to a post-indictment photographic display in *United States v. Ash* because the same concerns that existed in *Wade* were not applicable to a photographic display shown to a witness. 413 U.S. 300 (1973). In reviewing the historical expansion of the Sixth Amendment right to counsel, the Court did note that "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313.

[109] 389 U.S. 128 (1967).

legal rights may be lost if not exercised at this stage."[110] The Court found the proceeding in *Rhay* to be "a deferred sentencing" and not simply "a revocation of probation."[111] While the Court noted that there had not been a need "to enumerate the various stages in a criminal proceeding at which counsel was required," in *Gideon*, it reiterated that counsel "is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[112] While sentencing was thus a "critical stage" for the purposes of a defendant's right to counsel under the Sixth Amendment, parole revocation hearings as well as probation revocation hearings were ruled not to fall within the definition of a "criminal prosecution," and therefore counsel was not required.[113]

The Court also held in *Kirby v. Illinois*[114] that the right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated."[115] The Court was clear that the right to counsel exists before the commencement of a trial, but because the Sixth Amendment guarantees the assistance of counsel in all criminal prosecutions, a criminal prosecution must be initiated before it is applicable.[116] It is at that point that the "defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[117]

While the right to counsel had been extended to various stages of the criminal proceeding in the years following *Gideon*, there was still a lingering question regarding the right to counsel for misdemeanors, or "petty" offenses. Those hoping to see the Court's expansion of the right to counsel come to an end were presumably encouraged by the Court's decision in *Duncan v. Louisiana*,[118] where the Court declined to extend the Sixth Amendment's right to a jury trial to "petty" offenses.[119] The very same argument,

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[110] *Id.* at 135.

[111] *Id.* at 137.

[112] *Id.* at 134.

[113] The Supreme Court found that these hearings were not part of the "criminal proceedings" against the defendants because they occurred after sentencing. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (discussing a probation revocation hearing); Morrissey v. Brewer, 408 U.S. 471 (1972) (discussing a parole revocation hearing).

[114] 406 U.S. 682 (1972).

[115] *Id.* at 688.

[116] *Id.*

[117] *Id.* at 689.

[118] Duncan v. Louisiana, 391 U.S. 145 (1968). While the Supreme Court bases the Sixth Amendment right to counsel on the actual sentence imposed and not the categorization of the offense, the Sixth Amendment right to trial by jury is based on the categorization of the offense without regard to the actual sentence imposed. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989).

[119] The Court recognized in *Blanton* that there were certain "petty" offenses which fell outside of the Sixth Amendment jury trial provision. *See Blanton*, 489 U.S. at 541. The Court defined "petty" offenses by focusing on the objective seriousness of the offense, specifically the severity of the maximum punishment authorized. Ultimately, the Court concluded that a potential sentence of six months of incarceration coupled with a $1,000 fine was not severe enough to require trial by jury. *Id.* at 543–45. Nevertheless, the Court left open the possibility that other

that "petty" offenses do not implicate the Sixth Amendment's right to counsel, was advanced in *Argersinger v. Hamlin*.[120]

In *Argersinger*, the Court rejected the idea that a distinction should be made based on the seriousness of the offense and concluded that "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."[121] That reasoning is entirely consistent with the justifications offered in *Powell* and *Gideon* that the average person is simply unable to effectively represent themselves in a criminal proceeding. However, while rejecting the idea that the classification of the offense should impact the applicability of the Sixth Amendment's right to counsel, the Court did not rule that the Sixth Amendment actually applies to "all criminal prosecutions."[122] The Court ruled that a defendant's conviction must result in incarceration for the right to attach.[123]

The Court's decision to limit the right to counsel to cases of actual incarceration is completely at odds with its reasoning in *Powell* and *Gideon*[124] as well as being internally inconsistent because the Court recognizes that even "petty" offenses can involve complex legal issues.[125] The Court recognized that "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are [not] any less complex than when a person can be sent off for six months or more."[126] Because the defendant in *Argersinger* was actually sentenced to ninety days of incarceration following his trial, the Court did not consider "the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved."[127]

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penalties might indicate that the offense was considered serious enough by the legislature to require trial by jury:

> In using the word "penalty," we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense. We thus examine "whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial."

Id. at 542 (quoting Duncan v. Louisiana, 391 U.S. 145, 161 (1968)). While this Article limits itself to the argument that the right to counsel is implicated by enmeshed penalties, a similar argument could be made regarding a right to a jury trial.

[120] 407 U.S. 25 (1972).

[121] *Id.* at 36–37 (footnote omitted).

[122] *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 517–18 (2009).

[123] *Argersinger*, 407 U.S. at 37 ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (footnote omitted)).

[124] *See infra* Part II.C.

[125] *Argersinger*, 407 U.S. at 25 ("Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel.").

[126] *Id.* at 33.

[127] *Id.* at 37.

Viewed narrowly, *Argersinger* stands for the proposition "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[128] It leaves open the possibility that other factors might trigger the right to counsel under the Sixth Amendment. Justice Powell wrote a concurring opinion because he agreed that "[m]any petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel," but he found the "inflexible rule of the majority opinion" problematic.[129] He emphasized that "[s]erious consequences also may result from convictions not punishable by imprisonment" and found that the majority's reasoning "for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed."[130]

It is significant that the Court took the position that "[h]ow crimes should be classified is largely a state matter."[131] The Court never attempts to define what is or is not a "crime" when applying the Sixth Amendment right to counsel. Instead, the Court found that the sentence in a particular case is the proper indicator of what should be considered a "crime."[132] This reasoning would make sense if a conviction for any "crime" always involved a sentence of incarceration, but that was not the case at the time *Argersinger* was decided and it is even less so today because of the enmeshed penalties that come with conviction.

C. Actual Incarceration

Not long after the decision in *Argersinger*, the Court declined to extend the right to counsel to a defendant who was only facing a fine and reiterated that the right to counsel under the Sixth Amendment is tied to incarceration.[133] In *Scott v. Illinois*, the

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[128] *Id.*

[129] *Id.* at 47, 49 (Powell, J., concurring).

[130] *Id.* at 48, 52. Justice Powell favored a more flexible standard for the appointment of counsel which would take into consideration the complexity of the offense charged, the probable sentence, and individual factors peculiar to the cases. *Id.* at 64.

[131] *Id.* at 38 (footnote omitted); *see also* Hudson v. United States, 522 U.S. 93, 99 (1997) ("Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" (citation omitted) (quoting United States v. Ward, 448 U.S. 242, 248 (1990))).

[132] *Argersinger*, 407 U.S. at 40.

[133] Scott v. Illinois, 440 U.S. 367, 373–74 (1979); *see also* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 593 (2011) ("While some states have gone beyond *Scott* to provide counsel in all criminal cases, in cases involving substantial fines, or for all cases involving offenses punishable by imprisonment (regardless of whether a sentence of imprisonment is imposed), other states have hewn to *Scott*'s minimal requirement. Some states

defendant was convicted of theft and fined $50 although the maximum sentenced authorized was a $500 fine or one year in jail or both.[134] The various concurring opinions filed in *Argersinger* created some ambiguity as to the limitations imposed on the right to counsel in cases where incarceration was authorized but not actually imposed.[135] The Court's holding in *Scott* solidified the actual incarceration standard:

> Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.[136]

Argersinger and *Scott* ignore the emphasis in *Powell* and *Gideon* on the ability of a defendant to effectively represent himself and instead focus only on the penalty imposed. The Court's development of the right to counsel under the Sixth Amendment underwent a radical shift. While initially counsel was seen to be essential for due process of law and for fundamental fairness, those concerns about the legitimacy of the process were ultimately cast aside in favor of a "one day in jail rule."[137] While the right to counsel began as a procedural right, it has become tied to the outcome of a case. The

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allow trial courts to avoid appointing counsel simply by certifying that they will not impose incarceration regardless of the seriousness of the misdemeanor offense or the possibility that it will carry other consequences. (In Florida and Maine, courts can use this mechanism even for felony offenses.) The number of defendants convicted without counsel may well be increasing in the current depressed economy as states look to save money by cutting back on both incarceration and counsel." (footnotes omitted)).

[134] *Scott*, 440 U.S. at 368.

[135] *See* Steven Duke, *The Right to Appointed Counsel:* Argersinger *and Beyond*, 12 AM. CRIM. L. REV. 601, 604–05 (describing Justice Powell's concurrence and courts' various readings of *Argersinger*); *see also Scott*, 440 U.S. at 368–69 (discussing the "question left open" in *Argersinger* and petitioner's argument regarding authorized penalties).

[136] *Scott*, 440 U.S. at 373–74 (footnotes omitted).

[137] *Id.* at 374 (Powell, J., concurring).

formerly "obvious truth"[138] that a layperson is not capable of adequately defending himself was replaced by the dubious classification of an offense as criminal only if it results in incarceration.

Consequently, under the Sixth Amendment the right to counsel is not tied to the categorization of the offense, the complexity of the legal issues involved, or even the potential sentence. The defendant could be charged with drug possession, there could be Fourth Amendment issues regarding the search and seizure of the defendant, and the maximum penalty authorized for the offense could exceed a year in prison, but if the judge decides that a sentence of imprisonment will not follow a conviction, then the defendant does not have a Sixth Amendment right to counsel.

Scott limited the right to counsel to cases of actual imprisonment, with the Court reasoning "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."[139] But it is important to recognize that the Court contemplates only those penalties traditionally used in criminal cases: jail, fines, or probation. The Court does not acknowledge the wide range of penalties that result from a criminal conviction and which are now an integral part of our criminal justice system.[140]

In *Alabama v. Shelton*,[141] the Court was confronted with a novel approach to sentencing which reflects states' efforts to avoid providing counsel to indigent defendants who are facing misdemeanor charges. The defendant, without counsel, was tried and convicted of third-degree assault and sentenced to a jail term of thirty days, which the trial court immediately, suspended and then placed the defendant on probation for two years.[142] The Court found that the critical stage of the proceeding is the stage at which the defendant's "guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined."[143] Therefore the failure to provide the defendant with counsel at the time he was convicted violated the Sixth Amendment.[144]

Recently, in *Rothgery v. Gillespie County*,[145] the Court reaffirmed that the right to counsel begins at the time adversarial judicial criminal proceedings are initiated. The Court noted that once the right to counsel attaches, "the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings," and that "what makes a stage critical is what shows the need for counsel's presence."[146] In a somewhat puzzling footnote, the Court stated that it was not making any judgment regarding "the scope of an individual's postattachment right to the presence of counsel."[147] In other words, the right to counsel undoubtedly attaches at the

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[138] Gideon v. Wainwright, 372 U.S. 335, 344 (1962).
[139] *Scott*, 440 U.S. at 373.
[140] Duke, *supra* note 135, at 615–16.
[141] 535 U.S. 654 (2002).
[142] *Id.* at 658.
[143] *Id.* at 674.
[144] *Id.* at 667.
[145] 554 U.S. 191 (2008).
[146] *Id.* at 212 (footnote omitted).
[147] *Id.* at 212 n.15.

commencement of adversarial judicial proceedings, but the absence of counsel may not automatically result in prejudice to a defendant.[148]

D. Effective Assistance of Counsel

In *Strickland v. Washington*[149] and *United States v. Cronic*,[150] the Supreme Court ruled the right to counsel guaranteed under the Sixth Amendment includes the right to effective representation. In *Strickland*, the Court found that the question at issue when evaluating an ineffectiveness claim is "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."[151] To prevail on a claim of ineffective assistance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness."[152] That involves demonstrating that counsel's performance was deficient by showing "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "that the deficient performance prejudiced the defense."[153]

Strickland, like *Scott*, focuses on the outcome of the case. It is not enough to demonstrate that counsel's performance fell below an objective standard of reasonableness; a defendant who seeks to overturn a conviction must also demonstrate some form of prejudice. In *Cronic*, the Court acknowledged that prejudice need not be shown in cases where no actual assistance was provided because to hold otherwise would turn the appointment of counsel into a "mere" formality.[154] With that being said, the Court

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[148] This raises the question of whether the initial appearance where a defendant's liberty interest is at stake because bail may be set qualifies as a "critical stage" of the proceedings. The Supreme Court has never definitively stated that pretrial incarceration implicates the right to counsel, which is surprising considering the adoption of the "actual incarceration" standard. Two recent state court decisions suggest that a bail hearing is indeed a "critical stage" which requires the presence of counsel. DeWolfe v. Richmond, No. 34, 2012 WL 10863 (Md. Jan. 4, 2012); Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010). Nevertheless, an argument can be made that if none of the defendant's rights at trial are implicated at a bail hearing, then counsel need not be present.

[149] 466 U.S. 668 (1984).

[150] 466 U.S. 648 (1984).

[151] *Strickland*, 466 U.S. at 686.

[152] *Id.* at 688.

[153] *Id.* at 687.

[154] *Cronic*, 466 U.S. at 655 (quoting Avery v. Alabama, 308 U.S. 444, 446 (1940)) (internal quotation marks omitted). The Court went on to find that there may be some circumstances where, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659–60 (citing Powell v. Alabama, 287 U.S. 45 (1932)). These types of situations have begun to occur as public defender caseloads have become excessive and in instances where underfunding of indigent defense services has led to a complete breakdown in the adversarial system. David Carroll, *MO Supreme Court Rules that Public Defense Commission Can Decline Cases*,

also found that absent some effect "on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."[155] The Court dismissed external factors such as the attorney's level of experience or the amount of time he had to prepare a case for trial as determinative of an ineffectiveness claim and instead focused on "specific errors made by trial counsel."[156] The following year, the Court extended *Strickland*'s standard for ineffectiveness to claims arising out of the plea process.[157]

E. The Influence of Argersinger *and* Scott

The Supreme Court's decisions in *Argersinge*r and *Scott* made it possible for states to avoid having to appoint counsel for the indigent in criminal cases as long as a defendant was not sentenced to incarceration.[158] However, the "actual incarceration" standard for the appointment of counsel under the Sixth Amendment announced in *Argersinger* and validated in *Scott* has not been generally adopted by the states.[159] In California, defendants are entitled to representation in any felony or misdemeanor prosecution, whether or not it results in imprisonment.[160] The same is true in Indiana, where the state constitution guarantees the right to counsel for misdemeanors and felonies alike, regardless of whether actual imprisonment is imposed.[161] New York requires counsel in any "criminal proceeding[ ],"[162] and Washington requires counsel when a defendant is charged with an offense punishable by imprisonment.[163] Maryland requires the Office of the Public Defender to represent anyone charged with a "serious offense," which includes a felony, a misdemeanor, or an "offense punishable by confinement for more than [three] months or a fine of more than $500."[164] Alaska has gone so far

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SIXTH AMENDMENT CTR. (Aug. 7, 2012), http://sixthamendment.org/mo-supreme-court-rules-that-public-defense-commission-can-decline-cases/ (discussing Missouri's overloaded public defender system); Adam Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 103 (2007).

[155] *Cronic*, 466 U.S. at 658.

[156] *Id.* at 666.

[157] *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985).

[158] Paul Marcus, *Why the United States Supreme Court Got Some (but not a lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 146–47 (2009).

[159] *See id.* at 149–50 ("While the United States Supreme Court has not been overly generous in granting counsel in cases in which imprisonment is not ultimately ordered, many states go beyond the federal constitutional requirement. Instead of looking to actual imprisonment [or suspended sentences], they either provide counsel to poor people in all criminal cases, or in all cases other than the most minor infractions." (footnotes omitted)).

[160] *See* CAL. CONST. art. I, § 15. *See generally In re* Lopez, 465 P.2d 257 (Cal. 1970); *In re* Smiley, 427 P.2d 179 (Cal. 1967); *In re* Johnson, 398 P.2d 420 (Cal. 1965).

[161] *See* Brunson v. State, 394 N.E.2d 229 (Ind. Ct. App. 1979) (interpreting Article 1, Section 13 of the Indiana Constitution).

[162] N.Y. CRIM. PROC. LAW § 170.10 (McKinney 2010).

[163] *See* State v. Osborne, 855 P.2d 302, 305 (Wash. 1993).

[164] MD. CODE ANN., CRIM. PROC. § 16-204(b)(1)(i) (West 2012); MD. CODE ANN., CRIM. PROC. § 16-101(h)(1)(2) (West 2008).

as to recognize a state constitutional right to counsel when a conviction may result in the loss of a valuable license,[165] and New Jersey has found there to be a statutory right to counsel whenever a defendant faces a "consequence of magnitude," which includes the revocation of a driver's license.[166]

Other states have tried to deal with the inherent unpredictability of a standard that requires a trial judge to make a determination at the start of a case whether he will impose a sentence of incarceration if the defendant is convicted by establishing a right to counsel in any case which may result in incarceration.[167] Some states require that a judge explicitly state that imprisonment will not be imposed before proceeding without counsel.[168] Some states even allow the prosecutor to certify that he or she will not request a sentence of incarceration, thus divesting the trial court of the discretion envisioned by the Supreme Court in *Argersinger*.[169]

F. The Intersection of Critical Stages and Actual Incarceration

Despite the Sixth Amendment's guarantee of the right to counsel in all criminal prosecutions, an indigent defendant can be tried and convicted of a crime without counsel as long as he is not sentenced to incarceration.[170] However, in *Padilla*, the Court acknowledged that there are some consequences, such as the possibility of deportation,

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[165] *See* Alexander v. City of Anchorage, 490 P.2d 910, 913 (Alaska 1971) (construing Article I, Section 11 of the Alaska Constitution).

[166] Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (N.J. 1971).

[167] Arizona requires counsel when imprisonment is a possibility. *See* Campa v. Fleming, 656 P.2d 619 (Ariz. 1982) (interpreting Rule 6.1 of the Arizona Rules of Criminal Procedure). Iowa has a statute which establishes a right to counsel when the defendant faces the possibility of incarceration. *See* IOWA CODE ANN. § 2.61 (West 2013). Missouri has a statute which authorizes counsel when a defendant probably will be imprisoned. *See* MO. CODE REGS. ANN. tit. 18, § 10-2.010 (2013). Wyoming grants the right to counsel when a defendant is charged with a crime and imprisonment is a practical possibility. *See* Brisson v. State, 955 P.2d 888 (Wyo. 1998).

[168] Arkansas follows the actual incarceration standard but requires that a judge decide beforehand that imprisonment will not be part of the sentence if a defendant is convicted. *See* Calloway v. State, No. CACR00-1317, 2001 WL 651359, at *2 (Ark. Ct. App. June 13, 2001). Florida also follows the actual incarceration standard but requires the trial judge to affirmatively state, in writing and before trial, that a defendant will not be incarcerated if convicted. *See* FLA. STAT. ANN. § 3.111(b)(1) (West 2013).

[169] In Minnesota, "the prosecutor may certify . . . the offense as a petty misdemeanor if the prosecutor does not seek incarceration and seeks a fine at or below the statutory maximum for a petty misdemeanor." MINN. STAT. ANN. § 23.04 (West 2012). In Colorado

> the prosecuting attorney may, at any time during the prosecution, state in writing whether or not he or she will seek incarceration as part of the penalty upon conviction of an offense for which the defendant has been charged. If the prosecuting attorney does not seek incarceration as part of such penalty, legal representation and supporting services need not thereafter be provided for the defendant at state expense.

COLO. REV. STAT. § 16-5-501 (2012).

[170] *See* Scott v. Illinois, 440 U.S. 367 (1979).

that outweigh the threat of actual incarceration.[171] The Court also recognizes that the right to the effective assistance of counsel can be triggered by something other than the threat of incarceration. It is this untethering of the right to counsel to actual incarceration that undercuts the Court's precedent requiring the appointment of counsel under the Sixth Amendment only when a defendant is actually incarcerated.

The connection between the right to counsel and actual incarceration is eroded even further by the Court's decisions in *Frye* and *Lafler*.[172] It is difficult to reconcile the Court's acknowledgement of the importance of representation during the plea-bargaining stage with the limitations on the right to counsel imposed by the actual incarceration standard. What makes these two competing standards problematic is that one focuses on the significance of a particular event during the criminal prosecution while the other focuses on the end result. The Court's recognition that criminal convictions have enmeshed penalties that a defendant may be more concerned about than incarceration, and that defendants are entitled to be advised by counsel of those enmeshed penalties, clearly undercuts the idea that counsel needs to be appointed only in cases where actual incarceration will result.

While the Court recognized in *Argersinger* "that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure . . . a fair trial,"[173] it simultaneously limited the right to have the assistance of counsel to cope with those "problems" to cases that result in actual incarceration.[174] It makes no sense to say that counsel is necessary to ensure a fair trial, but only in cases where the defendant is actually incarcerated. The absence of incarceration as a sentence does not render the trial process any more or less fair. The actual incarceration requirement attaches the right to counsel to a particular event, one which follows the trial, rather than to a particular point in the criminal prosecution; thus it is result-oriented and not process-oriented. This brings it into conflict with the Court's decision to view effective counsel as a requirement during "critical stages" of the prosecution, a standard which focuses on the specific stage of the proceeding and not the ultimate result.[175]

Thought of another way, there are two prerequisites to the application of the Sixth Amendment right to counsel: the particular stage of the proceeding must be a "critical stage," and, in the event the defendant is convicted, the sentence must be to some period of incarceration. These two requirements are not completely incompatible, but their combined application leads to some questionable results, as the following examples illustrate:

- If counsel is assigned to a misdemeanor case for an indigent defendant and during plea negotiations is able to convince the judge not impose

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[171] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

[172] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

[173] Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (footnote omitted).

[174] *Id.* at 37.

[175] *See* United States v. Wade, 388 U.S. 218, 224–25 (1967).

a sentence of incarceration should the defendant be convicted, then the judge can proceed from that point without counsel.

- If a prosecutor realizes that a defendant would be subject to deportation if convicted, then he or she could ask the presiding judge to not impose a sentence of incarceration and require an indigent defendant to proceed to trial without counsel.[176]
- If a defendant's conviction will result in loss of employment and loss of housing, but no sentence of incarceration will be imposed, then he or she has no right to counsel.
- If a defendant is charged with a possessory offense, such as the possession of drugs or a firearm, but no sentence of incarceration will be imposed, then the defendant has no right to the assistance of counsel when litigating the reasonableness of the search and seizure under the Fourth Amendment.
- If a defendant is charged with a petty offense, such as disorderly conduct, and the trial judge intends to sentence the defendant to a single day in jail if convicted, then he or she does have a right to counsel.

Under the Court's current interpretation of the Sixth Amendment right to counsel, these are legally permissible results which call into question the wisdom of limiting the Sixth Amendment right to counsel to criminal cases where actual incarceration results.

III. CHANGES IN OUR CRIMINAL SYSTEM

Whatever validity the Court's decisions in *Argersinger* and *Scott* may have had at the time, changes to our criminal justice system over the past forty years call into serious doubt the continued practice of limiting the right to counsel to cases that result in actual incarceration.

A. Plea Bargaining

While the actual incarceration standard for the assignment of counsel adopted by the Court in *Argersinger* and *Scott* is problematic, it becomes more so when we consider that the rule presumes that most cases will be resolved by a trial. Following a trial in which a defendant is convicted, it is the judge who has discretion in sentencing.[177] The Court's intention in *Argersinger* is clear: "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."[178]

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[176] A similar situation is already taking place in many counties in Virginia. *See* Jeremy Borden, *Immigrants Take Guilty Pleas Without Lawyers and Can Later Be Deported*, WASH. POST (Jan. 27, 2013), http://articles.washingtonpost.com/2013-01-27/local/36583601_1_illegal-immigrants-guilty-plea-jail-time.

[177] *See, e.g.*, Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 624 n.1 (2006).

[178] *Argersinger*, 407 U.S. at 40.

While recognizing the problems inherent in the Court's limitation of the right to counsel in *Argersinger*, the decision reflects the Court's perception of our criminal justice system as one where the primary method for resolving criminal cases is through the trial process.[179] The Court makes it clear "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[180] If the majority of cases are in fact being resolved through the trial process, then framing the Sixth Amendment right to counsel as a trial right makes sense from a policy perspective. But even if that were true at the time, trials are now the exception and not the rule in our criminal justice system.[181]

The fact that our criminal justice system is dominated by plea bargaining has been the reality for quite some time, but the Court's recent recognition of this fact is significant when we consider how that recognition impacts the right to counsel during every critical stage of the proceedings. Though plea bargaining had been acknowledged by the Court as a "critical stage" of the proceedings well before *Padilla*, *Frye*, and *Lafler* were decided,[182] the Court's recognition of the dominance of plea bargaining means that plea bargaining is not simply one of many critical stages; it is the *only* critical stage.[183]

Because the assistance of counsel is necessary to navigate the increasingly complex plea-bargaining process, it makes no sense to tie the right to counsel to a specific result that is contingent upon the plea-bargaining process itself. Whether the defendant will actually be incarcerated is often entirely dependent upon the effectiveness of counsel's representation during the plea-bargaining process. The continued use of a posttrial incarceration standard for the assignment of counsel in a pretrial determinative criminal justice system makes little sense.

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[179] *See* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, CRIM. JUST., Fall 2010 at 21, 25 ("*Gideon* was . . . decided at a time when criminal jury trials were regarded as the norm in the American justice system . . ."); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

[180] *Argersinger*, 407 U.S. at 37.

[181] In *Argersinger*, the Court noted the problems associated with "assembly-line justice," and those problems have persisted. 407 U.S. at 34–37; *see* ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. ATTORNEYS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS (2011) [hereinafter THREE MINUTE JUSTICE]; *see also* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 307 (2011).

[182] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (citing Hill v. Lockhart, 474 U.S. 52 (1985), and McMann v. Richardson, 397 U.S. 759 (1970), as examples of how the Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel").

[183] *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002) ("The most important service that criminal defense lawyers perform for their clients is not dramatic cross-examination of prosecution witnesses or persuasive closing arguments to the jury; it is advising clients whether to plead guilty and on what terms.").

B. The Rise of Enmeshed Penalties

The Court's reasoning in *Argersinger* and *Scott* needs to be viewed against the backdrop of a criminal justice system which, at the time, imposed three distinct penalties: incarceration, fines, or probation. The Court in *Scott* concluded that the "central premise of *Argersinger*" was that imprisonment is different than fines or the threat of imprisonment, thus revealing that the Court was only considering those specific three punishments.[184] Our modern criminal justice system has a wide range of enmeshed penalties that result from a criminal conviction.[185]

The Court's decisions in *Argersinger* and *Scott* offer little justification for singling out incarceration as the only penalty which triggers the right to counsel under the Sixth Amendment except to note that it "is a penalty different in kind from fines or the mere threat of imprisonment."[186] As Justice Powell noted in his concurrence, the majority's reason "for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed."[187]

Making incarceration the touchstone for the appointment of counsel would make sense if a criminal conviction were typically followed by a sentence of incarceration. If a minor or petty offense were only punished with a fine, and more serious "criminal" conduct were punished by incarceration, then equating the right to counsel in all "criminal" prosecutions with the right to counsel in all cases where a defendant is incarcerated is reasonable. But forty years after *Argersinger*, we now have a criminal-justice system in which most people convicted of "crimes" are not sentenced to periods of incarceration.[188] The range of punishments has expanded dramatically.

The rise of "collateral consequences" has been well documented over the past several decades.[189] States have increasingly turned to nominally civil sanctions to punish people convicted of crimes.[190] The Supreme Court's decision in *Padilla* establishes that the Sixth Amendment right to the effective assistance of counsel applies to penalties which are severe, intimately related to a criminal conviction, and which occur automatically as a result of that conviction.[191] The question still remains as to what other

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[184] *See* Scott v. Illinois, 440 U.S. 367, 373 (1979).

[185] *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012).

[186] *Scott*, 440 U.S. at 373.

[187] Argersinger v. Hamlin, 407 U.S. 25, 52 (1972).

[188] *See* Chin, *supra* note 185, at 1804 (pointing out that "focusing . . . on 'mass incarceration' obscures the reality that most convicted persons are not sentenced to prison").

[189] *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003); *see also* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999).

[190] *See* Demleitner, *supra* note 189, at 153–54.

[191] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481–82 (2010).

types of penalties can be viewed as serious enough to warrant extending the Court's rationale in *Padilla*.

At first glance, it would seem difficult to equate another type of penalty with deportation, something which the Court describes as "exile."[192] The difficulty is that any one isolated consequence of conviction, such as the loss of voting rights[193] or access to public housing, may not be "severe" enough to warrant the extension of the right to counsel. But these types of enmeshed penalties cannot be viewed in isolation. On the contrary, they must be viewed in their entirety when assessing their severity for purposes of the right to counsel under the Sixth Amendment. A specific denial of a benefit or a curtailment of a right may not rise to the level of punishment, but a system of disabilities would constitute a type of severe punishment analogous to deportation.[194] It would be a mistake to look at a specific consequence of a conviction; instead, we must view all of the potential consequences of a conviction as a web of enmeshed penalties.[195]

The penalty at issue in *Padilla*, deportation, was of sufficient magnitude in and of itself to trigger the right to counsel under the Sixth Amendment.[196] But there are many lesser penalties which result from a criminal conviction which, taken together, constitute a system of punishment. These alternative systems of punishment, which are defined elsewhere than in a state's criminal code, cannot credibly be seen as anything other than intimately related to the state's system of punishment.[197]

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[192] *Id.* at 1486 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

[193] *See* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012), *available at* http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf (estimating that one in forty adults "is disenfranchised due to a current or previous felony conviction").

[194] *See* Chin, *supra* note 185, at 1790 ("[A] new 'civil death' is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences.").

[195] In evaluating whether the warrantless use of a GPS tracking device by law enforcement constitutes a search under the Fourth Amendment, courts have looked at the overall impact of GPS monitoring. What has been described as the "mosaic theory" takes into consideration that although an officer could have observed a portion of a defendant's movements over a period of time, he or she would have been unable, without the use of a GPS tracking device, to have knowledge of all of the defendant's movements. United States v. Maynard, 615 F.3d 544, 558, 566–67 (D.C. Cir. 2010). In requiring a warrant for the use of GPS tracking devices, courts have recognized that the "whole reveals more—sometimes a great deal more—than does the sum of its parts." *Id.* at 566–67; *see also* People v. Weaver, 909 N.E.2d 1195, 1199–1200, 1202 (N.Y. 2009).

[196] *See Padilla*, 130 S. Ct. at 1481–82.

[197] *See* Chin & Love, *supra* note 179, at 22 ("Modern criminal convictions do much more than send people to prison and impose fines pursuant to court order. Convictions are the basis for scores or hundreds of additional state and federal consequences, automatically imposed or potentially made available by statute or regulation.").

It is important to emphasize that what is at issue is not a societal reaction to a conviction, but rather state-imposed barriers to the exercise of certain rights or privileges as a result of a conviction. This is not a case of a business deciding not to hire someone who has previously been convicted of theft, but instead a legal impediment to employment created by the state. The same legislature that has written the minimum and maximum sentence for an offense in the criminal code has also written the various laws that bar a person convicted from employment, housing, and education.

Identifying the wide range of enmeshed penalties that result from a criminal conviction is a daunting task. Because these penalties are scattered throughout various statutes and administrative rules, and because they seem to grow more numerous by the day, identifying all of the penalties associated with a criminal conviction is a challenge. The ABA Standards for Criminal Justice, which address "Collateral Sanctions," recommend collecting all of a jurisdiction's collateral sanctions within the criminal code and note that one of the problems with including collateral sanctions in the sentencing process is that they are not easy to identify.[198] In conjunction with the National Institute of Justice, the ABA Criminal Justice Section is currently working on collecting and analyzing data regarding the collateral consequences of conviction in every jurisdiction in the United States.[199] The National Inventory of Collateral Consequences of Conviction now contains information on all the collateral consequences of a conviction in seventeen states.[200]

The systemic nature of these penalties becomes obvious once a list of them is compiled. To illustrate this point, *The Consequences of Criminal Proceedings in New York State*, produced by The Bronx Defenders, identifies the following areas in which there are enmeshed penalties: "immigration"; "employment"; "housing," including "public housing"; "public benefits"; "family law"; "drivers licenses"; "forfeitures"; "civic participation"; and additional consequences, including "liability in related civil cases."[201] There are over one hundred licenses for various occupations in New York that can be revoked as the result of a criminal conviction.[202] Even a conviction for a violation or an infraction, neither of which is considered a criminal offense in New

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[198] ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 21 (3d ed. 2004) ("Collateral sanctions have been promulgated with little coordination in disparate sections of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense.").

[199] ABA & NAT'L INST. OF JUSTICE, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION PROJECT DESCRIPTION, http://www.nij.gov/topics/courts/sentencing/aba/abacollateralconsequences-description.pdf.

[200] ABA & NAT'L INST. OF JUSTICE, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, *available at* http://www.abacollateralconsequences.org/CollateralConsequences/map.jsp (last visited Oct. 21, 2013).

[201] *See* THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2010), http://www.reentry.net/ny/search/item.76898.

[202] *Id.* at 6.

York, renders a person ineligible for public housing managed by the New York City Public Housing Authority for a period of two years.[203]

In Ohio, a felony conviction can lead to the denial of licenses or license revocations for the following professions:

> [A]ccountants, architects, athletic trainers, audiologists, barbers, motor vehicle dealers, chiropractors, counselors, credit service organizations, dentists and dental hygienists, dietitians, emergency medical service workers, engineers and surveyors, fireworks exhibitors, hearing aid dealers, horse race workers, insurance administrators, insurance agents, livestock brokers/dealers, liquor license, lottery sales agents, therapists, salvage dealers, nurses, occupational therapists, opticians, optometrists, pharmacists, physical therapists, physicians, physician assistants, precious metal dealers, private investigators, real estate appraisers, real estate brokers, respiratory care professionals, school employees, security guards, social workers, speech pathologists, telephone solicitors, and veterinarians.[204]

A survey of statutory "collateral consequences" in Kentucky identifies adverse consequences in the following areas: "civil rights"; "civil liberties"; "parental rights"; "public offices and officials"; "professional and occupational licenses"; "employment and employment benefits"; "applications and disclosures"; "licenses and permits"; "penalty enhancements"; "sex offender registration"; "contractual relations"; and, lastly, "disqualification as heir or beneficiary."[205]

In Minnesota, there has been a legislative effort to identify all of the state's "collateral sanctions."[206] Chapter 609B of Minnesota Statutes Annotated lists the following twenty-two categories of "collateral sanctions": employment and licensing; teaching; health care licenses; transportation; elections; carriers; miscellaneous licensing provisions; liquor; gambling; fiduciary service and public office vacancies; local government; metropolitan area officers and peace officers; driving and motor vehicles; prison program eligibility; offender registration; crimes against a person;

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[203] *Id.* This serves as a particularly powerful illustration of the difficulty in codifying the penalties that result from a conviction because the offense in this instance is not even classified as "criminal," and the penalty is authorized by a city agency.

[204] Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 536–37 (2005) (footnotes omitted).

[205] Troy B. Daniels et al., *Kentucky's Statutory Collateral Consequences Arising from Felony Convictions: A Practitioner's Guide*, 35 N. KY. L. REV. 413 (2008).

[206] A "collateral sanction" is defined as "a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically when that person is convicted of or found to have committed a crime, even if the sanction is not included in the sentence." MINN. STAT. ANN. § 609B.050 (West 2005).

crimes of violence; possession of firearms, explosives, and similar devices; services and benefits; property rights; civil rights and remedies; recreational activities; and game and fish laws.[207] It is difficult to see how a legal "penalty" that is "automatically" imposed as the result of a criminal conviction can credibly be defined as "collateral." Perhaps even more troubling is this caveat that follows the twenty-two categories of collateral sanctions: "[T]he list of collateral sanctions laws contained in this chapter is intended to be comprehensive but is not necessarily complete."[208] It appears that states like Minnesota are incapable of keeping track of all the supposedly "collateral consequences" that they impose on their citizens as a result of a criminal conviction.

In many ways, the nominally civil penalties that result from a criminal conviction are an even more integral part of the criminal-justice system than the penalty at issue in *Padilla*, deportation. Immigration law may at times be intimately connected to criminal law, but at least it exists independently of it. The other types of penalties associated with criminal convictions are often unique and have no corollary in any other body of law.

Three factors led the Court to conclude that deportation was an enmeshed penalty in *Padilla*: (1) the severity of the penalty; (2) that it was intimately related to the criminal process; and (3) that it was imposed automatically for certain convictions.[209] The second and third prongs of the enmeshed penalty test announced by the Court in *Padilla* are the easiest to satisfy. There is a wide range of penalties that are applied automatically and as a direct result of a criminal conviction. The more difficult argument is that those penalties are of the same severity as deportation. The mistake, however, would be to view these penalties in isolation. Admittedly, the denial of public benefits may not be equatable to "exile," but a single conviction triggers not one but potentially dozens of additional penalties. In a very real sense, states have established systems designed to make people who have been convicted of crimes second class citizens.[210]

C. The Availability and Dissemination of Criminal Records

The availability and dissemination of criminal records has grown exponentially since the Court's decision in *Argersinger*. In our digital age, where information is readily accessible, the use of criminal records to exclude people from employment, housing, and education has become commonplace.[211] Incarceration for a brief time,

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[207] *Id.*

[208] *Id.*

[209] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1480–87 (2010).

[210] *See generally* Chin, *supra* note 185, at 1790 ("[A] new 'civil death' is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences.").

[211] *See* Douglas Belkin, *More Job Seekers Scramble to Erase Their Criminal Past*, WALL ST. J. (Nov. 11, 2009), http://online.wsj.com/article/SB125789494126242343.html; CTR. FOR CMTY. ALTS., RECONSIDERED: THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS

while certainly unpleasant, pales in comparison to the life-altering consequences of a criminal conviction.

The Supreme Court was not oblivious to the far-reaching consequences of a criminal conviction when it decided *Argersinger*.[212] However, the Court assumed that those consequences were related to incarceration. The Court noted that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."[213] It was incarceration, and not necessarily conviction, that was considered problematic in the Court's opinion.[214] However, the potential for the conviction itself to be at least as damaging as incarceration, if not more so, was recognized by Judge Powell in his concurring opinion and is obvious today.[215]

Over the last forty years, technological advances have dramatically increased the availability of criminal records to both law enforcement and the general public. Criminal records have become, in the words of professor James Jacobs, "a negative curriculum vitae . . . used to determine eligibility for occupational licenses, social welfare benefits, employment, and housing."[216] The advent of digital record keeping, combined with computer technology, the internet, and now the smart phone literally puts criminal records in the palm of one's hand. A decade ago, background checks tended to be cursory or expensive, but now database providers can quickly access information from any of the country's 3,100 court jurisdictions and charge ten dollars or less for basic background checks.[217] When *Argersinger* was decided, if a person had been convicted of a crime and wanted to put the past behind him, all he had to do was move.[218]

(2010), *available at* http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf; HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING (2004), *available at* http://www.hrw.org/sites/default/files/reports/usa1104.pdf.

[212] *See* Argersinger v. Hamlin, 407 U.S. 25, 55 (1972) (Powell, J., concurring).

[213] *Id.* at 37 (citing Baldwin v. New York, 399 U.S. 66, 73 (1970)).

[214] *Id.* at 36–37.

[215] *Id.* at 47–48 (Powell, J., concurring) ("The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.' Serious consequences also may result from convictions not punishable by imprisonment . . . Losing one's driver's license is more serious for some individuals than a brief stay in jail." (footnote omitted)).

[216] James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177 (2008) (footnote omitted); *see also* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 420 (2006).

[217] Belkin, *supra* note 211, at 3.

[218] Jacobs & Crepet, *supra* note 216, at 211 ("Before the advent of these criminal records systems, individuals may have escaped their criminal past and begun new life in a different town, city, or state. In effect, the information technology revolution and the criminal records systems and databases that it has spawned return society to a kind of small town life where

Now, a criminal record follows a person for the rest of his life no matter where he goes. The Society for Human Resource Management conducted a survey of employers on the impact of criminal background checks.[219] The 2010 survey, *Background Checking: Conducting Criminal Background Checks*, revealed that seventy-three percent of employers conduct criminal background checks on all of their employees, with another nineteen percent conducting checks on selected employees.[220] When asked about the impact of a non-violent, misdemeanor conviction, defined as an offense punishable by a fine, a term of imprisonment of up to a year, or both, fifty-one percent of employers said that it would be "somewhat influential" on their decision not to hire the job applicant, with an additional twenty-two percent responding that it would be "very influential."[221] Criminal records have become a form of electronic branding.[222]

The Court's reasoning in *Argersinger* and *Scott* is that, by not imposing incarceration as a punishment, the offense is effectively decriminalized. At one time, this approach may have seemed like a reasonable exercise of judicial discretion in cases where the legislature had not mandated incarceration as a penalty upon conviction. In *Argersinger*, the Court quoted the ABA's *Project on Standards for Criminal Justice*, which endorsed disregarding the characterization of an offense as a felony, misdemeanor, or traffic infraction "[a]s a matter of sound judicial administration" and instead drawing "a categorical line at those *types* of offenses for which incarceration as a punishment is a practical possibility."[223] While certainly a practical recommendation at the time it was made, the decision to not impose a sentence of incarceration no longer "decriminalizes" an offense.[224] Incarceration, even for a brief period of time, undoubtedly has the potential to cause the temporary loss of employment and housing, but

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practically everyone knows or has access to everyone else's personal history, especially their contact with the criminal justice system.").

[219] SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (2010), *available at* http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx.

[220] *Id.* at 3.

[221] *Id.* at 5.

[222] There was a time when corporal punishments that sought to shame an offender were common, but as the nation grew, increased mobility limited the effectiveness of these forms of punishments. *See Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1870–73 (1998).

[223] Argersinger v. Hamlin, 407 U.S. 25, 39 (1972) (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 40 (app. draft 1968)).

[224] The National Legal Aid & Defender Association's *Guidelines for Legal Defense Systems in the United States* recommends making counsel available "[i]n any governmental fact-finding proceeding, the purpose of which is to establish the culpability or status of such persons, which might result in the loss of liberty or in a legal disability of a criminal or punitive nature." NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 1 (1976), *available at* http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems. Neither the categorization of the charges or the potential for incarceration is determinative of the right to counsel. *Id.*

a conviction, even without the penalty of incarceration, can result in the permanent loss of employment and housing.

IV. ADVOCATING FOR THE RIGHT TO COUNSEL BASED ON ENMESHED PENALTIES

The recognition in *Padilla* that certain types of enmeshed penalties implicate the right to counsel, coupled with the acknowledgment in *Lafler* and *Frye* that our criminal-justice system has made plea bargaining the most critical stage of the proceeding, undermines the holdings of *Argersinger* and *Scott*. The time has come to acknowledge another obvious truth: It is not always the sentence the court will impose that is to be feared, it is the conviction itself.

The Court's extension of procedural protections to criminal defendants over the last fifty years may have had the unintended consequence of encouraging overcriminalization and more severe sentencing schemes.[225] States have found another way to punish those convicted of crimes. It is no longer necessary to resort to jail, fines, or probation when the conviction itself will render a person unemployable or homeless. The Court's deference to legislative categorization of offenses has allowed states to create nominally civil proceedings that inflict punishment just as effectively, but far more efficiently, than criminal prosecutions.[226]

The web of enmeshed penalties that ensnare people who are convicted of crimes is further evidence of our criminal justice system's abandonment of the rehabilitative ideal.[227] The enmeshed penalties associated with conviction serve little, if any, rehabilitative purpose.[228] What we now have are systems designed solely to punish. In some ways, the enmeshed penalties of a criminal conviction are worse than a temporary loss of liberty through incarceration because many of them are permanent. It is important to note that the imposition of these types of enmeshed penalties is a policy decision made legislatively. If states wish to impose enmeshed penalties on people convicted

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[225] *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (discussing the unappreciated costs of constitutional criminal procedure).

[226] *See generally* Coffee, *supra* note 27 (arguing that the "blurring of the border" between civil and criminal law results in injustice); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can be Done About It*, 101 YALE L.J. 1875 (1992) (discussing the expansion of criminal law into the field of civil law); Markus D. Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509 (2004) (observing that our nation's criminal law has been transformed into a system of risk administration); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335 (2000) (noting that surprisingly little effort has been devoted to the question of what is a crime).

[227] *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 478 (2010).

[228] *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 792 (2011).

of crimes, then they are free to do so, but the Constitution requires that they pay a procedural price, a price they can avoid paying because the Sixth Amendment right to counsel is limited to cases of actual incarceration.

There is no question that our nation's indigent-defense systems are in crisis.[229] There are some who have advocated not for an expansion of the right to counsel, but rather for further limitations on that right.[230] The argument that counsel should be provided in any case where a conviction might subject someone to nominally civil penalties would only create more work for assigned counsel systems, which are incapable of meeting the current demand for legal services.[231]

While it is true that states have failed to adequately fund indigent-defense systems, there is every reason to believe that the additional pressure placed on those systems by expanding the right to counsel could lead to systemic reform. The actual incarceration standard allows states a Sixth Amendment loophole. The rule in *Argersinger* and *Scott* effectively rewrote the Sixth Amendment. Instead of a right to counsel in all criminal prosecutions, the Court declared that there is only a right to counsel in a prosecution that actually results in incarceration. The Court's designation of incarceration as the only punishment that implicates the Sixth Amendment right to counsel has allowed alternative systems of punishment to flourish.

CONCLUSION

The simplest way to illustrate that a criminal conviction is far more damaging than a day in jail is through the following hypothetical:

> You are charged with the misdemeanor of driving with a suspended license and are offered a plea bargain by the prosecutor: plea to a violation, what is considered a non-criminal offense, one that will not give you a criminal record, and spend a night in jail. The judge tells you that if you would prefer to simply plead

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[229] *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf; *see also* NAT'L ASS'N OF CRIMINAL DEF. ATTORNEYS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 7 (2009), *available at* http://www.nacdl.org/reports; THREE MINUTE JUSTICE, *supra* note 181, at 11.

[230] *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012) (arguing that the right to counsel should not be expanded to the civil context); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007) (arguing that empirical evidence suggests that counsel in misdemeanor cases do not typically provide significant benefits to their clients).

[231] This reality actually creates a perverse incentive for the attorneys who provide indigent defense services to not assert a defendant's right to counsel in cases other than those that result in actual incarceration. Hashimoto, *supra* note 230, at 478.

> guilty to the charge, the sentence imposed would be a fine of fifty dollars but reminds you that you would be pleading guilty to a misdemeanor, a crime. Assuming that you are in fact guilty of the charge and would be convicted at trial, would you accept the prosecutor's offer?

No reasonable person would choose to have a criminal record for the rest of his life when he could avoid it by spending a single night in jail. The Court has recognized that defendants need counsel to avoid the enmeshed penalties of conviction, and it has acknowledged the fact that our criminal-justice system is a system of plea bargaining. The time has come for the Court to accept the fact that convictions sometimes matter more than incarceration and to extend the Sixth Amendment right to counsel to criminal prosecutions where the conviction itself will subject a defendant to a web of enmeshed penalties.