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Gideon's Shadow

ABSTRACT. The right to counsel is regarded as a right without peer, even in a field of litigation saturated with constitutional protections. But from this elevated, elite-right status, the right to counsel casts a shadow over the other, less prominent criminal procedure rights. Elaborating on this paradoxical aspect of the *Gideon* right – that the very prominence of the right tends to dilute other rights, or at least justify limitations on non-*Gideon* rights – this Essay analyzes the judicial and scholarly practice of employing the counsel right as a cudgel to curb other rights.

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ESSAY CONTENTS

The right to counsel has been described as critical to our "universal sense of justice";[1] an "obvious truth";[2] the "foundation for our adversary system";[3] a weapon of antidiscrimination;[4] and the "gateway right" through which other rights are made real.[5] It is regarded as a right without peer, even in a field of litigation saturated with constitutional protections. But from this elevated, elite status, the right to counsel casts a shadow over the other, less prominent criminal procedural rights. Elaborating on this paradoxical aspect of the *Gideon* right—that the very prominence of the right tends to dilute other rights, or at least justify limitations on them—this Essay analyzes the judicial and scholarly practice of employing the right to counsel as a cudgel to curb other rights.

Whether it is viewed as causing limitations on other rights, or simply justifying and entrenching such limits, *Gideon*'s shadow takes two related but distinct forms. First, in some instances it functions in a comparative sense such that the right in question is deemed undeserving of vindication because, compared to *Gideon*, the other right is too *insubstantial* and *unrelated to innocence* to warrant constitutional remediation. It may well be that *Gideon* is a much more important right in many such cases, but the point here is to illustrate the role of *Gideon* as a lever for limiting other rights. Specifically, courts and scholars have identified *Gideon* as the paradigmatic protection of the innocent, the strongest conduit to justice, and the best insurance of procedural fairness, and they have defended and justified harsh limitations on non-*Gideon* rights that compare unfavorably to *Gideon* in one or all of these respects. Second, in other contexts, the right to counsel has a substitutive effect insofar as impediments to various non-*Gideon* rights are regarded as defensible precisely because the right to counsel adequately safeguards innocence, fundamental fairness, and the accuracy of the trial process. In either form, then, *Gideon* is distinguished from other rights because of its perceived relationship to innocence and fairness—that is, *Gideon* is used as a vehicle for

1. Betts v. Brady, 316 U.S. 455, 476 (1942) (Black, J., dissenting). It was Justice Black's dissent in *Betts* that laid the doctrinal groundwork for a unanimous decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. *Gideon*, 372 U.S. at 344.

3. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

4. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997).

5. Justin F. Marceau, *Embracing A New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1162 n.5 (2012) (citing James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 40 (1988)).

justifying limitations on non-*Gideon* rights by focusing our attention on certain normative values that are best protected by *Gideon* itself.

Notably, however, the limits flowing from *Gideon*'s shadow are justified by an idealized, abstract conception of *Gideon*, and thus stand in stark contrast to the recognition that *Gideon* has functioned as an important decision of principle, not practice. Specifically, the indigent defense system spurred by *Gideon* has itself been deemed "a national crisis" by commentators and judges.[6] The problem identified in this Essay, then, is twofold: the right to counsel's presumed prominence justifies imposing limitations on other rights, but the right to counsel's reality is itself an unfulfilled, illusory promise. Practically speaking, *Gideon* creates a small right, but casts a massive shadow.

To develop this claim and provide some optimism about where *Gideon* will take us next, the Essay proceeds in three parts. Part I provides a brief overview and tribute to the judicial and scholarly recognition that *Gideon* is the most prominent criminal procedure right. The focus here is on the rhetoric rather than the reality of *Gideon* because it is the idealized conception of *Gideon*, unencumbered by resource and other pragmatic constraints, that makes plausible the claim that the right to counsel is more important than all other criminal procedural rights. Part II identifies several concrete examples of *Gideon*'s shadow effect, whereby a variety of limitations on non-*Gideon* rights are defended or justified because of *Gideon*'s comparative or substitutive shadows. Finally, in Part III, I propose a reading of *Gideon* that facilitates rather than impedes the development of other rights, and I identify two recent cases that resonate with this approach. These two cases provide a modicum of optimism that *Gideon* is being disentangled from innocence and accuracy.

I. *GIDEON* AS THE GREATEST RIGHT

Although the full promise of *Gideon* has never come to bloom, at least as a rhetorical matter, the case instantly entered the pantheon of great cases and

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6. *See, e.g.*, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1054-57 (2006); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 598 (2011) ("No symposium designed to address crises in the legal profession would be complete without a discussion of our systematic failure to provide competent legal representation to criminal defendants.").

never receded.[7] In *Gideon*, a unanimous Supreme Court described the right to appointed counsel as necessary to the great and "noble ideal" of fair trials,[8] and almost overnight the right became a symbol of America's success as a nation. Attorney General Robert Kennedy remarked within months of the *Gideon* decision that it had fundamentally changed "the whole course of American legal history."[9] Similarly, in 1964, Abe Krash wrote that *Gideon* reflects our Cold War sense of competition insofar as "it stands as a notice that in the free world no man shall be condemned to penal servitude without a lawyer to defend him."[10]

The rhetoric surrounding the right has also enjoyed a unique ability to avoid vacillation and diminution over time. Whereas most Warren Court criminal procedure innovations, such as the exclusionary rule and *Miranda*, are under constant assault from the courts and the public, "no one seeks to overrule" *Gideon*; "the validity of *Gideon*—at least as an abstract matter—is universally accepted."[11]

There is good reason for the uniquely forceful and sustained celebration of the *Gideon* ideal. As the Court itself explained, "the Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done."[12] More generally, *Gideon* is conceived of as a right without rival because of its procedural trifecta: *Gideon* is regarded as the most fundamental check on unfairness at trial,[13] *Gideon* is the strongest protection for

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7. The rhetoric used to describe *Gideon*'s promise has previously been identified as an example of "absolutist rhetoric about rights," which necessarily fails to comport with practical realities of the criminal justice system. J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 278, 285-86 (2010) ("Rights lead dual lives, much like Dr. Jekyll and Mr. Hyde. Perhaps the Jekyll is the right's luminous place in our rhetoric and the Hyde is the right as it exists on the streets."); *id.* at 285-86 ("[T]he Supreme Court, in *Gideon v. Wainwright*, recognized the right to counsel as 'fundamental,' and since then, American rhetoric has hailed *Gideon*'s 'promise of equal justice' as one of the most important in the criminal justice system." (citations omitted)).

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

9. Eric H. Holder Jr., Gideon—*A Watershed Moment*, CHAMPION, June 2012, http://www.nacdl.org/Champion.aspx?id=24999 (quoting Robert Kennedy).

10. Abe Krash, *The Right to a Lawyer: The Implications of* Gideon v. Wainwright, 39 NOTRE DAME L. REV. 150, 154 (1964).

11. Lawrence C. Marshall, Gideon*'s Paradox*, 73 FORDHAM L. REV. 955, 960 (2004).

12. *Gideon*, 372 U.S. at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)) (internal quotation marks omitted).

13. The Court has explained that counsel is "necessary to insure [the] fundamental human rights of life and liberty." *Id.*

the innocent,[14] and *Gideon* is the primary point of entry for most other constitutional protections.[15] Speaking to this latter quality, Yale Kamisar has described *Gideon* as the "master key to all the rules and procedures" of the criminal trial.[16]

In short, although *Gideon*'s promise has been substantially unfulfilled,[17] the public acceptance and symbolic meaning of this canonical right cannot be gainsaid.[18] In the abstract, *Gideon* stands as the most important constitutional protection for criminal defendants. *Gideon* is uniquely capable of protecting the innocent and promoting accuracy of result.[19] The point of this essay, however, is not to reiterate or challenge *Gideon*'s primacy among rights, but rather to draw attention to its use as a justification for the curtailment of other rights.

II. *GIDEON* OVERSHADOWING OTHER RIGHTS

The mismatch between the ideal and the real in the *Gideon* context is itself cause for concern. The right to counsel as hailed by courts and commentators is significantly different than the reality of the right's application. The problem is amplified, however, when an abstract or symbolic conception of *Gideon* is used as the justification for limiting other rights—the ideal impacts the real. In this Section I will outline four examples where *Gideon* has emerged as a lever for

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14. Some might balk at the notion that *Gideon* is an innocence-serving right, but the Court is unequivocal on this point. *Id.* at 345 ("[W]ithout [counsel], though [the accused] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (quoting Powell v. Alabama, 287 U.S. 45 (1932))).

15. Benjamin H. Barton, *Against Civil* Gideon *(And For Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1232 (2010) ("*Gideon* is a little bit like *Brown v. Board of Education*. It may not have been consistent with the original understanding of the Constitution, but it is hard to argue in retrospect that it was not absolutely the right decision." (citations omitted)); Bennett L. Gershman, *Judicial Interference with Effective Assistance of Counsel*, 31 PACE L. REV. 560, 560 (2011) ("Of all the rights that an accused person possesses, the right to counsel is by far the most important because it affects the ability to assert all other rights.").

16. Panel Discussion, Gideon *at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 150–51 (2004).

17. Backus & Markus, *supra* note 6, at 1121–22.

18. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 49–50 (1991).

19. The emphasis on protecting the innocent is peculiar because Clarence Earl Gideon himself may not have had a compelling case of actual innocence. *See* Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 953 (2010) ("The defense case did not try to prove Gideon's innocence but rather invoked a defense based on reasonable doubt that centered upon the weakness of the state's proof.").

reducing the likelihood of vindicating other rights. In addition to the judicial doctrines, I will provide two illustrative examples of scholarly works that also invoke *Gideon* as a justification for limiting other rights.

A. Judicial Doctrines Developed in the Shadow of Gideon

1. Retroactivity

There are several judicial doctrines in the realm of postconviction litigation that explain or justify a limitation on the vindication of non-*Gideon* rights by reference to *Gideon* itself.[20] An illustrative example is the law of retroactivity, which applies *Gideon*'s comparative shadow. In this context, because other rights do not enjoy the same canonical status, they are deemed less deserving of retroactive application. In addition, the law of retroactivity provides an insight into why *Gideon* is generally deemed comparatively more important: *Gideon* is understood as protecting the innocent and improving the accuracy of trials.

The Court's current retroactivity doctrine was announced in *Teague v. Lane*, just after the twenty-fifth anniversary of the *Gideon* decision.[21] The rule is easily paraphrased: nothing is as important as *Gideon*, so nothing is retroactive. More precisely, under *Teague*, a new rule of procedure does not apply to a criminal conviction that is final unless it is a "watershed rule[] of criminal procedure."[22] Merely being fundamental "in some abstract sense is not enough," rather a rule is regarded as a watershed only if it implicates "the fundamental fairness and *accuracy* of the criminal proceeding."[23] A watershed rule of procedure, then, is a rule that protects the innocence-serving function of the trial and the basic fairness of the proceedings. *Gideon*, the Court has repeatedly told us, concerns the quintessential example of a right that safeguards the accuracy and innocence-protecting function of the trial.[24] Indeed, although *Gideon* was decided long before the current retroactivity doctrine was announced, the Court has described *Gideon* as "the only case that th[e] Court has identified as qualifying under this exception."[25]

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20. This is paradoxical because *Gideon* itself was decided on certiorari review from a denial of postconviction relief; it was a postconviction, or habeas, case.

21. 489 U.S. 288 (1989) (plurality opinion).

22. *Id.* at 311.

23. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (emphasis added) (citing *Teague*, 489 U.S. at 313).

24. *See, e.g.*, Gray v. Netherland, 518 U.S. 152, 170 (1996) (referring to the *Gideon* rule as a "paradigmatic example" of the second *Teague* exception).

25. Whorton v. Bockting, 549 U.S. 406, 419 (2007).

Thus, by relying on *Gideon* in the *abstract*—that is, the rhetoric of *Gideon* as a pillar of accuracy and fairness—the Court has curtailed the content of other rights in *reality*. Stated more directly, it is as though *Gideon*'s "noble ideal," divorced from the reality of underfunding, is the measuring stick by which other procedural rights are evaluated. Not surprisingly, with *Gideon* in the abstract as the comparative standard, the Court has confidently posited that "it is unlikely that any . . . watershed rule[] ha[s] yet to emerge."[26]

To date, the Court's retroactivity cases confirm the self-fulfilling conclusion that other rights, because they are not sufficiently linked to the accuracy of the trial and the protection of the innocent, do not warrant retroactivity under *Teague*.[27] For example, in refusing to extend watershed status to one of the hallmarks of the modern criminal trial, the Court explained that "[t]he *Crawford* rule is in no way comparable to the *Gideon* rule."[28] The confrontation right announced in *Crawford*, the Court observed, "is much more limited in scope [than *Gideon*], and the *relationship of that rule to the accuracy* of the factfinding process is far less direct and profound."[29] Likewise, in *Schriro v. Summerlin*, the Court held that the *Teague* exception is "extremely narrow" and explained that non-*Gideon* rights simply do not have a sufficient relationship to accuracy and innocence.[30] Only *Gideon* violations, the Court reasoned, seriously diminish the "likelihood of an accurate conviction."[31] A range of other rights have come before the Supreme Court after *Teague*, and in every single case the Court deemed the right nonretroactive because it was less important than the

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26. Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001) (internal quotation marks omitted) (citing Sawyer v. Smith, 497 U.S. 227, 243 (1990)).

27. Lower courts and scholars, of course, have followed suit and embraced the primacy of *Gideon* as a product of the right's perceived relationship to protecting the innocent. *See, e.g.*, Barry C. Scheck & Sarah L. Tofte, Gideon's *Promise and the Innocent Defendant*, CHAMPION, Feb. 2003, at 38, 40 (recognizing *Gideon*'s enormous potential "to protect [the] innocent").

28. *Whorton*, 549 U.S. at 419 (noting that a watershed rule is one that "implicates the fundamental fairness and accuracy of the criminal proceeding" because it is necessary to prevent an unacceptably large risk of an inaccurate conviction).

29. *Id.* (emphasis added).

30. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (explaining that most rights have a "more speculative connection to innocence" and that it is unlikely that any more procedural rights will, like *Gideon*, be deemed to be retroactive).

31. *Id.* In addition, commentators who have rejected the retroactive application of the modern sentencing revolution, initiated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), have said that *Apprendi* lacks the "primacy" of *Gideon*, in part because it does not have any role in protecting the "blameless from punishment." *See, e.g.*, Nancy J. King & Susan R. Klein, *Après* Apprendi, 12 FED. SENT'G REP. 331, 333 (2000).

accuracy- and innocence-protecting values served by *Gideon*.[32] Notably, the Court has even developed a familiar, explicitly *Gideon*-centered formula for the *Teague* analysis: "[w]hatever one may think of the importance of [the right in question], it has none of the primacy and centrality of the rule adopted in *Gideon*."[33] Moreover, lower courts have described *Gideon* as the *Teague* "exception that proves the exception," noting that when it comes to watershed rules "there are new rules [that will not be retroactive], and then there are new *Gideon*-extension rules [that are retroactive]."[34]

In short, retroactivity doctrine has been shaped by the caricature of *Gideon*. It is the abstract or idealized conception of *Gideon*—its primacy, scope, and innocence-serving function—that justifies limiting the vindication of other rights.[35] In a sense, the celebrated rhetoric of *Gideon* has been co-opted in the service of justifying doctrines like *Teague*. This is not to say that *Gideon*'s promise is not more important and more central to the role of protecting accuracy and innocence than other rights. Nor do I suggest that overruling *Gideon* is a plausible cure for the narrow scope of the *Teague* doctrine—

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32. *See, e.g.*, Beard v. Banks, 542 U.S. 406, 417 (2004) (declining to retroactively apply a new rule of constitutional criminal procedure regulating jury instructions in capital murder cases); Lambrix v. Singletary, 520 U.S. 518, 539 (1997) (denying retroactive application of a prohibition on weighing invalid aggravating factors in capital sentencing); Sawyer v. Smith, 497 U.S. 227, 241 (1990) (refusing to retroactively apply a due process rule barring prosecutors from misleading juries about their power to determine the appropriateness of a death sentence); Saffle v. Parks, 494 U.S. 484, 495 (1990) (holding that a prior decision requiring that the jury be allowed to base its sentencing decision in a capital case upon sympathy it feels for the defendant was not a watershed rule).

33. *Saffle*, 494 U.S. at 495; *see also Beard*, 542 U.S. at 407 (noting that two recent decisions intended to avoid "potentially arbitrary impositions of the death sentence" nevertheless had "none of the primacy and centrality of the rule adopted in *Gideon*" (quoting *Saffle*, 494 U.S. at 495)).

34. Howard v. United States, 374 F.3d 1068, 1080 (11th Cir. 2004) (cataloguing a long list of *Gideon*-based rules that were held retroactive—the right to counsel at plea hearings, at probation revocation hearings, and for misdemeanors resulting in imprisonment—and holding that the extension of *Gideon* to suspended sentences in *Alabama v. Shelton*, 535 U.S. 654 (2002), was also retroactive); *id* at 1076 ("Every extension of the right to counsel from *Gideon* through *Argersinger* has been applied retroactively to collateral proceedings by the Supreme Court.").

35. Circuit courts routinely justify denying relief to federal habeas applicants by citing to *Gideon* and invoking the watershed rule of procedure exception. *See, e.g.*, United States v. Powell, 691 F.3d 554, 558 (4th Cir. 2012) (recognizing as well entrenched the notion that the "only procedural rules deserving of retroactive application are those that are comparable in importance to *Gideon v. Wainwright*"); Reinhold v. Rozum, 604 F.3d 149, 156 (3d Cir. 2010) (refusing retroactivity because the right in question "has none of the primacy and centrality of the rule adopted in *Gideon*"); Meeks v. McKune, 354 F. App'x. 348, 352 n.4 (10th Cir. 2009).

overruling *Gideon* does not make *Crawford* retroactive. The point is a more modest, descriptive one: *Gideon*'s legacy is that of justifying onerous limitations on constitutional remediation. *Gideon* justifies the retroactivity doctrine by defining the doctrine in a manner that appears less harsh, less extreme, and less absolute.

2. General Habeas Limits

A second prominent example of *Gideon*'s shadow relates to some of the general limits on federal habeas review. In this context, *Gideon* plays a substitutive role: because of the right to counsel at trial, other downstream procedural protections are deemed unnecessary.

The most litigated limits on federal habeas review, the statutory provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), would likely be regarded as effecting an unconstitutional suspension of the writ, but for the existence of the *Gideon* right. While the Supreme Court has not directly ruled on the constitutionality of many of AEDPA's central provisions, dicta in many decisions suggests that the robustness of criminal trial procedures, particularly the right to counsel and the right to jury trial, makes it less constitutionally dubious to substantially curtail federal postconviction oversight. In one of the Guantanamo cases, *Boumediene v. Bush*,[36] for example, the Court takes care to emphasize that although radically curtailed collateral review procedures in the military detainee context might amount to a Suspension Clause violation, "similar limitations on the scope of habeas review may be appropriate" where the prisoner has enjoyed the benefit of appointed counsel and a full trial.[37] Under this view, but for the existence of *Gideon*, the centerpiece of AEDPA and the primary barrier to relief for most state prisoners, 28 U.S.C. § 2254(d), would not be constitutionally conscionable.[38]

Similarly, the procedural default doctrine in federal habeas tends to prioritize the right to counsel at the expense of nearly all other constitutional claims. Procedural default is the doctrine by which the State can bar a federal court from passing constitutional judgment on a claim if, most notably, trial counsel fails to properly and timely raise the question in state court. The purpose for this rigid rule that deprives federal courts of reviewing power over unconstitutional convictions is the notion that trial-level representation must

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36. 553 U.S. 723 (2008).

37. *Id.* at 790-91.

38. John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 260 (2006) (describing 28 U.S.C. § 2254(d) as a centerpiece of the modern habeas limits).

be the "main event."[39] Notably, the primary check on the harshness of the procedural default rule is that trial counsel's failure to raise the defaulted claim may itself be grounds for an ineffective assistance of counsel claim that is cognizable in federal court. That is to say, the right to counsel enjoys a prominence that justifies substituting the possibility of vindicating other claims for an opportunity to vindicate only a right-to-counsel claim.[40]

The problem with such an approach is twofold. First, it requires the prisoner to satisfy a fact-specific showing of deficient performance and prejudice that is much more difficult to prove than a freestanding constitutional error.[41] Proving deficient performance and prejudice requires the prisoner, most likely litigating pro se, to overcome the rationalizations and post hoc strategic justifications of his former defense lawyer who is now working with the state prosecutors so as to thwart this claim and avoid an ethical rebuke by the state bar. Second, where the trial attorney's error was a so-called structural error, such as a failure to object to a patent *Batson* violation, it remains an open question whether the errors of counsel require automatic reversal, or whether a showing of prejudice as is typical of right-to-counsel claims is necessary.[42] To be sure, demonstrating prejudice from a structural error, like a *Batson* violation, or the deprivation of a public trial, or the right to a speedy trial, is nothing short of impossible.[43]

In short, the procedural default doctrine ensures that a substantial number of postconviction claims can only be litigated through the lens of the right to counsel; vindicating the counsel right substitutes for procedures to vindicate other rights. The same can be said for doctrines that, like *Stone v. Powell*,[44] preclude the litigation of Fourth Amendment claims on federal habeas while allowing the same Fourth Amendment violation to serve as the predicate for a right-to-counsel claim.[45] Again, statutory reforms like AEDPA and judicial

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39. Wainwright v. Sykes, 433 U.S. 72 (1977).

40. Of course, procedural defaults can also be overcome if the prisoner establishes cause and prejudice for the default, either through ineffective assistance of counsel or otherwise.

41. Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (describing habeas review of right-to-counsel claims as "doubly" deferential (quoting Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009))).

42. BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 9B:75 (2012) (elaborating on the circuit split surrounding this issue).

43. It is impossible to show prejudice because a defining feature of structural error is that the prejudice is "necessarily unquantifiable and indeterminate." Sullivan v. Louisiana, 508 U.S. 275, 282 (1993). As the Court has explained, "any inquiry into its effect on the outcome of the case would be purely speculative." Satterwhite v. Texas, 486 U.S. 249, 256 (1988).

44. 428 U.S. 465 (1976).

45. Kimmelman v. Morrison, 477 U.S. 365 (1986).

doctrines like procedural default and *Stone* do not compel the conclusion that *Gideon* was wrongly decided and should be abandoned, nor do they require resolving the question of whether *Gideon* is the most important right. And as a normative matter, reasonable people can disagree about whether more federal habeas review is always better. The point, then, is more general and descriptive. Many of the most severe statutory and judicial limits on federal habeas review are rendered tenable because of *Gideon*. Because a defendant has a right to counsel, he can both be substantially deprived of federal habeas review outright, per AEDPA,[46] and many of the claims he can raise are filtered into the black hole of ineffective assistance of counsel via procedural default. Such counsel-centered litigation is less hospitable to relief and doctrinal development than straight merits litigation of the underlying claim.[47]

3. Challenging a Prior Conviction

A third illustration of *Gideon*'s shadow arises in the Supreme Court's jurisprudence regarding the use of an unconstitutional prior conviction to enhance one's sentence for a subsequent crime.[48] The case law in this area is indicative of the comparative use of *Gideon*. In the leading case, *Custis v. United*

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46. AEDPA contains a wide range of limitations on relief, including substantive limits such as 28 U.S.C. § 2254(d) and procedural limits such as the limit on successive petitions, *id.* § 2244(b), or the statute of limitations, *id.* § 2244(d). There is good reason to believe that due process and the Suspension Clause would be implicated by many of these limits if there was not a full and fair opportunity for litigation at trial and on appeal. *See* Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 64-65 (2010) (arguing that the constitutionality of many aspects of AEDPA may be contingent upon the existence of full and fair state procedures, including appointed trial counsel).

47. In addition, litigation filtered through the right to counsel threatens to create a shadow land of constitutional litigation. That is to say, litigating a right through the lens of ineffective assistance of counsel claims can distort the content of the predicate right because of the deferential review permitted under *Strickland*. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 410 (1996) (describing how the content of rights can be distorted when they are litigated in frameworks that require deference to state courts or otherwise prevent the federal court from directly addressing the actual content of the right).

48. One reading of the Court's constitutional sentencing phase cases is that they reflect, generally, the prioritization of *Gideon*. *Cf.* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1968 (2005) (explaining that although the right to confrontation and the right to a jury do not apply to sentencing, the right to counsel is fully applicable).

States,[49] the Court held that a defendant need not be afforded the opportunity to collaterally challenge his or her prior convictions at the time they are being used to enhance a sentence.[50] An unconstitutional prior conviction, in other words, can be used to enhance the sentence for a subsequent conviction. The sole exception to this rule is *Gideon,* which the Court recognized as the one "unique" right because it facilitates the essential "right to be heard."[51] According to the Court, when a prior conviction was obtained in violation of *Gideon*, the conviction was "pronounced by a court without jurisdiction."[52] Of course, ordinarily the term "jurisdiction" in a criminal case does not encompass anything other than the question of whether the court has formal adjudicative authority over a case (for example, whether the crime was committed within the jurisdiction). In this sense, a violation of *Gideon* is no more related to jurisdiction than a violation of countless other rights such as the right to a public trial, an indictment, or the right to a speedy trial.[53] But the Court's use of "jurisdiction" in *Custis* has a very different meaning, used to connote the unique stature of Gideon. The right to counsel is jurisdictional only in the sense that the Court regards it as fundamental to the protection of the innocent and accuracy of the trial.[54] All other rights, as a comparative matter, do not rise "to the level of a jurisdictional defect" and cannot be challenged at sentencing.[55] *Gideon* may be a uniquely important right, but there is no widely accepted theory for regarding *Gideon* alone as a jurisdictional defect.

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49. 511 U.S. 485 (1994).

50. *Id.* at 487.

51. *Id.*

52. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

53. The Court's analogy between a *Gideon* violation and the lack of jurisdiction has its origins in the debate about the proper scope of federal habeas jurisdiction. *See, e.g.*, Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915); *see also* Johnson, 304 U.S. at 465-68 (citing *Frank*, 237 U.S. at 309) (noting that habeas review is limited to correcting errors of jurisdiction, but adopting a broad enough conception of jurisdiction to allow the reviewing court to look into the underlying substance of a right-to-counsel claim).

54. Leading habeas scholars, looking to define habeas review of jurisdictional defects as broadly as possible, have argued that a claim is jurisdictional in the habeas sense of the term if it raises a fundamental constitutional right, as opposed to a legal claim that fails to implicate the accuracy or fairness of the trial. JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4(d)-(e) (3d ed. 1998). Defined broadly, then, jurisdiction might include a number of rights beyond merely the right to counsel.

55. *Custis*, 511 U.S. at 496 (refusing to permit even an ineffective assistance of counsel challenge to a prior conviction); Burgett v. Texas, 389 U.S. 109, 115 (1967) ("To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case." (citation omitted)).

4. Harmless Error

The dichotomy between harmless and structural error provides a fourth example of *Gideon*'s comparative significance as a justification for limiting remedies for other constitutional claims. In this context, *Gideon* helps to provide a doctrinal footing for this largely indefensible bifurcation.

As a general matter, the Supreme Court has held that not all constitutional errors entitle a prisoner to a new trial; instead, only the violation of those rights that are "so basic to a fair trial that their infraction can never be treated as harmless error" requires a new trial.[56] In defining this distinction, the Court initially offered three examples of structural errors requiring automatic reversal: coerced confessions, biased judges, and *Gideon*-based claims.[57] The Court subsequently rejected the notion that coerced confessions were structural error,[58] leaving only the claims of a biased judge and a *Gideon* violation.[59] While subsequent decisions have recognized other constitutional errors as structural and unfit for harmless error review, the list of such rights is perilously small—perhaps only a half dozen—and many such rights are linked in some manner to the right to counsel.[60] It is understood that, unlike other rights, *Gideon* is simply "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[61]

Of course, the fact that *Gideon* has been cast as the paradigmatic example of structural error does not, standing alone, compel the conclusion that *Gideon* sets the standard for defining the class of errors that might qualify as structural.[62] But the Court's parsimonious recognition of rights as structural in

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56. Chapman v. California, 386 U.S. 18, 23 (1967). A defining feature of structural error is that the error is not quantifiable. Sullivan v. Louisiana, 508 U.S. 275, 282 (1993).

57. *Chapman*, 386 U.S. at 23 n.8.

58. Arizona v. Fulminante, 499 U.S. 279, 308-10 (1991).

59. In announcing the onerous standard for demonstrating that an error is not harmless on habeas review, the Supreme Court emphasized only *Gideon* as an example of structural error. Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993).

60. The right to counsel of choice, for example, is among the small class of errors deemed structural. United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). Likewise, a violation of *Gideon*'s mirror image, the right to waive counsel and self-represent, is also structural error. Faretta v. California, 422 U.S. 806 (1975); *see also Gonzalez-Lopez*, 548 U.S. at 149 (listing rights that enjoy structural error status).

61. *Chapman*, 386 U.S. at 43 (Stewart, J., concurring).

62. The doctrinal justifications for harmless error may also be more suspect than doctrines like retroactivity. *Cf.* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 31, 61 (2002) (noting with regard to retroactivity limits that "lowering of the cost of innovation may have contributed to the scope of the Warren Court's innovation" but

conjunction with the celebrated status of Gideon has caused *Gideon*'s prominence in this realm to metastasize. It is difficult to fully trace the source of *Gideon*'s prominence in this context, but in many decisions *Gideon* has emerged as the defining threshold. This is illustrated by the formulaic language reflexively employed by some lower court judges in rejecting structural error status for a right: "[the error at issue in this case does not] resemble the errors that the United States Supreme Court has previously deemed to be structural in nature, such as the total denial of counsel in *Gideon*, [or] the biased trial judge."[63] Given that a claim of judicial bias is factually improbable and nearly impossible to prove, *Gideon* stands substantially alone as the index by which the worthiness of other constitutional rights for structural error status is gauged.[64] It has emerged as a sort of talismanic truth that if the right is not of the same order of magnitude as the *Gideon* right, as conceived in the abstract, then the right does not deserve structural error status.[65]

Again, this is not a direct indictment of the *Gideon* right or a call for its abandonment. The claim, rather, is more descriptive: the canonical, largely mythical status of *Gideon* shapes the process by which courts determine whether other rights warrant remediation. One need not suggest that many more rights should be treated as structural in order to appreciate *Gideon's* role in this area of law. Rather, my point is simply that *Gideon*'s unrivaled rhetorical status facilitates the indefensible and untenable bifurcation. The distinction between structural errors and harmless errors is actually much less than it seems. Indeed, as a practical matter, *Gideon* errors could be just as amenable to harmless error analysis as most other constitutional violations. Even if the *Gideon* right is violated, where the evidence of guilt is absolutely overwhelming such that there is no question of guilt, it is strange to say that *Gideon* is somehow more structural or less amenable to harmless error.[66] In many instances, a *Gideon* violation might be just as harmless as other constitutional violations that are routinely regarded as harmless by courts, such as involuntary confessions.

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explaining that because "harmless error does not have the capacity to change behaviors over time . . . [a]n error that is harmless in case one will likely be harmless in later cases").

63. *See, e.g.*, State v. Colon, 885 N.E.2d 917, 928 (Ohio 2008) (O'Donnell, J., dissenting), *overruled by* State v. Horner, 935 N.E.2d 26 (Ohio 2013).

64. Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 165 (1991) (describing judicial bias and the deprivation of counsel as the "two paradigmatic 'structural errors'").

65. In addition, when the Court lists examples of structural error, *Gideon* "is conspicuously first." Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 133 (2009/2010).

66. *See* Ogletree, *supra* note 64, at 160.

The point, then, is not that *Gideon* caused the distinction between harmless and structural error; instead, the point is that *Gideon*, because of its abstract prominence, justifies and fortifies an otherwise precarious and untenable distinction between structural and harmless errors. By serving as the paradigmatic example of structural error, *Gideon* serves as a doctrinal justification for a largely meaningless distinction.

B. Scholarly Proposals that Illustrate Gideon*'s Shadow*

In addition to established judicial doctrines that entrench limitations on the vindication of non-*Gideon* rights *because* they lack the primacy of *Gideon* (comparative), or because *Gideon* provides sufficient protection itself (substitutive), prominent scholars of the past and present have urged legislative and judicial reforms that would limit federal oversight of state convictions because of the importance of the *Gideon* right. For purposes of this essay, I will mention just two illustrative examples.

The first example is one of the seminal works in the habeas corpus field, Judge Friendly's 1970 article, *Is Innocence Irrelevant*?[67] Responding to the Warren Court's habeas reforms, Judge Friendly argued that disruption to the finality of a state conviction is only conscionable when "the prisoner supplements his constitutional plea with a colorable claim of innocence."[68] But an oft-overlooked aspect of Judge Friendly's argument in support of more limited federal habeas review was his explicit recognition that our criminal justice system "has been steadily improving, particularly because of the Supreme Court's decision that an accused, whatever his financial means, is entitled to the assistance of counsel at every critical stage."[69] The core insight here, for better or worse, was that *Gideon* promised to make the state process more reliable, and thus federal habeas review was less necessary. Such reasoning is not inconsistent with the purpose and promise of *Gideon*, but it reflects the way in which *Gideon* casts a shadow by substitution—the existence of a constitutionally entrenched right to counsel justifies limiting access to postconviction remediation.

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67. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

68. *Id.* at 142 ("My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.").

69. *Id.* at 145.

An additional body of recent scholarship urges limiting other rights not because of *Gideon*'s prominence but because of its cost.[70] Perhaps no one makes this case more forcefully than Nancy King and Joseph Hoffmann.[71] Following up on a groundbreaking empirical study of federal habeas corpus, these two scholars have focused on the critical importance of competent trial counsel in justifying a radically limited scope of federal habeas review. The limitations proposed by these scholars are actually the mirror image of previous calls for abridging habeas, including those of Paul Bator or Judge Friendly, insofar as King and Hoffmann urge a limitation on the vindication of other federal rights as a way to save money to invest in the *Gideon* right, rather than justifying limits on other rights because of the existence of the counsel right.[72] Specifically, rather than emphasizing *Gideon* in the abstract and on this basis calling for a reduction of other rights as unnecessary, King and Hoffmann grapple with the reality of a failing *Gideon* right and urge that resources be divested from federal habeas review and redeployed to improve indigent representation at the trial level.[73] Although it does not address the likelihood that financial resources saved by curtailing federal habeas review would actually be reinvested in state indigent defense funding,[74] this argument reflects the substitutive approach to *Gideon* and can be summarized in four basic steps: (a) the right to counsel is of preeminent importance; (b) the right is currently suffering from underfunding; (c) cutting federal habeas review (even for claims of ineffective assistance) will save money that can be reinvested in trial-level representation; and (d) this "front-end reform" of funding the right to counsel "promises to do more good" overall.[75] In short, it is the importance of the *Gideon* right and of actualizing it through better funding that serves as the policy rationale for curtailing federal review of other constitutional claims.[76]

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70. *See, e.g.*, Barton, *supra* note 15, at 1233 (arguing that the right to counsel should not apply to misdemeanants because it dilutes *Gideon*); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 488-89 (2007).

71. NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT (2011).

72. *See id.* at 14-17.

73. King and Hoffmann argue that the "federalism crisis" that justified robust habeas review—states defiantly ignoring the constitution—has passed and thus, the money spent on federal habeas would be better spent on "improvements to state defense representation services." *Id.* at 15-16.

74. *See* John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 467-71 (2011).

75. KING & HOFFMANN, *supra* note 71, at 88.

76. Although under the AEDPA regime, habeas relief in noncapital cases is "microscopically" rare, *id.* at 83, it would be a mistake to conflate the cause with the effect. *Cf.* Peter F.

One need not debate the normative claims underlying these premises to recognize that this reform is another example of prioritizing *Gideon*—precisely because it is viewed as a gateway right and a right that best protects innocence—at the expense of the vindication of other, even obvious deprivations of constitutional rights that may come to light post-trial.

To recap, then, there is a common if not ubiquitous strand of reasoning in judicial doctrine and academic commentary suggesting the existence of a doctrinal quid pro quo—in exchange for the grand right of *Gideon*, prisoners must forgo remedies for other constitutional harms. The prominence and accuracy-serving function of the *Gideon* right can both cause and justify limits on the scope of remedies for other rights. Sometimes this takes the form of a comparative assessment, and other times it is more of substitution effect, but in either case the net effect is a *Gideon*-based justification for denying a prisoner access to another right.[77]

III. ENVISIONING A LEGACY THAT *GIDEON* COULD BE PROUD OF

Having argued that *Gideon* has cast a judicial and scholarly pall over other rights—either as a matter of resource tradeoffs or doctrinal principle—this final Part will briefly sketch out a possible vision for overcoming this rights hierarchy. Whereas many of the doctrines that rely on *Gideon* as a justification for limiting other rights focus on the innocence-protecting function of counsel, it is possible to read *Gideon* broadly so as to facilitate a vision of the Constitution as a set of living protections that are not particularly contingent

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Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 601 (finding, for example, that suppression motions based on confessions succeed in fewer than five percent of cases; out of 7,035 cases studied, only five convictions (0.071%) were lost as the result of a *Miranda* suppression). It is commonplace to regard the exclusionary rule as an important tool of behavior modification for law enforcement officers, even though it appears to result in relatively few actual instances of suppression. To be sure, the actual benefits and costs of the exclusionary rule may well be higher than Nardulli concludes because when state courts know they will be reviewed on federal habeas, they may be more solicitous of the constitutional protections at issue. Thus, habeas may be providing benefits that are not fully captured by the empirical data. The same empirical underestimation appears to be present in the *Miranda* context. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 393 (1996) (arguing that these figures fail to account for the confessions that are not obtained at all, not just those that are suppressed, because of the provision of *Miranda* warnings).

77. It is worth reiterating that I do not necessarily reject the view that *Gideon* is the most important criminal procedure right. Moreover, the claim is not strictly causal—that the right to counsel has caused the other limitations identified in Part III. The point, rather, is to highlight the paradoxical doctrinal relationship between *Gideon* and other rights such that *Gideon* is employed by courts and scholars to prop up limitations on other rights.

on historical practices, innocence, accuracy, or the limiting of other rights.[78] If *Gideon*'s core mandate is one of fundamental fairness in our criminal processes,[79] then two cases, both decided in 2012, have the potential to be landmark decisions in forecasting an application of right-to-counsel principles in the service of facilitating rather than impeding other rights. These cases tend to disentangle *Gideon* from innocence and facilitate procedural mechanisms for the discovery and articulation of new rights.

The first case is *Martinez v. Ryan*,[80] which imports into the realm of postconviction review a preoccupation with fairness rather than accuracy.[81] In *Martinez*, the Court held that a procedural default that would otherwise entirely bar federal habeas review of a claim can be overcome through a showing that postconviction counsel was ineffective.[82] In *Martinez*, the Court explicitly relies on *Gideon* and its due process undergirding in order to expand, rather than contract, the scope of federal habeas procedures.[83] This may be the first time in over a decade that the Supreme Court has relied on *Gideon* in support of an expansion of federal habeas review rather than a contraction. Accordingly, *Martinez* potentially foretells an era in which the guiding hand of counsel is recognized as a gateway to other rights rather than a rationale for curtailing them.

In candor, however, the legacy of *Martinez* is substantially unknown; indeed, it is even possible that *Martinez* will ultimately prove to be another example of the primacy of the counsel right denigrating the remediation of other rights. On the one hand, in recognizing an equitable right to counsel in postconviction proceedings, *Martinez* does threaten to swing open the federal courthouse doors to a variety of federal claims that were defaulted in state court because of the ineptitude of state postconviction counsel. But, on the other hand, the precise limitation on the procedural default doctrine announced in

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78. Barton, *supra* note 15, at 1232 ("Among the cases that made up the due process revolution of the 1960s and early 1970s, *Gideon* and its progeny were in the forefront of the 'living constitution' cases.").

79. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 35 (1991) (Scalia, J., concurring) ("*Gideon* . . . established that no matter how strong its historical pedigree, a procedure prohibited by the Sixth Amendment (failure to appoint counsel in certain criminal cases) violates 'fundamental fairness' . . . .").

80. 132 S. Ct. 1309 (2012).

81. The same year that *Gideon* was decided, the Court sought to entrench a much more capacious view of federal habeas review. Fay v. Noia, 372 U.S. 391, 401 (1963) ("Although . . . [habeas] is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.").

82. *Martinez*, 132 S. Ct. at 1318.

83. *Id.* at 1317-18.

Martinez arises out of a true, trial-related, *Gideon* concern. That is to say, in recognizing a right to federal review despite a state procedural default, *Martinez* holds only that a default relating to the right to trial counsel may be excused.[84] Citing *Gideon*, the Court explains that: it is an "obvious truth the idea that any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," adding "[i]ndeed, the right to counsel is the foundation for our adversary system."[85] On its face, then, *Martinez* is a *Gideon*-specific right.[86]

Nonetheless, there is good reason to anticipate that *Martinez* will ultimately be applied so as to excuse procedural defaults for claims other than the right to counsel.[87] *Martinez* contains language suggesting that the equitable concerns relating to the opportunity for one full and fair opportunity to litigate constitutional claims, either in state or federal court, would apply with equal force to claims such as *Brady*[88] or juror misconduct that could not be raised on direct appeal. Most notably, in explaining its rationale for excusing a procedural default, the Court emphasized that claims requiring an examination of facts beyond the trial record, such as the right to counsel, are often best suited for postconviction review.[89] Read broadly, then, *Martinez* recognizes the importance of competent postconviction counsel as a means of protecting any

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84. *Id.* (citing *Gideon* and explaining that "the right to counsel is the foundation for our adversary system" such that "[e]ffective trial counsel preserves claims to be considered on appeal and in federal habeas proceedings") (citiations omitted). Lawrence Marshall previously concluded that "the Court should recognize that the only way to guarantee a right to effective assistance of counsel at trial is to guarantee counsel for post-conviction challenges to the adequacy of the counsel who represented the defendant at trial." Marshall, *supra* note 11, at 962.

85. *Martinez*, 132 S. Ct. at 1317.

86. More to the point, the Court did not recognize a general constitutional right to counsel on postconviction review. *Id.* at 1320 ("[The holding] permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default . . . .").

87. Notably, in other contexts, such as assessing the retroactivity of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), *Gideon* has been used as a justification for limiting the reach even of other right-to-counsel-based claims. *See, e.g.*, People v. Kabre, 905 N.Y.S.2d 887, 899 (N.Y. Crim. Ct. 2010) ([The] rule of "*Padilla* is not as sweeping and fundamental as that of *Gideon*, and it does not, therefore, rise to the status of a watershed rule that must be applied retroactively.").

88. Brady v. Maryland, 373 U.S. 83 (1963) (requiring the disclosure of material evidence favorable to the defendant).

89. *Martinez*, 132 S. Ct. at 1318 ("Abbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim.").

rights that are not readily cognizable on direct appeal.[90] Indeed, conceived of in capacious terms, *Martinez* serves to substantially undermine and defuse what threatened to be the two greatest limitations on federal habeas relief in decades: the AEDPA and *Cullen v. Pinholster*.[91]

The second, perhaps more clear-cut example of a case evincing a right-enhancing conception of *Gideon* is *Lafler v. Cooper*.[92] *Lafler* goes some distance towards defining the right to counsel in a way that is liberated from cramped notions of verdict accuracy and innocence. In *Lafler*, the defendant received inadequate assistance of counsel prior to trial that contributed to his decision to reject a plea offer. The most salient feature of the *Lafler* decision is the fact that Lafler was convicted following a full and fair trial and did not have any claim that the jury verdict was unreliable.[93] The critical question, then, was whether the right to counsel was primarily an adjunct to a fair trial right and an accurate verdict. The Court held that the right to counsel "is not so narrow in its reach" and explained that, even when the "defendant's guilt or innocence" is not at issue, the right to counsel can still be violated because the right to counsel is "not designed simply to protect the trial."[94] The simplicity of the Court's recognition that a fair trial is "insufficient . . . as a backstop that inoculates [other] errors"[95] masks the potentially profound implications of this decision. In a nutshell, *Lafler* explodes the conception of the right to counsel as

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90. Other scholars suggest that postconviction costs, including those associated with the *Martinez* decision, further dilute the already limited stream of money being spent on ensuring adequate trial counsel representation. Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2455-56 (2013); King & Hoffmann, *supra* note 71, at 15-16. However, this critique seems to assume a basic fungibility of money that is inconsistent with political realities. In states where a statute provides for an office of postconviction counsel, this money does not come out of the state defender budget, and the elimination of such offices has not led to increases in trial-level funding.

91. 131 S. Ct. 1388 (2011). The decision holds that federal habeas review of a claim adjudicated in state court is limited to the record before the state court. Habeas lawyers know that factual development is one of the key predictors of success on habeas review, so *Pinholster* threatens to produce a stifling federal framework. However, a broad reading of *Martinez* may provide a work-around for most *Pinholster*-barred claims. Specifically, the failure of postconviction counsel to develop key facts in support of a claim during state postconviction proceedings may make the claim unadjudicated and therefore technically defaulted. However, *Martinez* may provide the basis for overcoming that default. Such an application of *Martinez* would have a profoundly rights-enhancing impact. *See, e.g.*, Dickens v. Ryan, 688 F.3d 1054 (9th Cir. 2012).

92. 132 S. Ct. 1376 (2012). Notably, the same day the Court decided *Lafler*, a related case, *Missouri v. Frye*, 132 S. Ct. 1399 (2012), was also handed down.

93. *Lafler*, 132 S. Ct. at 1386.

94. *Id.* at 1385-86.

95. *Id*. at 1388 (quoting *Frye*, 132 U.S. at 1407).

primarily an accuracy- or innocence- protecting right, and breathes life into a more capacious fairness orientation for the right to counsel.

Such a holding is nothing short of groundbreaking. A firm recognition that the right to counsel is not primarily an accuracy-enhancing right has implications for a variety of the doctrines that rely on *Gideon* as a justification for curtailing other rights. If the right to counsel does not exist primarily to protect innocent defendants and ensure the accuracy of trials, then the retroactivity doctrine's current account of what constitutes a watershed rule of procedure and the defining features of the structural error classification, among other things, deserve to be revisited. In short, it is plausible that *Martinez* and *Lafler* signal a new era in the Court's application of *Gideon*—an era that casts considerable doubt on the doctrines that rely on *Gideon's* innocence- and trial-related functioning as a justification for limiting other rights. It is possible that *Gideon's* shadow is receding and that the right to counsel could soon play less of a role in justifying limitations on the vindication of other rights.

CONCLUSION

The biblical story of Gideon's Trumpet is the story of a man who, when tasked with conquering a much larger enemy, resorts to trickery. Gideon arms his men with trumpets and torches so that the noise and light is of such intensity as to fool his enemies into believing they were out-armed and outmanned. There is a very real danger that the *Gideon* of criminal procedure has been dressed in flashy rhetoric and bombastic descriptions to such a degree as to impede relief for other, noncounsel constitutional rights. Although indigent representation systems across the country are in a state of financial and resource crisis, time and again, the bright lights of the monumental *Gideon* decision have served as a justification for curtailing other rights. *Gideon* is larger in principle than in practice, and its rhetoric has provided a shadowy cover for practical limits on other rights. Perhaps, however, as *Gideon* turns fifty, there is room for measured optimism about the use of the right to counsel and its corollaries to facilitate rather than impede the remediation of rights unrelated to innocence or trial-level representation. Read broadly, cases like *Lafler* and *Martinez* suggest a very different tune for the next fifty years of *Gideon*'s Trumpet.